AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# Federal Register

12–9–08 Tuesday
Vol. 73 No. 237 Dec. 9, 2008

Pages 74605–74926

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. 237

Tuesday, December 9, 2008

**Agency for Healthcare Research and Quality**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74721–74724

**Agricultural Marketing Service**
NOTICES
Funds Availability (NOFA) Inviting Applications for the Federal-State Marketing Improvement Program (FSMIP), 74685–74687

**Agriculture Department**
*See* Agricultural Marketing Service
*See* Animal and Plant Health Inspection Service
*See* Food and Nutrition Service
*See* Forest Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74683–74685

**Animal and Plant Health Inspection Service**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
PPQ Form 816; Contract Pilot and Aircraft Acceptance, 74687

**Children and Families Administration**
RULES
Child Support Enforcement Program, 74898–74921

**Commerce Department**
*See* International Trade Administration
*See* National Oceanic and Atmospheric Administration
*See* National Telecommunications and Information Administration

**Consumer Product Safety Commission**
NOTICES
Provisional Acceptance of a Settlement Agreement and Order:
Nordstrom, Inc., 74709–74711

**Defense Department**
NOTICES
Federal Acquisition Regulation; Information Collection; Incentive Contracts, 74711–74712

**Education Department**
RULES
Family Educational Rights and Privacy, 74806–74855

**Energy Department**
*See* Energy Information Administration
PROPOSED RULES
Energy Conservation Program for Consumer Products:
Test Procedures for Clothes Dryers and Room Air Conditioners, 74639–74658
Revision of Department of Energy's Freedom of Information Act Regulations, 74658–74661
NOTICES
Geothermal Workforce Education Development and Retention; Request For Information, 74712–74713

**Energy Information Administration**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74713–74714

**Environmental Protection Agency**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74714–74719

**Executive Office of the President**
*See* Presidential Documents

**Federal Accounting Standards Advisory Board**
NOTICES
Release of Exposure Draft:
Hierarchy of Generally Accepted Accounting Principles for Federal Entities, etc., 74719

**Federal Aviation Administration**
PROPOSED RULES
Airworthiness Directives:
Turbomeca S.A. Arriel 2B, 2B1, and 2B1A Turboshaft Engines, 74661–74663

**Federal Emergency Management Agency**
PROPOSED RULES
Proposed Flood Elevation Determinations, 74666–74673
Proposed Flood Elevation Determinations; Correction, 74673–74674

**Federal Motor Carrier Safety Administration**
NOTICES
Meetings; Sunshine Act, 74798

**Federal Railroad Administration**
NOTICES
Petition for Special Approval of Alternate Standard, 74798–74799

**Federal Reserve System**
NOTICES
Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies, 74719
Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction, 74719–74720
Meetings; Sunshine Act, 74720

**Federal Retirement Thrift Investment Board**
NOTICES
Meetings; Sunshine Act, 74720

**Financial Management Service**
*See* Fiscal Service

**Fiscal Service**
NOTICES
Surety Companies Acceptable on Federal Bonds:
Allegheny Surety Co., 74802–74803

**Fish and Wildlife Service**
RULES
Importation, Exportation, and Transportation of Wildlife; Inspection Fees, Import/Export Licenses, and Import/Export License Exemptions, 74615–74631
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
90-Day Finding on a Petition to Reclassify the Delta Smelt (Hypomesus transpacificus) from Threatened to Endangered, 74674–74675
Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover (Charadrius melodus) in Texas, 74675–74681
NOTICES
Archie Carr National Wildlife Refuge, Brevard and Indian River Counties, FL, 74746–74747
Mackay Island National Wildlife Refuge, Currituck County, NC, 74747
Multistate Conservation Grant Program; Priority List for Conservation Projects, 74747–74749

**Food and Drug Administration**
NOTICES
Meetings:
Blood Products Advisory Committee, 74725

**Food and Nutrition Service**
RULES
Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions; Approval of Information Collection Request, 74605
NOTICES
Emergency Food Assistance Program; Availability of Foods for Fiscal Year 2009, 74687–74688

**Forest Service**
RULES
Travel Management:
Designated Routes and Areas for Motor Vehicle Use, 74612–74613
NOTICES
Meetings:
Shasta County Resource Advisory Committee, 74688
Travel Management Directives; Forest Service Manual 2350, 7700, and 7710 and Forest Service Handbook 7709.55., 74689–74703

**General Services Administration**
RULES
Acquisition Regulation:
Protests, Disputes, and Appeals, 74613–74615
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74720
Federal Acquisition Regulation; Information Collection; Incentive Contracts, 74711–74712
General Services Administration Acquisition Regulation; Information Collection; Identification of Products with Environmental Attributes, 74721

**Health and Human Services Department**
*See* Agency for Healthcare Research and Quality
*See* Children and Families Administration
*See* Food and Drug Administration
*See* Indian Health Service
*See* National Institutes of Health
*See* Substance Abuse and Mental Health Services Administration

**Homeland Security Department**
*See* Federal Emergency Management Agency
*See* U.S. Citizenship and Immigration Services
PROPOSED RULES
Privacy Act of 1974: Implementation of Exemptions, 74632–74639
NOTICES
Privacy Act; Systems of Records, 74729–74746

**Indian Health Service**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Health Promotion/Disease Prevention Grantee Survey, 74725–74726

**Inter-American Foundation**
NOTICES
Meetings; Sunshine Act, 74746

**Interior Department**
*See* Fish and Wildlife Service
*See* Land Management Bureau
*See* National Indian Gaming Commission
*See* National Park Service
*See* Reclamation Bureau
*See* Surface Mining Reclamation and Enforcement Office

**International Trade Administration**
NOTICES
Applications for Duty-Free Entry of Scientific Instruments, 74703
Ball Bearings and Parts Thereof from Japan:
Amended Final Results of Antidumping Duty Administrative Reviews, 74703–74704
Stainless Steel Sheet and Strip in Coils from Taiwan:
Final Results and Rescission in Part of Antidumping Duty Administrative Review, 74704–74707

**Justice Department**
NOTICES
Lodging of an Amendment to the Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act, 74751–74752
Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 74752

**Labor Department**
*See* Occupational Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74752–74753

**Land Management Bureau**
NOTICES
Alaska Native Claims Selection, 74749
Proposed Reinstatement of Terminated Oil and Gas Lease: Wyoming, 74749

**Legal Services Corporation**
NOTICES
Availability of Calendar Year 2009 Competitive Grant Funds; Correction, 74756

**National Aeronautics and Space Administration**
NOTICES
Federal Acquisition Regulation; Information Collection; Incentive Contracts, 74711–74712

**National Highway Traffic Safety Administration**
NOTICES
Reports, Forms, and Recordkeeping Requirements, 74799–74801

**National Indian Gaming Commission**
NOTICES
Fee Rate, 74756–74757

**National Institutes of Health**
NOTICES
Meetings:
Center for Scientific Review, 74726–74727
National Advisory Council for Complementary and Alternative Medicine, 74727–74728

**National Oceanic and Atmospheric Administration**
RULES
Fisheries of the Northeastern United States:
Atlantic Herring Fishery; 2007-2009 Specifications, 74631
PROPOSED RULES
Endangered and Threatened Species:
Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish, 74681–74682
NOTICES
Availability of Seats for the Cordell Bank National Marine Sanctuary Advisory Council, 74707
Availability of Seats for the Olympic Coast National Marine Sanctuary Advisory Council, 74708
Endangered Species (File No. 1547):
Receipt of Application for Modification, 74708

**National Park Service**
RULES
Special Regulations; Areas of the National Park System, 74606–74612

**National Science Foundation**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74757

**National Telecommunications and Information Administration**

NOTICES
Public Telecommunications Facilities Program; Closing Date, 74709

**Nuclear Regulatory Commission**
NOTICES
Applications and Amendments to Facility Operating Licenses, 74757–74763
Draft Regulatory Guide: Issuance, Availability, 74764–74766
Environmental Impact Statements; Availability, etc.:
Amendment to Byproduct Materials License, etc.; Neurogen Corp. Facility, Branford, CT, 74763–74764
Amergen Energy Co., LLC; Three Mile Island Nuclear Station, Unit 1; Public Meetings, 74766–74767
Virginia Electric and Power Company, 74767
Meetings; Sunshine Act, 74767–74768

**Occupational Safety and Health Administration**
NOTICES
Technical Amendments to, and Revocation of, Permanent Variances:
AmerenUE; American Airlines, Inc., et al., 74754–74756

**Personnel Management Office**
PROPOSED RULES
Nonforeign Area Cost-of-Living Allowances:
2008 Interim Adjustments, 74858–74860
NOTICES
2007 Nonforeign Area Cost-of-Living Allowance Survey Report:
Pacific and Washington, DC, Areas, 74861–74896
Excepted Service, 74768–74769

**Presidential Documents**
PROCLAMATIONS
*Special observances:*
National Pearl Harbor Remembrance Day (Proc. 8326), 74923–74926

**Public Debt Bureau**
*See* Fiscal Service

**Reclamation Bureau**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74749–74750

**Securities and Exchange Commission**
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
National Securities Clearing Corp., 74769–74770
NYSE Arca, Inc., 74770–74797

**Small Business Administration**
NOTICES
Major Disaster Declarations:
Arkansas; Amendment 1, (11514, 11557), 74797
California; Amendment 1, (11541, 11542), 74797–74798
Missouri; Amendment 1, (11525 , 11526), 74798

**Social Security Administration**
PROPOSED RULES
Technical Revisions to the Supplemental Security Income (SSI) Regulations on Income and Resources, 74663–74666

**Substance Abuse and Mental Health Services Administration**

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74728–74729

**Surface Mining Reclamation and Enforcement Office**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 74750–74751

**Surface Transportation Board**
NOTICES
Exemptions:
Consolidated Rail Corp., CSX Transportation, Inc., Norfolk Southern Railway Co.; Hudson County, NJ, 74801–74802

**Tennessee Valley Authority**
NOTICES
Meetings; Sunshine Act, 74798

**Thrift Supervision Office**
NOTICES
Mutual Savings Association Advisory Committee, 74803

**Transportation Department**
*See* Federal Aviation Administration
*See* Federal Motor Carrier Safety Administration
*See* Federal Railroad Administration
*See* National Highway Traffic Safety Administration
*See* Surface Transportation Board

**Treasury Department**
*See* Fiscal Service
*See* Thrift Supervision Office
**NOTICES**
Bank Secrecy Act Advisory Group; Solicitation of Application for Membership, 74802

**U.S. Citizenship and Immigration Services**
**RULES**
Special Immigrant and Nonimmigrant Religious Workers; Correcting Amendment, 74605–74606

---

**Separate Parts In This Issue**

**Part II**
Education Department, 74806–74855

**Part III**
Personnel Management Office, 74858–74896

**Part IV**
Health and Human Services Department, Children and Families Administration, 74898–74921

**Part V**
Executive Office of the President, Presidential Documents, 74923–74926

---

**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.


**3 CFR**
**Proclamations:**
8326.....74925

**5 CFR**
**Proposed Rules:**
591.....74858

**6 CFR**
**Proposed Rules:**
5 (4 documents) .....74632, 74633, 74635, 73637

**7 CFR**
250.....74605

**8 CFR**
299.....74605

**10 CFR**
**Proposed Rules:**
430.....74639
1004.....74658

**14 CFR**
**Proposed Rules:**
39.....74661

**20 CFR**
**Proposed Rules:**
416.....74663

**34 CFR**
99.....74806

**36 CFR**
7.....74606
212.....74612

**44 CFR**
**Proposed Rules:**
67 (2 documents) .....74666, 74673

**45 CFR**
301.....74898
302.....74898
303.....74898
304.....74898

**48 CFR**
533.....74613
552.....74613

**50 CFR**
14.....74615
648.....74631
**Proposed Rules:**
17 (2 documents) .....74674, 74675
226.....74681

# Rules and Regulations

Federal Register
Vol. 73, No. 237
Tuesday, December 9, 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 AGRICULTURE

### Food and Nutrition Service

### 7 CFR Part 250

**[FNS–2007–0039]**

**RIN 0584–AD45**

### Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions; Approval of Information Collection Request

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule; notice of approval of Information Collection Request (ICR).

**SUMMARY:** The final rule entitled Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions was published on August 8, 2008. The Office of Management and Budget approved and cleared the associated information collection requirements (ICR) on October 14, 2008. This document announces approval of the ICR.

**DATES:** The ICR associated with the final rule published in the **Federal Register** on August 8, 2008 at 73 FR 46169, was approved and cleared by OMB on October 14, 2008, under OMB Control Number 0584–0293.

**FOR FURTHER INFORMATION CONTACT:** Lillie F. Ragan, Assistant Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 500, Alexandria, Virginia 22302, (703) 305–2662, or *Lillie.Ragan@fns.usda.gov.*

Dated: December 2, 2008.

**E. Enrique Gomez,**

*Acting Administrator, Food and Nutrition Service.*

[FR Doc. E8–29089 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–30–P

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

### 8 CFR Part 299

**[CIS No. 2302–05; DHS Docket No. USCIS–2005–0030]**

**RIN 1615–AA16**

### Special Immigrant and Nonimmigrant Religious Workers; Correcting Amendment

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

**ACTION:** Correcting amendment.

**SUMMARY:** With this amendment, the Department of Homeland Security (DHS) corrects an error in the amendatory text from the Special Immigrant and Nonimmigrant Religious Workers final rule published in the **Federal Register** on November 26.

**DATES:** *Effective Date:* This correction is effective December 9, 2008, and is applicable beginning November 26, 2008.

**FOR FURTHER INFORMATION CONTACT:** Emisa Tamanaha, Adjudications Officer, Business and Trade Services, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, telephone (202) 272–1505.

**SUPPLEMENTARY INFORMATION:**

#### Need for Correction

On November 26, 2008, U.S. Citizenship and Immigration Services (USCIS) published a final rule at 73 FR 72275 improving the Department of Homeland Security's ability to detect and deter fraud and other abuses in the religious worker program. This rule included revisions to two public use forms:

- Form I–360, Petition for Amerasian, Widow(er) or Special Immigrant, and
- Form I–129, Petition for a Nonimmigrant Worker.

USCIS inadvertently left out the form edition dates under 8 CFR 299.1 for Forms I–360 and I–129. This document corrects this error.

#### List of Subjects

*8 CFR Part 299*

Immigration, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

### PART 299—IMMIGRATION FORMS

■ 1. The authority citation for part 299 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103; 8 CFR part 2.

■ 2. Section 299.1 is amended by revising the entries for Forms ''1–129 ''and ''I–360'' to read as follows:

**§ 299.1 Prescribed forms.**

* * * * *

| Form No. | Edition date | Title and description |
|---|---|---|
| * * * | * * * | * * * |
| I–129 | 11–26–08 | Petition for a Nonimmigrant Worker. |
| * * * | * * * | * * * |
| I–360 | 11–26–08 | Petition for Amerasian, Widow(er) or Special Immigrant. |

* * * * *

Dated: December 4, 2008.

**Sunday A. Aigbe,**

*Chief, Regulatory Management Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services.*

[FR Doc. E8–29085 Filed 12–8–08; 8:45 am]

BILLING CODE 9111–97–P

## DEPARTMENT OF THE INTERIOR

## National Park Service

## 36 CFR Part 7

**RIN 1024–AD74**

## Special Regulations; Areas of the National Park System

**AGENCY:** National Park Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule will manage winter visitation and recreational use in Yellowstone and Grand Teton National Parks and the John D. Rockefeller, Jr. Memorial Parkway. Publication of this final rule in the **Federal Register** complies with the November 7, 2008 order of the U.S. District Court for the District of Wyoming in *Wyoming* v. *United States Department of the Interior,* Case Nos. 07–CV–0319–B, 08–CV–00004–B, which reinstated the 2004 final rule on winter use in the parks, without its sunset provisions.

**DATES:** This regulation is effective December 9, 2008.

**FOR FURTHER INFORMATION CONTACT:** John Sacklin, Management Assistant's Office, Yellowstone National Park, 307–344–2019.

**SUPPLEMENTARY INFORMATION:** This rule was originally published in 2004 to provide a framework for managing winter use in the parks while the National Park Service (NPS) prepared a long-term winter use plan and EIS for the parks. Because NPS intended to supersede the 2004 rule with a long-term rule after 3 years, the actual authorizations of snowmobile and snowcoach use and the designation of routes for those uses contained provisions ending those authorizations and designations after the winter of 2006–2007 (''sunset provisions''). In 2007, NPS completed the long-term process, publishing a final rule implementing the decision in the **Federal Register** on December 13, 2007.

The 2007 rule was challenged by several environmental groups in a lawsuit in the U.S. District Court for the District of Columbia, *Greater Yellowstone Coalition* v. *Kempthorne,* Civ. Nos. 07–2111 and 07–2112 (EGS), and by the State of Wyoming and others in the above-cited lawsuit in the U.S. District Court for the District of Wyoming. On September 15, 2008, the D.C. District Court issued a decision vacating and remanding the 2007 final rule.

On November 3, 2008, NPS released a Winter Use Plans Environmental Assessment (EA), and on November 5, 2008, NPS published a proposed rule that would have managed winter use in the parks for three winter seasons. Public comments were accepted on the EA until November 17 and on the proposed rule until November 20.

Subsequent to the publication of that proposed rule, on November 7, 2008, the Wyoming District Court issued an order finding that ''equity requires reinstatement of the 2004 temporary rule to provide some semblance of order in this disordered and confusing state of affairs.'' Accordingly, the Court ''[found] it appropriate to reinstate the 2004 temporary rule without the sunset provision'' and that ''[t]his will provide businesses and tourists with the certainty that is needed in this confusing litigation.'' On November 19, 2008, the Wyoming District Court entered judgment stating it had ''entered a final order implementing a temporary rule.'' The Court thus ''ordered, adjudged and decreed that * * * the National Park Service shall reinstate the 2004 temporary rule until such time as it can promulgate an acceptable rule to take its place.'' This publication in the **Federal Register** complies with the court order and provides notice to the public of the rule now in effect. Pursuant to the court order, this rule will be in effect for this winter season, and will remain in effect until NPS promulgates ''an acceptable rule to take its place.''

The 2004 rule was originally published at 69 FR 65348 (Nov. 10, 2004) and more information and explanation of its provisions are available there.

### List of Subjects in 36 CFR Part 7

District of Columbia, National parks, Reporting and recordkeeping requirements.

■ 36 CFR Part 7 is amended as set forth below:

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

■ 1. The authority citation for Part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

■ 2. Amend § 7.13 to revise paragraph (l) to read as follows:

### § 7.13 Yellowstone National Park.

* * * * *

(l)(1) *What is the scope of this regulation?* The regulations contained in paragraphs (l)(2) through (1)(17) of this section are intended to apply to the use of recreational and commercial snowmobiles. Except where indicated, paragraphs (l)(2) through (1)(17) do not apply to non-administrative snowmobile or snowcoach use by NPS, contractor or concessioner employees who live or work in the interior of Yellowstone, or other non-recreational users authorized by the Superintendent.

(2) *What terms do I need to know?* This paragraph also applies to non-administrative snowmobile use by the NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

*Commercial guide* means a guide who operates as a snowmobile guide for a fee or compensation and is authorized to operate in the park under a concession contract. In this regulation, ''guide'' also means ''commercial guide.''

*Historic snowcoach* means a Bombardier snowcoach manufactured in 1983 or earlier. Any other snowcoach is considered a non-historic snowcoach.

*Oversnow route* means that portion of the unplowed roadway located between the road shoulders and designated by snow poles or other poles, ropes, fencing, or signs erected to regulate oversnow activity. Oversnow routes include pullouts or parking areas that are groomed or marked similarly to roadways and are adjacent to designated oversnow routes. An oversnow route may also be distinguished by the interior boundaries of the berm created by the packing and grooming of the unplowed roadway. The only motorized vehicles permitted on oversnow routes are oversnow vehicles.

*Oversnow vehicle* means a snowmobile, snowcoach, or other motorized vehicle that is intended for travel primarily on snow and has been authorized by the Superintendent to operate in the park. An oversnow vehicle that does not meet the definition of a snowcoach or a snowplane must comply with all requirements applicable to snowmobiles.

*Snowcoach* means a self-propelled mass transit vehicle intended for travel on snow, having a curb weight of over 1,000 pounds (450 kilograms), driven by a track or tracks and steered by skis or

tracks, and having a capacity of at least 8 passengers.

*Snowplane* means a self-propelled vehicle intended for oversnow travel and driven by an air-displacing propeller.

(3) *May I operate a snowmobile in Yellowstone National Park?* (i) You may operate a snowmobile in Yellowstone National Park in compliance with use limits, guiding requirements, operating hours and dates, equipment, and operating conditions established pursuant to this section. The Superintendent may establish additional operating conditions and shall provide notice of those conditions in accordance with § 1.7(a) of this chapter or in the **Federal Register**.

(4) *May I operate a snowcoach in Yellowstone National Park?* (i) Commercial snowcoaches may be operated in Yellowstone National Park under a concessions contract. Non-commercial snowcoaches may be operated if authorized by the Superintendent. Snowcoach operation is subject to the conditions stated in the concessions contract and all other conditions identified in this section.

(ii) Beginning with the winter of 2005–2006, all non-historic snowcoaches must meet NPS air emissions requirements. These requirements are the applicable EPA emission standards for the vehicle at the time it was manufactured.

(iii) All critical emission-related exhaust components (as defined in 40 CFR 86.004–25(b)(3)(iii) through (v)) must be functioning properly. Malfunctioning critical emissions-related components must be replaced with the original equipment manufacturer (OEM) component, where possible. Where OEM parts are not available, aftermarket parts may be used.

(iv) Modifying or disabling a snowcoach's original pollution control equipment is prohibited except for maintenance purposes.

(v) Individual snowcoaches may be subject to periodic inspections to determine compliance with the requirements of paragraphs (l)(4)(ii) through (l)(4)(iv) of this section.

(vi) Historic snowcoaches are not required to meet air emissions restrictions.

(5) *Must I operate a certain model of snowmobile?* Only commercially available snowmobiles that meet NPS air and sound emissions requirements as set forth in this section may be operated in the park. The Superintendent will approve snowmobile makes, models, and year of manufacture that meet those requirements. Any snowmobile model not approved by the Superintendent may not be operated in the park.

(6) *How will the Superintendent approve snowmobile makes, models, and year of manufacture for use in the park?* (i) Beginning with the 2005 model year, all snowmobiles must be certified under 40 CFR part 1051, to a Family Emission Limit no greater than 15 g/kW-hr for hydrocarbons and to a Family Emission Limit no greater than 120 g/kW-hr for carbon monoxide.

(A) 2004 model year snowmobiles may use measured emissions levels (official emission results with no deterioration factors applied) to comply with the emission limits specified in paragraph (l)(6)(i) of this section.

(B) Snowmobiles manufactured prior to the 2004 model year may be operated only if they have been shown to have emissions no greater than the limits specified in paragraph (l)(6)(i) of this section.

(C) The snowmobile test procedures specified by EPA (40 CFR parts 1051 and 1065) shall be used to measure air emissions from model year 2004 and later snowmobiles. Equivalent procedures may be used for earlier model years.

(ii) For sound emissions, snowmobiles must operate at or below 73dB(A) as measured at full throttle according to Society of Automotive Engineers J192 test procedures (revised 1985). Snowmobiles may be tested at any barometric pressure equal to or above 23.4 inches Hg uncorrected.

(iii) The Superintendent may prohibit entry into the park any snowmobile that has been modified in a manner that may adversely affect air or sound emissions.

(7) *Where must I operate my snowmobile in Yellowstone National Park?* (i) You must operate your snowmobile only upon designated oversnow routes established within the park in accordance with § 2.18(c) of this chapter. The following oversnow routes are so designated for snowmobile use:

(A) The Grand Loop Road from its junction with Terrace Springs Drive to Norris Junction.

(B) Norris Junction to Canyon Junction.

(C) The Grand Loop Road from Norris Junction to Madison Junction.

(D) The West Entrance Road from the park boundary at West Yellowstone to Madison Junction.

(E) The Grand Loop Road from Madison Junction to West Thumb.

(F) The South Entrance Road from the South Entrance to West Thumb.

(G) The Grand Loop Road from West Thumb to its junction with the East Entrance Road.

(H) The East Entrance Road from the East Entrance to its junction with the Grand Loop Road.

(I) The Grand Loop Road from its junction with the East Entrance Road to Canyon Junction.

(J) The South Canyon Rim Drive.

(K) Lake Butte Road.

(L) In the developed areas of Madison Junction, Old Faithful, Grant Village, Lake, Fishing Bridge, Canyon, Indian Creek, and Norris.

(M) Firehole Canyon Drive between noon and 9 p.m. each day.

(ii) The Superintendent may open or close these routes, or portions thereof, for snowmobile travel after taking into consideration the location of wintering wildlife, appropriate snow cover, public safety, and other factors. Notice of such opening or closing shall be provided by one or more of the methods listed in § 1.7(a) of this chapter.

(iii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(iv) Maps detailing the designated oversnow routes will be available from Park Headquarters.

(8) *What routes are designated for snowcoach use?* (i) Authorized snowcoaches may only be operated on the routes designated for snowmobile use in paragraphs (l)(7)(i)(A) through (l)(7)(i)(M) of this section and the following additional oversnow routes:

(A) Firehole Canyon Drive.

(B) Fountain Flat Road.

(C) Virginia Cascades Drive.

(D) North Canyon Rim Drive.

(E) Riverside Drive.

(F) That portion of the Grand Loop Road from Canyon Junction to Washburn Hot Springs overlook.

(ii) The Superintendent may open or close these oversnow routes, or portions thereof, or designate new routes for snowcoach travel after taking into consideration the location of wintering wildlife, appropriate snow cover, public safety, and other factors. Notice of such opening or closing shall be provided by one of more of the methods listed in § 1.7(a) of this chapter.

(iii) This paragraph also applies to non-administrative snowcoach use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(9) Must I travel with a commercial guide while snowmobiling in Yellowstone and what other guiding requirements apply? (i) All recreational snowmobile operators must be accompanied by a commercial guide.

(ii) Snowmobile parties must travel in a group of no more than 11

snowmobiles, including that of the guide.

(iii) Guided parties must travel together within a maximum of one-third mile of the first snowmobile in the group.

(10) *Are there limits established for the numbers of snowmobiles permitted to operate in the park each day?* The numbers of snowmobiles allowed to operate in the park each day is limited to a certain number per entrance or location. The limits are listed in the following table:

TABLE 1 TO § 7.13—DAILY SNOWMOBILE LIMITS

| Park entrance/location | Total number of commercially guided snowmobile allocations |
|---|---|
| (i) YNP—North Entrance* .... | 30 |
| (ii) YNP—West Entrance ..... | 400 |
| (iii) YNP—South Entrance .... | 220 |
| (iv) YNP—East Entrance ..... | 40 |
| (v) YNP—Old Faithful* ..... | 30 |

*These limits may be reallocated between these two areas as necessary, so long as the total daily number of snowmobiles for the two areas does not exceed 60.

(11) *When may I operate my snowmobile or snowcoach?* The Superintendent will determine operating hours and dates. Expect for emergency situations, changes to operating hours may be made annually and the public will be notified of those changes through one or more of the methods listed in § 1.7(a) of this chapter.

(12) *What other conditions apply to the operation of oversnow vehicles?* (i) The following are prohibited:

(A) Idling an oversnow vehicle more than 5 minutes at any one time.

(B) Driving an oversnow vehicle while the driver's motor vehicle license or privilege is suspended or revoked.

(C) Allowing or permitting an unlicensed driver to operate an oversnow vehicle.

(D) Driving an oversnow vehicle in willful or wanton disregard for the safety of persons, property, or park resources or otherwise in a reckless manner.

(E) Operating an oversnow vehicle without a lighted white headlamp and red taillight.

(F) Operating an oversnow vehicle that does not have brakes in good working order.

(G) The towing of persons on skis, sleds or other sliding devices by oversnow vehicles, except in emergency situations.

(ii) The following are required:

(A) All oversnow vehicles that stop on designated routes must pull over to the far right and next to the snow berm. Pullouts must be utilized where available and accessible. Oversnow vehicles may not be stopped in a hazardous location or where the view might be obscured, or operating so slowly as to interfere with the normal flow of traffic.

(B) Oversnow vehicle drivers must possess a valid motor vehicle driver's license. A learner's permit does not satisfy this requirement. The license must be carried by the driver at all times.

(C) Equipment sleds towed by a snowmobile must be pulled behind the snowmobile and fastened to the snowmobile with a rigid hitching mechanism.

(D) Snowmobiles must be properly registered and display a valid registration from the United States or Canada.

(iii) The Superintendent may impose other terms and conditions as necessary to protect park resources, visitors, or employees. The public will be notified of any changes through one or more methods listed in § 1.7(a) of this chapter.

(iv) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employee, or other non-recreational users as authorized by the Superintendent.

(13) *What conditions apply to alcohol use while operating an oversnow vehicle?* In addition to the regulations contained in 36 CFR 4.23, the following conditions apply:

(i) Operating or being in actual physical control of an oversnow vehicle is prohibited when the driver is under 21 years of age and the alcohol concentration in the driver's blood or breath is 0.02 grams or more of alcohol per 100 milliliters of blood or 0.02 grams or more of alcohol per 210 liters of breath.

(ii) Operating or being in actual physical control of an oversnow vehicle is prohibited when the driver is a snowmobile guide or a snowcoach driver and the alcohol concentration in the operator's blood or breath is 0.04 grams or more of alcohol per 100 milliliters of blood or 0.04 grams or more of alcohol per 210 liters of breath.

(iii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users as authorized by the Superintendent.

(14) *Do other NPS regulations apply to the use of oversnow vehicles?* (i) The use of oversnow vehicles in Yellowstone is not subject to §§ 2.18 (b), (d), (e), and 2.19(b) of this chapter.

(ii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users as authorized by the Superintendent.

(15) *Are there any forms of non-motorized oversnow transportation allowed in the park?* (i) Non-motorized travel consisting of skiing, skating, snowshoeing, or walking is permitted unless otherwise restricted pursuant to this section or other provisions of 36 CFR Part 1.

(ii) The Superintendent may designate areas of the park as closed, reopen such areas, or establish terms and conditions for non-motorized travel within the park in order to protect visitors, employees, or park resources.

(iii) Dog sledding and ski-joring are prohibited.

(16) *May I operate a snowplane in Yellowstone?* The operation of a snowplane in Yellowstone is prohibited.

(17) *Is violating any of the provisions of this section prohibited?* Violating any of the terms, conditions or requirements of paragraphs (l)(1) through (l)(16) of this section is prohibited. Each occurrence of non-compliance with these regulations is a separate violation.

* * * * *

■ 3. Amend § 7.21 to revise paragraph (a) to read as follows:

**§ 7.21 John D. Rockefeller, Jr., Memorial Parkway.**

(a)(1) *What is the scope of this regulation?* The regulations contained in paragraphs (a)(2) through (a)(17) of this section are intended to apply to the use of recreational and commercial snowmobiles. Except where indicated, paragraphs (a)(2) through (a)(17) do not apply to non-administrative snowmobile or snowcoach use by NPS, contractor or concessioner employees who live or work in the interior of Yellowstone, or other non-recreational users authorized by the Superintendent.

(2) *What terms do I need to know?* All the terms in § 7.13(l)(2) of this part apply to this section. This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(3) *May I operate a snowmobile in the Parkway?* You may operate a snowmobile in the Parkway in compliance with use limits, guiding requirements, operating hours and

dates, equipment, and operating conditions established pursuant to this section. The Superintendent may establish additional operating conditions and shall provide notice of those conditions in accordance with § 1.7(a) of this chapter or in the **Federal Register**.

(4) *May I operate a snowcoach in the Parkway?* (i) Commercial snowcoaches may be operated in the Parkway under a concessions contract. Non-commercial snowcoaches may be operated if authorized by the Superintendent. Snowcoach operation is subject to the conditions stated in the concessions contract and all other conditions identified in this section.

(ii) Beginning with the winter of 2005–2006, all non-historic snowcoaches must meet NPS air emissions requirements. These requirements are the applicable EPA emission standards for the vehicle at the time it was manufactured.

(iii) All critical emission-related exhaust components (as defined in 40 CFR 86.004–25(b)(3)(iii) through (v)) must be functioning properly. Malfunctioning critical emission-related components must be replaced with the original equipment manufacturer (OEM) component, where possible. Where OEM parts are not available, after-market parts may be used.

(iv) Modifying or disabling a snowcoach's original pollution control equipment is prohibited except for maintenance purposes.

(v) Individual snowcoaches may be subject to periodic inspections to determine compliance with the requirements of paragraphs (a)(4)(ii) through (a)(4)(iv) of this section.

(vi) Historic snowcoaches are not required to meet air emissions restrictions.

(5) *Must I operate a certain model of snowmobile?* Only commercially available snowmobiles that meet NPS air and sound requirements as set forth in this section may be operated in the Parkway. The Superintendent will approve snowmobile makes, models and year of manufacture that meet those restrictions. Any snowmobile model not approved by the superintendent may not be operated in the Parkway.

(6) *How will the Superintendent approve snowmobile makes, models, and year of manufacture for use in the Parkway?* (i) Beginning with the 2005 model year, all snowmobiles must be certified under 40 CFR part 1051, to a Family Emission Limit no greater than 15 g/kW-hr for hydrocarbons and to a Family Emission Limit no greater than 120 g/kW-hr for carbon monoxide.

(A) 2004 model year snowmobiles may use measured air emissions levels (official emission results with no deterioration factors applied) to comply with the air emission limits specified in paragraph (a)(6)(i) of this section.

(B) Snowmobiles manufactured prior to the 2004 model year may be operated only if they have shown to have air emissions no greater than the restrictions identified in paragraph (a)(6)(i) of this section.

(C) The snowmobile test procedures specified by EPA (40 CFR parts 1051 and 1065) shall be used to measure air emissions from model year 2004 and later snowmobiles. Equivalent procedures may be used for earlier model years.

(ii) For sound emissions snowmobiles must operate at or below 73dB(A) as measured at full throttle according to Society of Automotive Engineers J192 test procedures (revised 1985). Snowmobiles may be tested at any barometric pressure equal to or above 23.4 inches Hg uncorrected.

(iii) These air and sound emissions restrictions shall not apply to snowmobiles originating in the Targhee National Forest and traveling on the Grassy Lake Road to Flagg Ranch. However these snowmobiles may not travel further into the Parkway than Flagg Ranch unless they meet the air and sound emissions and all other requirements of this section.

(iv) The Superintendent may prohibit entry into the Parkway of any snowmobile that has been modified in a manner that may adversely affect air or sound emissions.

(7) *Where must I operate my snowmobile in the Parkway?* (i) You must operate your snowmobile only upon designated oversnow routes established within the Parkway in accordance with § 2.18(c) of this chapter. The following oversnow routes are so designated for snowmobile use:

(A) The Continental Divide Snowmobile Trail (CDST) along U.S. Highway 89/287 from the southern boundary of the Parkway north to the Snake River Bridge.

(B) Along U.S. Highway 89/287 from the Snake River Bridge to the northern boundary of the Parkway.

(C) Grassy Lake Road from Flagg Ranch to the western boundary of the Parkway.

(D) Flagg Ranch developed area.

(ii) The Superintendent may open or close these routes, or portions thereof, for snowmobile travel after taking into consideration the location of wintering wildlife, appropriate snow cover, public safety and other factors. Notice of such opening or closing shall be provided by one or more of the methods listed in § 1.7(a) of this chapter.

(iii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(iv) Maps detailing the designated oversnow routes will be available from Park Headquarters.

(8) *What routes are designated for snowcoach use?* (i) Authorized snowcoaches may only be operated on the route designated for snowmobile use in paragraph (a)(7)(i)(B) of this section. No other routes are open to snowcoach use.

(ii) The Superintendent may open or close this oversnow route, or portions thereof, or designate new routes for snowcoach travel after taking into consideration the location of wintering wildlife, appropriate snow cover, public safety, and other factors. Notice of such opening or closing shall be provided by one or more of the methods listed in § 1.7(a) of this chapter.

(iii) This paragraph also applies to non-administrative snowcoach use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(9) *Must I travel with a commercial guide while snowmobiling in the Parkway, and what other guiding requirements apply?* All recreational snowmobile operators using the oversnow route along U.S. Highway 89/287 from Flagg Ranch to the northern boundary of the parkway must be accompanied by a commercial guide. A guide is not required in other portions of the Parkway.

(i) Guided snowmobile parties must travel in a group of no more than 11 snowmobiles, including that of the guide.

(ii) Guided snowmobile parties must travel together within a maximum of one-third mile of the first snowmobile in the group.

(10) *Are there limits established for the numbers of snowmobiles permitted to operate in the Parkway each day?* (i) The numbers of snowmobiles allowed to operate in the Parkway each day is limited to a certain number per road segment. The limits are listed in the following table:

TABLE 1 TO § 7.21—DAILY SNOWMOBILE ENTRY LIMITS

| Park entrance/road segment | Total number of snowmobile entrance passes |
|---|---|
| (ii) GTNP and the Parkway—Total Use on CDST* | 50 |
| (iii) Grassy Lake Road (Flagg-Ashton Road) | 50 |
| (iv) Flagg Ranch to Yellowstone South Entrance | 220 |

*The Continental Divide Snowmobile Trail lies within both GTNP and the Parkway. The 50 daily snowmobile use limit applies to total use on this trail in both parks.

(11) *When may I operate my snowmobile or snowcoach?* The Superintendent will determine operating hours and dates. Except for emergency situations, changes to operating hours may be made annually and the public will be notified of those changes through one or more of the methods listed in § 1.7(a) of this chapter.

(12) *What other conditions apply to the operation of oversnow vehicles?* (i) The following are prohibited:

(A) Idling an oversnow vehicle more than 5 minutes at any one time.

(B) Driving an oversnow vehicle while the operator's motor vehicle license or privilege is suspended or revoked.

(C) Allowing or permitting an unlicensed driver to operate an oversnow vehicle.

(D) Driving an oversnow vehicle in willful or wanton disregard for the safety of persons, property, or parkway resources or otherwise in a reckless manner.

(E) Operating an oversnow vehicle without a lighted white headlamp and red taillight.

(F) Operating an oversnow vehicle that does not have brakes in good working order.

(G) The towing of persons on skis, sleds or other sliding devices by oversnow vehicles, except in emergency situations.

(ii) The following are required:

(A) All oversnow vehicles that stop on designated routes must pull over to the far right and next to the snow berm. Pullouts must be utilized where available and accessible. Oversnow vehicles may not be stopped in a hazardous location or where the view might be obscured, or operating so slowly as to interfere with the normal flow of traffic.

(B) Oversnow vehicle drivers must possess a valid motor vehicle operator's license. The license must be carried by the driver at all times. A learner's permit does not satisfy this requirement.

(C) Equipment sleds towed by a snowmobile must be pulled behind the snowmobile and fastened to the snowmobile with a rigid hitching mechanism.

(D) Snowmobiles must be properly registered and display a valid registration from the United States or Canada.

(iii) The Superintendent may impose other terms and conditions as necessary to protect parkway resources, visitors, or employees. The public will be notified of any changes through one or more methods listed in § 1.7(a) of this chapter.

(iv) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(13) *What conditions apply to alcohol use while operating an oversnow vehicle?* In addition to the regulations in 36 CFR 4.23, the following conditions apply:

(i) Operating or being in actual physical control of an oversnow vehicle is prohibited when the driver is under 21 years of age and the alcohol concentration in the driver's blood or breath is 0.02 grams or more of alcohol per 100 milliliters of blood or 0.02 grams or more of alcohol per 210 liters of breath.

(ii) Operating or being in actual physical control of an oversnow vehicle is prohibited when the driver is a snowmobile guide or a snowcoach driver and the alcohol concentration in the operator's blood or breath is 0.04 grams or more of alcohol per 100 milliliters of blood or 0.04 grams or more of alcohol per 210 liters of breath.

(iii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(14) *Do other NPS regulations apply to the use of oversnow vehicles?* (i) The use of oversnow vehicles is not subject to §§ 2.18(d), (e), and 2.19(b) of this chapter.

(ii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users as authorized by the Superintendent.

(15) *Are there any forms of non-motorized oversnow transportation allowed in the parkway?* (i) Non-motorized travel consisting of skiing, skating, snowshoeing, or walking is permitted unless otherwise restricted pursuant to this section or other provisions of 36 CFR Part 1.

(ii) The Superintendent may designate areas of the Parkway as closed, reopen such areas, or establish terms and conditions for non-motorized travel within the Parkway in order to protect visitors, employees, or park resources.

(iii) Dog sledding and ski-joring are prohibited.

(16) *May I operate a snowplane in the Parkway?* The operation of a snowplane in the Parkway is prohibited.

(17) *Is violating any of the provisions of this section prohibited?* Violating any of the terms, conditions or requirements of paragraphs (a)(1) through (a)(16) of this section is prohibited. Each occurrence of non-compliance with these regulations is a separate violation.

* * * * *

■ 4. Amend § 7.22 to revise paragraph (g) to read as follows:

**§ 7.22 Grand Teton National Park.**

* * * * *

(g)(1) *What is the scope of this regulation?* The regulations contained in paragraphs (g)(2) through (g)(20) of this section are intended to apply to the use of recreational and commercial snowmobiles. Except where indicated, paragraphs (g)(2) through (g)(20) do not apply to non-administrative snowmobile or snowcoach use by NPS, contractor or concessioner employees who live or work in the interior of Yellowstone, or other non-recreational users authorized by the Superintendent.

(2) *What terms do I need to know?* All the terms in § 7.13(l)(1) of this part apply to this section. This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(3) *May I operate a snowmobile in the Grand Teton National Park?* (i) You may operate a snowmobile in Grand Teton National Park in compliance with use limits, operating hours and dates, equipment, and operating conditions established pursuant to this section. The Superintendent may establish additional operating conditions and provide notice of those conditions in accordance with § 1.7(a) of this chapter or in the **Federal Register**.

(4) *May I operate a snowcoach in Grand Teton National Park?* It is prohibited to operate a snowcoach in Grand Teton National Park except as authorized by the superintendent.

(5) *Must I operate a certain model of snowmobile in the park?* Only commercially available snowmobiles that meet NPS air and sound emissions requirements as set forth in this section

may be operated in the park. The Superintendent will approve snowmobile makes, models, and year of manufacture that meet those requirements. Any snowmobile model not approved by the Superintendent may not be operated in the park.

(6) *How will the Superintendent approve snowmobile makes, models, and year of manufacture for use in Grand Teton?* (i) Beginning with the 2005 model year, all snowmobiles must be certified under 40 CFR part 1051, to a Family Emission Limit no greater than 15 g/kW-hr for hydrocarbons and to a Family Emission Limit no greater than 120 g/kW-hr for carbon monoxide.

(A) 2004 model year snowmobiles may use measured air emissions levels (official emission results with no deterioration factors applied) to comply with the air emission limits specified in paragraph (g)(6)(i) of this section.

(B) Snowmobiles manufactured prior to the 2004 model year may be operated only if they have shown to have air emissions no greater than the requirements identified in paragraph (g)(6)(i) of this section.

(C) The snowmobile test procedures specified by EPA (40 CFR Parts 1051 and 1065) shall be used to measure air emissions from model year 2004 and later snowmobiles. Equivalent procedures may be used for earlier model years.

(ii) For sound emissions snowmobiles must operate at or below 73dB(A) as measured at full throttle according to Society of Automotive Engineers J192 test procedures (revised 1985). Snowmobiles may be tested at any barometric pressure equal to or above 23.4 inches Hg uncorrected.

(iii) These air and sound emissions requirements shall not apply to snowmobiles while in use to access lands authorized by paragraphs (g)(16) and (g)(18) of this section.

(iv) The Superintendent may prohibit entry into the park of any snowmobile that has been modified in a manner that may adversely affect air or sound emissions.

(7) *Where must I operate my snowmobile in the park?* (i) You must operate your snowmobile only upon designated oversnow routes established within the park in accordance with § 2.18(c) of this chapter. The following oversnow routes are so designated for snowmobile use:

(A) The frozen water surface of Jackson Lake for the purposes of ice fishing only. Those persons accessing Jackson Lake for ice fishing must possess a valid Wyoming fishing license and the proper fishing gear. Snowmobiles may only be used to travel to and from fishing locations on the lake.

(B) The Continental Divide Snowmobile Trail along U.S. 26/287 from Moran Junction to the eastern park boundary and along U.S. 89/287 from Moran Junction to the north park boundary.

(ii) The Superintendent may open or close these routes, or portions thereof, for snowmobile travel, and may establish separate zones for motorized and non-motorized use on Jackson Lake, after taking into consideration the location of wintering wildlife, appropriate snow cover, public safety and other factors. Notice of such opening or closing shall be provided by one or more of the methods listed in § 1.7(a) of this chapter.

(iii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(iv) Maps detailing the designated oversnow routes will be available from Park Headquarters.

(8) *Must I travel with a commercial guide while snowmobiling in Grand Teton National Park?* You are not required to use a guide while snowmobiling in Grand Teton National Park.

(9) *Are there limits established for the numbers of snowmobiles permitted to operate in the park each day?* The numbers of snowmobiles allowed to operate in the park each day are limited to a certain number per road segment or location. The snowmobile limits are listed in the following table:

TABLE 1 TO § 7.22—DAILY SNOWMOBILE LIMITS

| Road segment/location | Total number of snowmobiles |
|---|---|
| (i) GTNP and the Parkway—Total Use on CDST* | 50 |
| (ii) Jackson Lake | 40 |

*The Continental Divide Snowmobile Trail lies within both GTNP and the Parkway. The 50 daily snowmobile use limit applies to total use on this route in both parks; however, the limit does not apply to the portion described in paragraph (16)(ii) of this section.

(10) *When may I operate my snowmobile?* The Superintendent will determine operating hours and dates. Except for emergency situations, changes to operating hours or dates may be made annually and the public will be notified of those changes through one or more of the methods listed in § 1.7(a) of this chapter.

(11) *What other conditions apply to the operation of oversnow vehicles?* (i) The following are prohibited:

(A) Idling an oversnow vehicle more than 5 minutes at any one time.

(B) Driving an oversnow vehicle while the operator's motor vehicle license or privilege is suspended or revoked.

(C) Allowing or permitting an unlicensed driver to operate an oversnow vehicle.

(D) Driving an oversnow vehicle in willful or wanton disregard for the safety of persons, property, or park resources or otherwise in a reckless manner.

(E) Operating an oversnow vehicle without a lighted white headlamp and red taillight.

(F) Operating an oversnow vehicle that does not have brakes in good working order.

(G) The towing of persons on skis, sleds or other sliding devices by oversnow vehicles.

(ii) The following are required:

(A) All oversnow vehicles that stop on designated routes must pull over to the far right and next to the snow berm. Pullouts must be utilized where available and accessible. Oversnow vehicles may not be stopped in a hazardous location or where the view might be obscured, or operating so slowly as to interfere with the normal flow of traffic.

(B) Oversnow vehicle drivers must possess a valid motor vehicle operator's license. The license must be carried by the driver at all times. A learner's permit does not satisfy this requirement.

(C) Equipment sleds towed by a snowmobile must be pulled behind the snowmobile and fastened to the snowmobile with a rigid hitching mechanism.

(D) Snowmobiles must be properly registered and display a valid registration from the United States or Canada.

(iii) The Superintendent may impose other terms and conditions as necessary to protect park resources, visitors, or employees. The public will be notified of any changes through one or more methods listed in § 1.7(a) of this chapter.

(iv) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(12) *What conditions apply to alcohol use while operating an oversnow vehicle?* In addition to the regulations in 36 CFR 4.23, the following conditions apply:

(i) Operating or being in actual physical control of an oversnow vehicle

is prohibited when the driver is under 21 years of age and the alcohol concentration in the driver's blood or breath is 0.02 grams or more of alcohol per 100 milliliters or blood or 0.02 grams or more of alcohol per 210 liters of breath.

(ii) Operating or being in actual physical control of an oversnow vehicle is prohibited when the driver is a snowmobile guide or a snow coach operator and the alcohol concentration in the driver's blood or breath is 0.04 grams or more of alcohol per 100 milliliters of blood or 0.04 grams or more of alcohol per 210 liters of breath.

(iii) This paragraph also applies to non-administrative snowmobile use by NPS, contractor or concessioner employees, or other non-recreational users authorized by the Superintendent.

(13) *Do other NPS regulations apply to the use of oversnow vehicles?* The use of oversnow vehicles in Grand Teton is not subject to §§ 2.18(d) and (e) and 2.19(b) of this chapter.

(14) *Are there any forms of non-motorized oversnow transportation allowed in the park?* (i) Non-motorized travel consisting of skiing, skating, snowshoeing, or walking is permitted unless otherwise restricted pursuant to this section or other provisions of 36 CFR Part 1.

(ii) The Superintendent may designate areas of the park as closed, reopen such areas, or establish terms and conditions for non-motorized travel within the park in order to protect visitors, employees, or park resources.

(iii) Dog sledding and ski-joring are prohibited.

(15) *May I operate a snowplane in the park?* The operation of a snowplane in Grand Teton National Park is prohibited.

(16) *May I continue to access public lands via snowmobile through the park?* Reasonable and direct access, via snowmobile, to adjacent public lands will continue to be permitted on designated routes through the park. Requirements established in this section related to air and sound emissions, snowmobile operator age, guiding, and licensing do not apply on these oversnow routes. The following routes only are designated for access via snowmobile to public lands:

(i) From the parking area at Shadow Mountain directly along the unplowed portion of the road to the east park boundary.

(ii) Along the unplowed portion of the Ditch Creek Road directly to the east park boundary.

(iii) The Continental Divide Snowmobile Trail, from the east park boundary to Moran Junction.

(17) *For what purpose may I use the routes designated in paragraph (g)(16) of this section?* You may use those routes designated in paragraph (g)(16) of this section only to gain direct access to public lands adjacent to the park boundary.

(18) *May I continue to access private property within or adjacent to the park via snowmobile?* Until such time as the United States takes full possession of an inholding in the park, the Superintendent may establish reasonable and direct access routes via snowmobile, to such inholding, or to private property adjacent to park boundaries for which other routes or means of access are not reasonably available. Requirements established in this section related to air and sound emissions, snowmobile operator age, licensing, and guiding do not apply on these oversnow routes. The following routes are designated for access to properties within or adjacent to the park:

(i) The unplowed portion of Antelope Flats Road off U.S. 26/89 to private lands in the Craighead Subdivision.

(ii) The unplowed portion of the Teton Park Road to the piece of land commonly referred to as the ''Clark Property''.

(iii) From the Moose-Wilson Road to the land commonly referred to as the ''Barker Property''.

(iv) From the Moose-Wilson Road to the land commonly referred to as the ''Wittimer Property''.

(v) From the Moose-Wilson Road to those two pieces of land commonly referred to as the ''Halpin Properties''.

(vi) From the south end of the plowed sections of the Moose-Wilson Road to that piece of land commonly referred to as the ''JY Ranch''.

(vii) From Highway 26/89/187 to those lands commonly referred to as the ''Meadows'', the ''Circle EW Ranch'', the ''Moulton Property'', the ''Levinson Property'' and the ''West Property''.

(viii) From Cunningham Cabin pullout on U.S. 26/89 near Triangle X to the piece of land commonly referred to as the ''Lost Creek Ranch''.

(ix) Maps detailing designated routes will be available from Park Headquarters.

(19) *For what purpose may I use the routes designated in paragraph (g)(18) of this section?* Those routes designated in paragraph (g)(18) of this section are only to access private property within or directly adjacent to the park boundary. Use of these roads via snowmobile is authorized only for the landowners and their representatives or guests. Use of these roads by anyone else or for any other purpose is prohibited.

(20) *Is violating any of the provisions of this section prohibited?* Violating any of the terms, conditions or requirements of paragraphs (g)(1) through (g)(19) of this section is prohibited. Each occurrence of non-compliance with these regulations is a separate violation.

Dated: December 4, 2008.

**Lyle Laverty,**

*Assistant Secretary, Fish and Wildlife and Parks.*

[FR Doc. E8–29110 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–70–P

## DEPARTMENT OF AGRICULTURE

## Forest Service

## 36 CFR Part 212

## Travel Management; Designated Routes and Areas for Motor Vehicle Use

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Forest Service is revising the travel management rule to make it consistent with language proposed in the rule's implementing directives that was published for public notice and comment in the **Federal Register** and that has been adopted in the final directives. The notice adopting the final travel management directives is contained in the same issue of the **Federal Register** as this rule. The change to the travel management rule is needed to allow for limited motor vehicle use on National Forest System (NFS) lands within a specified distance of State or county roads or trails solely for the purposes of dispersed camping or big game retrieval.

In addition, the agency is removing a redundant paragraph from the regulations concerning the travel management rule.

**DATES:** *Effective Date:* This rule is effective January 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** Deidre St. Louis, Recreation, Heritage, and Volunteer Resources Staff, (202) 205–0931.

**SUPPLEMENTARY INFORMATION:** The travel management rule requires designation of those roads, trails, and areas that are open to motor vehicle use. Designations are made by class of vehicle and, if appropriate, by time of year (36 CFR 212.51(a)). The rule prohibits the use of motor vehicles off the designated system, as well as use of motor vehicles on routes and in areas that is not consistent with the designations (36 CFR 261.13). Responsible officials may

include in the designation the limited use of motor vehicles within a specified distance of certain designated routes, and if appropriate within specified time periods, solely for the purposes of dispersed camping or retrieval of a downed big game animal by an individual who has legally taken that animal (big game retrieval) (36 CFR 212.51(b)).

In many places in the NFS, visitors use motor vehicles for dispersed camping or big game retrieval within a limited distance of State or county roads or trails, which are not under the jurisdiction of the Forest Service and cannot be designated for motor vehicle use (36 CFR 212.1, 212.50(a), and 212.51(a)). The travel management rule currently allows for motor vehicle use for dispersed camping or big game retrieval only in conjunction with designated routes.

Consequently, the proposed directives implementing the travel management rule contained language at Forest Service Manual (FSM) 7710 that would allow the responsible official to include in a designation the limited use of motor vehicles within a specified distance of certain forest roads and forest trails, and if appropriate within specified time periods, solely for the purposes of dispersed camping or big game retrieval. Forest roads and trails include State and county roads and trails in the NFS, as well as NFS roads and NFS trails (36 CFR 212.1). The Forest Service published the proposed directives for implementing the travel management rule for public notice and comment in the **Federal Register** on March 9, 2007 (72 FR 10632). In the final directives at FSM 7715.74, the Forest Service has retained the provision in proposed FSM 7710 that would allow the responsible official to include in a designation the limited use of motor vehicles within a specified distance of certain forest roads and forest trails, and if appropriate within specified time periods, solely for the purposes of dispersed camping or big game retrieval. In addition, the agency has included the phrase, ''where motor vehicle use is allowed'' after ''certain forest roads and forest trails,'' since not all forest roads and trails are open to motor vehicle use. The agency is revising the travel management rule at 36 CFR 212.51(b) to make it consistent with FSM 7715.74 in the final directives. Since the proposed language regarding dispersed camping and big game retrieval was subjected to full public notice and comment under the Administrative Procedure Act, further public notice and comment are unnecessary (5 U.S.C. 553(b)(B)).

In addition, the agency is removing paragraph (d) of 36 CFR 212.2, which governs the program of work for the forest transportation system, as it duplicates verbatim paragraph (c) of that section. Public notice and comment regarding this minor, purely nonsubstantive correction of a formatting error are unnecessary (5 U.S.C. 553(b)(B)).

**List of Subjects in 36 CFR Part 212**

Highways and roads, National forests, Public lands—rights-of-way, and Transportation.

■ For the reasons set forth in the preamble, part 212 of title 36 of the Code of Federal Regulations is amended to read as follows:

## PART 212—TRAVEL MANAGEMENT

### Subpart A—Administration of the Forest Transportation System

■ 1. The authority citation for part 212, subpart A, continues to read as follows:

**Authority:** 16 U.S.C. 551, 23 U.S.C. 205.

**§ 212.2 [Amended]**

■ 2. In § 212.2, remove paragraph (d).

### Subpart B—Designation of Roads, Trails, and Areas for Motor Vehicle Use

■ 3. The authority citation for part 212, subpart B, continues to read as follows:

**Authority:** 7 U.S.C. 1011(f), 16 U.S.C. 551, E.O. 11644, 11989 (42 FR 26959).

■ 4. Revise § 212.51 paragraph (b) to read as follows:

**§ 212.51 Designation of roads, trails, and areas.**

* * * * *

(b) *Motor vehicle use for dispersed camping or big game retrieval.* In designating routes, the responsible official may include in the designation the limited use of motor vehicles within a specified distance of certain forest roads or trails where motor vehicle use is allowed, and if appropriate within specified time periods, solely for the purposes of dispersed camping or retrieval of a downed big game animal by an individual who has legally taken that animal.

* * * * *

Dated: November 10, 2008.

**Mark Rey,**

*Under Secretary, Natural Resources and Environment.*

[FR Doc. E8–29040 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–11–P

## GENERAL SERVICES ADMINISTRATION

### 48 CFR Parts 533 and 552

**[GSAR Amendment 2008–03; GSAR Case 2007–G501;Docket 2008–0007; Sequence 1 (Change 24)]**

**RIN 3090–AI49**

### General Services Administration Acquisition Regulation; GSAR Case 2007–G501, Protests, Disputes, and Appeals

**AGENCIES:** General Services Administration (GSA), Office of the Chief Acquisition Officer.

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) by updating language pertaining to protests, disputes, and appeals.

**DATES:** *Effective Date*: January 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Meredith Murphy at (202) 208–6925, or by e-mail at *meredith.murphy@gsa.gov*. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite Amendment 2005–03, GSAR case 2007–G501 (Change 24).

**SUPPLEMENTARY INFORMATION:**

### A. Background

The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to update the text addressing protests, disputes, and appeals. This rule is a result of the General Services Administration Acquisition Manual (GSAM) rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the FAR and implement streamlined and innovative acquisition procedures that contractors, offerors, and GSA contracting personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

GSA will rewrite each part of the GSAR and GSAM, and as each GSAR part is rewritten, will publish it in the **Federal Register**.

This rule covers the rewrite of GSAR Part 533, Protests, Disputes, and Appeals. A proposed rule was published in the **Federal Register** at 73 FR 32514 on June 9, 2008. No comments were received in response to the

proposed rule. Subsequent to the close of the comment period, the GSA Office of General Counsel proposed to reinstate some material from the clause at 552.233–70, Protests Filed Directly with the General Services Administration, as text coverage at a new subsection, 533.103–1. The language was added at the recommendation of the Office of General Counsel to clarify GSA's rules in the context of the FAR process. This is the only change in the final version of GSAR Part 533 from the proposed rule.

The revised GSAR no longer includes the two clauses and associated prescriptions for Part 533. The GSA-unique utilities disputes clause and prescription were deleted at the request of the Public Buildings Service (PBS). The GSA-unique clause, 552.233–70, Protests Filed Directly with the General Services Administration, and its prescription, were also deleted, because the clause merely repeated much of the associated FAR clause.

Editorial changes were made to GSAR section 533.211, Contracting officer's decision, so as not to repeat the information that must be included, as prescribed in FAR 33.211, to clarify the GSA-unique requirements, and to recognize that the GSBCA's duties are now vested in the Civilian Board of Contract Appeals (CSBA). Material from Subpart 533.70, Processing Contract Appeals, was determined to be implementing, not supplementing, the FAR, and it was moved into Subpart 533.2.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### B. Regulatory Flexibility Act

The General Services Administration does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule will only affect an offeror that is submitting a protest or has a dispute with GSA. Further, GSA is making only minor changes in the regulations and procedures for pursuing either action. For these reasons, it is expected that the number of entities impacted by this rule will be minimal. Therefore, a Regulatory Flexibility Analysis was not performed.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements that require approval ofthe Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 533 and 552

Government procurement.

Dated: October 30, 2008

**David A. Drabkin,**

*Senior Procurement Executive,Office of the Chief Acquisition Officer, General Services Administration.*

■ Therefore, GSA amends 48 CFR parts 533 and 552 as set forth below:

## PART 533—PROTESTS, DISPUTES, AND APPEALS

■ 1. The authority citation for 48 CFR part 533 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c).

■ 2. Add section 533.103–1 to read as follows:

#### 533.103–1 Filing a protest.

(a) Any protester filing an agency protest has the choice of requesting either that the contracting officer or the Agency Protest Official decide the protest. If the protest is silent on this matter, the contracting officer will decide the protest. If a party requests a review at a level above the contracting officer, the Agency Protest Official will decide the protest. The decision by the Agency Protest Official for GSA is an alternative to a decision by the contracting officer on a protest. The Agency Protest Official for GSA will not consider an appeal of the contracting officer's decision on an agency protest.

(b) If an agency protest is filed, the deciding official uses the procedures in FAR 33.103 and this section to resolve the protest. The deciding official will provide a fair and quick review of any protest filed with the agency.

(c) The filing timeframes in FAR 33.103(e) apply. An agency protest is filed when the complete protest is received at the location the solicitation designates for serving protests. GSA's hours of operation are 8 a.m. to 4:30 p.m. Protests delivered after 4:30 p.m. will be considered received and filed the following business day.

(d) The protest must meet all the following conditions:

(1) Include the information required by FAR 33.103(d)(2).

(2) Indicate that it is a protest to the agency.

(3) Be filed in writing with the contracting officer.

(4) State whether the protester chooses to have the contracting officer or the Agency Protest Official decide the protest. If the protest does not include the protester's choice, then the contracting officer will decide the protest (see paragraph (a) of this subsection).

(e) The following procedures apply to information submitted in support of or in response to an agency protest:

(1) GSA procedures do not provide for any discovery.

(2) The deciding official has discretion to request additional information from either the agency or the protester, orally or in writing, as may be necessary to render a timely decision on the protest. However, protests are normally decided on the basis of information initially provided by the protester and the agency.

(3) To the extent permitted by law and regulations, the parties may exchange relevant information.

(4) The agency must make a written response to the protest within ten days unless another date is set by the deciding official.

(5) The agency must also provide the protester with a copy of the response on the same day it files the protest response with the deciding official. If the agency believes it needs to redact or withhold any information in the response from the protester, it should identify and provide the information to the deciding official for *in camera* review.

(f) A protester may represent itself or be represented by legal counsel. GSA will not reimburse the protester for any legal fees related to the agency protest.

(g) GSA may dismiss or stay proceedings on an agency protest if a protest on the same or similar basis is filed with a protest forum outside of GSA.

#### 533.103–72 [Removed]

■ 3. Remove section 533.103–72.

#### 533.209 [Added]

■ 4. Add section 533.209 to read as follows:

#### 533.209 Suspected fraudulent claims.

In GSA, the agency official responsible for investigating fraud is the Office of Inspector General.

■ 5. Revise section 533.211 to read as follows:

#### 533.211 Contracting officer's decision.

The contracting officer's written decision must include the paragraph at FAR 33.211(a)(4)(v). The contracting officer shall state in the decision that a contractor's notice of appeal to the Civilian Board of Contract Appeals (CBCA) should include a copy of the contracting officer's decision.

**533.215 [Removed]**

■ 6. Remove section 533.215.

## PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. The authority citation for 48 CFR part 552 continues to read as follows:

**Authority:** 40 U.S.C. 121(c).

**552.233–70 and 552.233–71 [Removed]**

■ 8. Remove sections 552.233–70 and 552.233–71.

[FR Doc. E8–29061 Filed 12–8–08; 8:45 am]

BILLING CODE 6820–61–S

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 14

**[FWS–R9–LE–2008–0024; 99011–1224–0000–9B]**

**RIN 1018–AV31**

## Importation, Exportation, and Transportation of Wildlife; Inspection Fees, Import/Export Licenses, and Import/Export License Exemptions

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), publish this final rule to revise subpart I—Import/Export Licenses, of title 50 of the Code of Federal Regulations, part 14 (50 CFR 14), to clarify the import/export license and fee requirements, adjust the inspection fee schedule, and update license and inspection fee exemptions. We are clarifying when an import/export license is required by persons who engage in the business of importing and exporting wildlife as well as changing the license requirement exemptions. Revised regulations will help those importing and exporting wildlife better understand when an import/export license is required and will allow us to consistently apply these requirements. We are gradually increasing inspection fees, and now publishing the changes for 2008 through 2012. We determined that these inspection fees must be adjusted every year to cover the increased cost of providing inspection services. Because we are publishing these inspection fee changes now, importers and exporters can accurately predict the costs of importing and exporting wildlife several years in advance.

**DATES:** This final rule is effective January 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** Kevin Garlick, Special Agent in Charge, Branch of Investigations, Office of Law Enforcement, U.S. Fish and Wildlife Service, telephone (703) 358–1949, fax (703) 358–1947.

**SUPPLEMENTARY INFORMATION:**

### Public Assistance for Import/Export Questions

We highly recommend that you contact our wildlife inspectors about importing and exporting procedures and requirements before you import or export your wildlife. We have wildlife inspectors stationed at numerous ports throughout the country. You can find contact information for our wildlife inspectors on our Web site at: *http://www.fws.gov/le/ImpExp/inspectors.htm*. In addition, the Service has a telephone hotline that is staffed Monday through Friday, 8 a.m. through 8 p.m. Eastern time, to provide assistance for any questions you may have regarding importing and exporting wildlife, at 1–800–344–WILD.

### Background

We have oversight responsibilities under statutory and regulatory authority to regulate the importation, exportation and transportation of wildlife. Consistent with this authority, we have established an inspection program to oversee the importation, exportation, and transportation of wildlife and wildlife products. In support of our program activities, we promulgated regulations contained in 50 CFR 14 to provide individuals and businesses with guidelines and procedures to follow when importing or exporting wildlife, including parts and products. These regulations explain the requirements for individuals or businesses importing or exporting wildlife for commercial purposes, or for people moving their household goods, personal items, or pets, as well as the exemptions provided for specific activities or types of wildlife. The regulations at 50 CFR 14 provide individuals and businesses with the specific ports and locations where these activities may be conducted and any fees that may be charged as a result of these activities.

### Final Rule

The following parts of this preamble explain the final rule and present discussion of the substantive issues of each section that we are changing in subpart I of part 14, along with our responses to comments we received on the proposed rule. The final rule largely implements the changes we described in the proposed rule but makes some adjustments based upon public comments. We are changing the requirements for an import/export license, how to apply for an import/export license, what inspection fees apply to importers and exporters, and what exemptions we apply to licenses and fees.

On February 25, 2008, we published a proposed rule in the **Federal Register** (73 FR 9972) revising 50 CFR 14, Subpart I. The public comment period remained open until April 25, 2008. In addition, we sent letters to organizations and associations that represent businesses that could be affected by the rulemaking. We wanted to ensure that these entities had an opportunity to review and comment on our proposed rule.

In response to this proposed rule, we received 72 comments from the public. These included comments from industry representatives importing or exporting fur, aquacultured white sturgeon, elk, deer, mother-of-pearl shell, tropical fish, corals, insects, seafood products, and other wildlife commodities, as well as comments from one foreign embassy and several trade councils, associations, and non-governmental organizations. Four of the comments were unrelated to the proposed rule and are not discussed below. We also held a public meeting on April 3, 2008, that was attended by 14 persons. Two commenters provided oral comments at the meeting. The majority of comments we received were in writing and pertained to changes in the inspection fee structure. Many comments were form letters that were identical or nearly identical in content. Many comments provided variations on the same substantive issues and ranged from strongly supportive to strongly critical.

### Our Changes to Import/Export License Requirements (§ 14.91—When do I need an import/export license?)

We are removing the definition of ''engage in business as an importer or exporter of wildlife,'' because the elements of the definition are already expressed in the current definition of ''commercial,'' and the broader definition of commercial more accurately reflects what we consider as ''engaging in business.''

We are removing the existing section on certain persons required to be licensed, § 14.91(c), and replacing it with a table that provides examples of when we consider persons to be engaging in business as an importer or exporter of wildlife. We are limiting who should be licensed to those persons directly involved with importing and exporting wildlife. Therefore, we are

eliminating requirements for persons who are indirectly involved with a shipment either before or after our clearance of the shipment. Based upon comments, we added one example related to hobbyists and commercial activities and one example regarding hunting trophies to the table. We also made changes to the language in other examples to further clarify when we require an import/export license.

**Comments on Our Proposed Changes to § 14.91**

Three commenters responded to the changes in this section. One commenter representing 11 nongovernmental organizations agreed with our use of the definition of commercial to replace the phrase ''engage in business.''

We received one comment stating we should not treat imports of hunting trophies as commercial shipments when they are consigned in the hunter's name in care of a taxidermist or tannery. We agree with the commenter and have added an example to reflect this. Imports of personal hunting trophies for a hunter that are shipped in care of a taxidermist or tannery are not considered commercial shipments. We recognize that many hunting trophies imported by a hunter are sent directly to a taxidermist for preparation after import clearance. The commercial work that is conducted domestically after clearance does not cause a personal trophy import to be considered commercial.

One commenter representing 11 nongovernmental organizations suggested several changes to the table in § 14.91(c). One comment suggested we change § 14.91(c)(4) to include laboratory suppliers. We agree and have updated the table accordingly. Another suggestion was that we change § 14.91(c)(5) to include the phrase ''of personally owned live wildlife (pets).'' We agree with the concept and have updated the table accordingly. A final suggestion was that we change § 14.91(c)(6) regarding hobbyists to include the phrase ''individual owner of personal and household effects'' and limit this example to previously owned specimens. We decline to adopt this suggestion since we do not believe the narrowing of this example to personal or household effects that are previously owned specimens would be appropriate. All noncommercial imports and exports for personal use are exempt from the import/export license whether or not they are shipped as a personal or household effect or are previously owned. This example remains unchanged from the proposed rule.

**Our Changes to Exemptions to Import/Export License Requirements (§ 14.92—What are the exemptions to the import/export license requirements?)**

We are removing two exemptions from our import/export license requirements for businesses that import or export products from several mammal species that have been bred and born in captivity and for circuses that import or export wildlife.

Until the effective date of this final rule, our regulations have allowed businesses that exclusively import or export chinchilla, fisher, fox, marten, mink, muskrat, and nutria that have been bred and born in captivity, and products of these animals, to conduct business without obtaining an import/export license. If a particular business chooses to import or export wild specimens of these species or species other than those listed above, they must obtain an import/export license. Upon the effective date of this final rule, we are removing the import/export license exemption in § 14.92 for businesses that exclusively import or export chinchilla, fisher, fox, marten, mink, muskrat, and nutria that have been bred and born in captivity or products of these animals.

Our current import/export license regulations also exempt businesses that import or export products from the rabbit and karakul. The karakul, which is a variety of the domestic sheep, and the rabbit are defined as domesticated species and, therefore, are already exempted from all Service import or export requirements.

Our import/export data show that the majority of businesses that import or export mammals or products made from mammals do not deal exclusively in chinchilla, fisher, fox, marten, mink, muskrat, and nutria that have been bred and born in captivity. Rather, most businesses deal in a mixture of these species and other species that do not qualify for the import/export license exemption, or the trade is in wild-caught specimens. Only approximately 1.5 percent of the shipments declared to us in fiscal year 2005 consisted exclusively of captive-bred specimens of the above-listed species. Although many businesses have not taken advantage of the exemption, any exempted shipments still require our inspection and clearance.

All other wildlife types that are identified as being exempt from the import/export license, such as certain shellfish and nonliving fishery products, are also wildlife that the Endangered Species Act (16 U.S.C. 1531 *et seq.*) or these regulations have exempted from inspection and clearance. No statutory or regulatory inspection or clearance exemptions are provided for captive-bred mammals or their products. This exemption has had the unfortunate consequence of creating a monetary incentive for the global trade community to falsely declare wild mammal specimens as captive-bred upon import into the United States. In addition, due to shipping and other business practices, importers of foreign-sourced mammal products imported into the United States are more likely to declare the products as captive-bred for purposes of claiming the exemption than exporters of U.S.-sourced mammal products.

Because these specific captive-bred mammal shipments are exempt from the import/export license requirements, the corresponding importers or exporters are not required to maintain records of their imports or exports or any subsequent dispositions and do not have to provide the Service with access to these records or inventories of wildlife upon reasonable notice. The lack of recordkeeping requirements and access to these records hinders our ability to investigate instances of false declarations. These corresponding importers and exporters are also exempt from paying inspection fees and filing reports with the Service upon request. Because of all the problems that have resulted from this exemption, we are removing the exemption to the import/export license requirements for persons engaging in the business of importing or exporting shipments containing only chinchilla, fisher, fox, marten, mink, muskrat, and nutria that have been bred and born in captivity or their products.

We also have determined that circuses will no longer qualify for the exemption from our import/export license requirements. Our current import/export regulations allow certain persons and businesses, including circuses, to import or export wildlife without obtaining an import/export license. However, with the exception of circuses, it is apparent that these exempt businesses or organizations, which include common carriers, custom house brokers, public museums, scientific or educational institutions, and government agencies, are not engaging in business as importers or exporters of wildlife. While circuses typically do not import or export wildlife for resale, they do import or export wildlife to stimulate additional business through ticket sales or other promotions.

We clarify that importers and exporters of shellfish and nonliving fishery products are exempt from the import/export license requirement. We

had proposed to change the language in this section to ''nonliving fish products,'' which reflects the historical working implementation by the Service of this exemption. The Service defines shellfish in 50 CFR 10.12 as ''an aquatic vertebrate with a shell including but not limited to, (a) an oyster, clam, or other mollusk; and (b) a lobster or other crustacean; or any other part, product, egg, or offspring thereof, or the dead body or parts thereof (excluding fossils), whether or not included in a manufactured product or in a processed food product.'' The Service has also long defined fishery products as nonliving fish products. However, based upon comments received, we retained the original wording of ''fishery product'' but accepted the change of ''nonliving.'' This change makes it clear that the Service considers only dead fishery products to be granted the exemption. Nothing in this wording change affects how the Service implements this exemption.

**Comments on Our Proposed Changes to § 14.92**

We received 12 comments from commenters related to our proposal to remove the exemption to the import/export license requirements for persons engaging in the business of importing or exporting shipments containing only chinchilla, fisher, fox, marten, mink, muskrat, and nutria that have been bred and born in captivity or their products. Nine commenters representing U.S. retail businesses, a U.S. fur industry coalition, a Canadian fur industry coalition, and the government of Canada strongly opposed the elimination of the import/export license exemption because of ''increased costs for shipping furs and fur products between the United States and Canada.''

Several commenters opposed to the elimination stated that the elimination would create an inequity of treatment between the United States and Canada because Canada does not charge for inspections of wildlife. Other commenters argued that elimination of the exemption undermines the North American Free Trade Agreement (NAFTA) and one commenter argued the elimination is contrary to U.S. obligations under the General Agreement on Tariffs and Trade (GATT). Another commenter stated the elimination of the exemption represented a discriminatory action against small retailers and manufacturers. Two commenters stated that if cost recovery was our objective, then we should remove all exemptions.

Three commenters representing 11 nongovernmental organizations strongly supported the elimination of the exemption that in their view had created incentives to falsely declare wild animals as captive-bred. One commenter stated that the exemption hampered the Service's ability to track the trade and any possible impacts on wildlife populations, while another commenter stated that removal would weaken the ability of the trade to falsely declare wild-source products as from captive-bred animals. One commenter stated that in the interest of fairness the exemptions should be revoked and that it was ''unclear why for-profit endeavors'' had ever been exempted since ''these businesses should share in the funding of the inspection program in tandem with other commercial traders.''

As previously stated, most businesses deal in a mixture of these species and other fur-bearing species that do not qualify for the import/export license exemption, or the trade is in wild-caught specimens. For those shipments that do qualify, we still must provide inspection and clearance services to fulfill our legal mandates. In addition, as noted previously, retention of this exemption would allow some members of the trade to continue to falsely declare the source of their specimens in order to receive a fee exemption and our inability to review import records would not allow us to detect these false practices. This exemption has had the unintended consequences of unfairly granting a fee exemption primarily to foreign-origin goods. Finally, as discussed throughout this rule, we do not find it fair that nonexempt businesses pay more than their share of the costs in order for us to recover the costs not paid by exempt businesses. See the preamble discussion associated with inspection fees (Our Changes to Inspection Fees; §14.94—What fees apply to me?), for a further discussion on fees related to this exemption.

We have determined that removing this exemption is wholly consistent with the United States' obligations under NAFTA and GATT because the exemption provided an advantage to businesses that deal exclusively in chinchilla, fisher, fox, marten, mink, muskrat, and nutria that have been bred and born in captivity. Besides, GATT clearly permits the recovery of costs for services rendered to importers and exporters. In addition, neither GATT nor NAFTA overrules our obligations to regulate the international wildlife trade under the Convention on International Trade in Endangered Species (CITES) or stricter U.S. conservation laws, provided we do so in a non-discriminatory manner. Those currently not receiving the exemption pay a disproportionate share of the costs of the inspection program. The final rule establishes a level playing field.

Although some countries do not currently charge for import/export related services, inspection fees for these types of services are being adopted by more and more countries. In the United States, commercial importers and exporters of wildlife must have permission to engage in the business of importing or exporting wildlife, file required declarations, and receive clearance from the Service. These are not activities that the general taxpayer engages in and thus the recipient of these services should be responsible for paying for the costs of these services. We are not making any changes to the rule in response to these comments.

We received four comments in response to our proposal to eliminate the import/export license exemption for circuses. As previously mentioned, two commenters stated that if cost recovery was our objective, then we should remove all exemptions. One commenter strongly concurred that circuses should no longer qualify for exemption since the ''circus trade results in high profits for this industry.'' Another commenter strongly supported the removal of the exemption since commercial entertainment such as circuses, magic acts, and animal acts are for-profit businesses. We agree that circuses are importing and exporting for commercial purposes. We are therefore removing the exemption from the import/export license requirements. We consider shipments of wildlife imported or exported as part of commercial entertainment, such as magic acts or animal shows, commercial as well and are not exempting them from import/export license requirements.

Seven commenters representing the seafood industry and the National Oceanic and Atmospheric Administration National Marine Fisheries Service (NOAA-Fisheries) provided comments related to the proposed wording in § 14.92 regarding the exemption from the import/export license requirements for certain shellfish and nonliving fish products. The comments addressed shipments of squid, octopus, and cuttlefish. All of the comments from industry opposed the change in wording because of what they perceived to be a narrowing of the exemption and a creation of new requirements for squid, octopus, and cuttlefish. As stated above, the change in wording does not affect the way the Service currently implements the exemption.

One commenter stated that the legislative history of the Endangered

Species Act (ESA; 16 U.S.C. 1531 *et seq.*) suggests that Congress intended to exempt squid from licensing requirements. We disagree. Nothing in the legislative history of the ESA provides guidance on what species are included in the statutory exemption. Indeed the same commenter also indicates that the initial House bill, the Senate bill, and the Conference report all failed to provide any explanations as to what was intended to be covered by the exemption. Several commenters referred to other legislation, such as the Saltonstall-Kennedy Act and the Magnuson-Stevens Act, which include squid as a fishery product. We note, however, that the referenced pieces of legislation have overly broad definitions of both ''fish'' and ''fishery products'' that in many instances include all aquatic plants and animals. Nothing in these references requires us to apply these definitions to wildlife shipments regulated under the ESA.

NOAA-Fisheries, our partner agency in oversight of these species, commented that both the Magnuson-Stevens Act provisions and the regulations of the agency's Northeast Region lack a clear definition of shellfish. The NOAA-Fisheries commenter referenced a definition of shellfish from the United Nations Food and Agriculture Organization that states ''shellfish includes both mollusks, such as clams, and crustaceans, such as lobsters,'' as well as the Service's definition of shellfish, and stated that their understanding is that organisms in the class Cephalopoda are shellfish. While we would agree that squid, octopus, and cuttlefish are mollusks, we do not consider them to be an aquatic invertebrate with a shell as is required under the definition and is shown through examples in the definitions. NOAA-Fisheries requested that we provide clarification in the rule on the definition of shellfish and requested that the Service change the language in the rule from ''Shellfish and fishery products'' to ''Shellfish, as defined by 50 CFR 10.12, and nonliving fishery products.'' Although nothing in this wording changes our implementation of the exemption, we accepted these comments and changed the language accordingly.

Several comments we received from industry questioned our authority to regulate shipments of squid, octopus, cuttlefish, and other seafood. The ESA provides the Service with broad authority to regulate the import and export of fish and wildlife through licensing of importers and exporters, inspecting shipments, and charging and retaining reasonable fees for processing applications and performing inspections. This authority is not limited to endangered or threatened species or those protected under CITES.

Several of these commenters referenced the Reorganization Plan 4 of 1970 and a memorandum of understanding between NOAA-Fisheries and the Service transferring certain responsibilities to NOAA-Fisheries. Nothing in the reorganization plan transferred the authority for imports and exports of wildlife to NMFS. In fact, regulations at 50 CFR 222.205 state that importers or exporters of fish or wildlife subject to NMFS jurisdiction should refer to our regulations at 50 CFR 14 for importing and exporting requirements. We also note that NOAA-Fisheries submitted comments on this exemption and not only did not question our authority but indicated it looked ''forward to working with FWS in advancing environmentally sound import/export regulations.''

Several commenters complained about the Service's selective enforcement of this exemption. We are aware of the inconsistencies in enforcement at our ports and are working nationwide to implement the requirements consistently. We note that the Service currently does not have direct access to manifest or entry information provided to U.S. Customs and Border Protection (CBP) and relies heavily upon the import/export community to comply with our regulatory requirements. Working with CBP and our partners in the U.S. Food and Drug Administration, we hope to gain greater compliance from the trade and consistent application of the requirements.

Several commenters stated that the removal of the shellfish exemption would create a financial burden and that we had provided an inaccurate analysis of the costs of adding this new requirement. We are not removing the exemption or adding requirements associated with shellfish and nonliving fishery products. As we stated earlier, nothing about the language change in this rule affects the way we currently implement the exemption.

**Our Changes to Import/Export License Application Requirements (§ 14.93—How do I apply for an import/export license?)**

We are removing the specific additional information language from the current §14.93(b) because we updated the import/export license application form, FWS Form 3–200–3, to include this additional specific information. We are also reorganizing the license conditions section for clarity and to add the requirement that importers and exporters are responsible for providing current contact information, including an address, that the Service will use for official notifications.

For clarity, we are reorganizing the section that outlines issuance, denial, suspension, revocation, or renewal of an import/export license. We are also adding two new factors that are grounds for suspension, revocation, denial, or renewal of an import/export license. Although these factors are already generally covered by the regulations in part 13 of subchapter B of chapter I of title 50 of the Code of Federal Regulations, we wish to highlight these two factors for wildlife importers and exporters. We are going to consider repeated failure to provide the required prior notification for certain shipments as possible grounds for action against an existing import/export license holder or during consideration of a new or renewal import/export license application. Failure by importers or exporters to provide this required notification risks the health or condition of live and perishable shipments because of clearance delays and requires us to accommodate last-minute inspection schedule changes that directly impact the schedules of other importers or exporters.

We are also adding the repeated import or export of certain types of wildlife without following the requirements in this subpart as grounds for action against an existing import/export license holder or during consideration of a new or renewal import/export license application. This repeated failure to follow requirements for certain wildlife imports or exports may result in a restriction of the license to disallow engaging in business with those particular types of wildlife while still allowing the importer or exporter to continue to engage in business with other wildlife.

**Comments on Our Proposed Changes to § 14.93**

We received one comment from a license holder related to our addition of repeated failure to provide prior notification as a criterion for taking action against an import/export license holder. The commenter stated we should clearly indicate that denial should be made only where the violations can be considered egregious. The commenter requested that we include examples of what those egregious violations might be.

We consider the repeated failure to provide prior notification to be a serious violation. As we stated in the proposed

rule, failure by importers or exporters to provide this required notification risks the health or condition of live and perishable shipments. It causes clearance delays and requires us to accommodate last-minute inspection schedule changes that directly impact the schedules of other importers or exporters. Importers and exporters wishing to engage in the business of importing or exporting wildlife must receive the Service's permission in order to do so. We believe that continual failure to abide by Service import/export requirements should subject a license holder to the potential denial of an import/export license. The general permit conditions in 50 CFR part 13 do not limit the use of this denial authority to only egregious violations, and therefore we have not changed the rule based upon this comment.

We received two comments suggesting that the Service should define ''repeated'' in the context of revoking or not reissuing import/export licenses, with one commenter suggesting we replace ''repeatedly'' with ''more than once.'' We decline to accept these comments. We feel that the terms ''repeated'' and ''repeatedly'' give sufficient guidance in the context of revoking or not reissuing import/export licenses, and that in some circumstances, more than one violation may not warrant revocation or not reissuing an import/export license.

**Our Changes to Inspection Fees (§ 14.94—What fees apply to me?)**

This final rule implements the fee structure described in the proposed rule. We clarified it to state that if updates to the fee schedule are not in place by December 31, 2012, the fees from 2012 will apply to shipments from 2013 and beyond until a new fee structure is in place. As we stated in the proposed rule, the regulations in 50 CFR 14 contain an inspection fee schedule for inspections of wildlife shipments. We are changing the inspection fee structure and will generally increase inspection fees to cover the increased cost of providing these services and the required support.

The inspection fees currently apply primarily to commercial importers and exporters whose shipments of wildlife are declared to, and inspected and cleared by, Service wildlife inspectors, to ensure compliance with wildlife protection laws. These fees are not intended to fully fund the wildlife inspection program, which includes both a compliance monitoring function involving services to the trade community and a vital smuggling interdiction mission focused on detecting and disrupting illegal wildlife trade. The fee increase appropriately focuses only on recovering costs associated with services provided to importers and exporters engaged in legal wildlife trade.

In developing this final rule, the Service is guided by the Independent Offices Appropriations Act of 1952, codified at 31 U.S.C. 9701 (''the User Fee Statute''), which provides that services provided by Federal agencies are to be ''self-sustaining to the extent possible.'' The Act allows for agencies to prescribe regulations establishing charges for services provided. Each charge is to be fair and based upon costs to the government, the value of the service to the recipient and the public policy or interest served. The Act also authorizes the establishment of charges for special benefits provided to a recipient that are at least as great as costs to the government of providing the special benefits.

We are also guided by the Office of Management and Budget (OMB) Circular No. A–25, Federal user fee policy, which establishes Federal policy regarding fees assessed for government services. It provides that user fees will be sufficient to recover the full cost to the Federal Government of providing the service, will be based on market prices, and will be collected in advance of, or simultaneously with, the rendering of services. The policy requires Federal agencies to recoup the costs of ''special services'' that provide benefits to identifiable recipients.

The ESA (16 U.S.C. 1540(f)) also authorizes the Service to charge and retain reasonable fees for processing applications and for performing reasonable inspections of importation, exportation, and transportation of wildlife. The benefit of inspection fees is the shift in the payment of services from taxpayers as a whole to those persons who are receiving the government services.

While taxes may not change by the same amount as the change in inspection fee collections, there is a related shift in the appropriations of taxes to government programs, which allows those tax dollars to be applied to other programs that benefit the general public. Therefore, there could be a relative savings to taxpayers as a result of the changes in inspection fees.

The inspection and clearance of wildlife imports and exports is a special service provided to importers and exporters who are authorized to engage in activities not otherwise authorized for the general public. Our ability to effectively provide these services and the necessary support for these services depends on inspection fees. Although the Service began collecting inspection fees in February 1986, we have been unable to achieve full cost recovery as several categories of importers and exporters have been exempt from paying fees, and fees were not established at levels that would cover all costs of the services provided to the trade community. Inspection fees currently recover less than half the costs of the inspection program. Exempt businesses have included most noncommercial importers/exporters; companies dealing in specific captive-bred or personally trapped furs, meat from bison, ostrich, and emu, and aquacultured sturgeon food items; and circuses.

The inspection fee schedule in §14.94 we are modifying has been in place since 1996. These fees were calculated based solely upon the salary and benefits of a journeyman-level wildlife inspector and did not attempt to recover other costs of conducting compliance inspections and providing clearance services to the wildlife trade community. Before the effective date of this final rule, commercial importers or exporters (i.e., entities that hold a Service import/export license) have paid a flat rate of $55 per shipment for inspections at designated ports during normal working hours. Additional per-hour charges have been applied when inspections are conducted outside normal working hours; non-licensees receiving inspections outside normal working hours also paid these hourly charges.

All importers or exporters, whether licensed or not, have paid a $55 administrative fee for inspections at a staffed nondesignated port, plus a 2-hour minimum of $20 per hour for inspections during normal working hours. Higher hourly charges applied to inspections outside normal working hours. Importers and exporters whose inspections occur at nondesignated ports that are not staffed by Service inspectors have been charged all costs associated with providing the inspection, including salary, travel, transportation, and per diem costs.

Under this final rule, the inspection fee structure consists of a flat rate base inspection fee based upon the type of port ($85 for designated ports or ports acting as designated ports; $133 for staffed, nondesignated ports; and $133 for nonstaffed, nondesignated ports) that reflects the recovery of specific direct and indirect costs; and two premium inspection fees, each $19, reflecting additional labor costs associated with specific types of commodities. The inspection fee structure also provides for overtime fees. The inspection fees

reflect the cost of the services provided for routine shipments, shipments that contain species that are protected by Federal law or international treaty, and shipments that contain live specimens. Routine shipments are charged a base inspection fee based upon the type of port. Shipments containing protected species or live specimens are charged a premium inspection fee in addition to any applicable base inspection fee. If a shipment contains both protected species and live specimens, we charge two premium inspection fees in addition to any applicable base inspection fee.

For commercial shipments at designated ports, our regulations have required an inspection fee of $55. The new inspection fee structure requires an $85 base inspection fee for inspections at these ports. Upon the effective date, these shipments are subject to an additional $30 in inspection fees per shipment (a change from $55 to $85) in 2008 under the new fee structure. A further increase of $8 is spread out over the next 4 years (2009–2012), to yield an inspection fee of $93 in 2012 for a routine shipment at a designated port. For fiscal year 2005, approximately half of the shipments at designated ports did not contain species that are protected by Federal law or international treaty or live specimens and would be considered routine shipments under these regulations.

In addition to the nonstaffed, nondesignated port base inspection fee ($133 in 2008, rising to $145 by 2012), all importers or exporters who use these types of ports will be required to pay any associated travel and per diem expenses needed for our wildlife inspector to conduct an inspection at these ports. Until this final rule becomes effective, our current regulations require importers or exporters who use these types of nonstaffed ports to pay these travel and per diem expenses, plus the salary of the wildlife inspector conducting the inspection, in addition to a base hourly administrative fee. However, the new fee structure simplifies the fees for a nonstaffed, nondesignated port to consist of a flat rate base fee of $133 in 2008 to use these ports, which incorporates the salary of the wildlife inspector conducting the inspection, in addition to any travel and per diem costs. Importers and exporters using this type of port are also responsible for payment of premium fees if their shipment includes live or protected specimens, as is the case at the other types of ports.

We are publishing 5 years' worth of fees, for the period 2008–2012, and applying an inflation factor to the base fees, premium fees, and overtime fees. Throughout the 5-year period, we will increase the base inspection fees annually, based upon inflation, using the Gross Domestic Product (GDP) indices. We will increase the premium inspection fees gradually over the 5-year period, reflecting both inflation and a gradual move to 100-percent cost recovery. Because we are publishing these inspection fee changes for a 5-year period, importers and exporters of wildlife can incorporate these fee increases into their budget planning. Within the 5-year period, we will publish a proposed rule on inspection fees that will be effective for the year 2013 and a number of years beyond, to be determined. In the event the rulemaking establishing inspection fees for 2013 and beyond is delayed beyond December 31, 2012, the inspection fees in this final rule for the year 2012 will be in effect for the year 2013 and beyond, as needed, until the updated rulemaking is finalized.

**Comments on Our Proposed Changes to § 14.94**

We received 39 comments on the proposed changes to the inspection fees. Thirty-four comments were generally opposed to the increased fees, although several commenters acknowledged the need to recover increasing costs. Three commenters strongly supported the increase in inspection fees, and two commenters indicated they had no concerns with the fees because they recognized the need to recover increased costs.

As previously mentioned, we must make the wildlife trade compliance program as self-sustaining as possible. The collection of inspection fees currently funds approximately 40 percent of the inspection program. The remainder is funded through limited appropriated funds. We do not consider it proper to pass these increased costs on to the general public who are not the primary beneficiaries of these services. In order to maintain the same level of inspection services, we have no option but to raise inspection fees and move toward achieving cost recovery from the trade for the compliance portion of the inspection program.

Many of the commenters opposed to the increased fees represent industries that do not import or export routine wildlife shipments, but import or export shipments which require additional specialized services for live or protected species. In our economic analysis, we determined that approximately 50 percent of the shipments imported or exported at designated ports were live or protected species and thus would be subject to these increased premium fees. We do not consider it equitable to require the other half of the trade to pay even more fees in order to spread out the costs of these additional specialized services.

Other commenters opposed to the increased fees are currently exempt from fees and wish to remain exempt. As we state above, we must still provide services to these industries and we do not find it equitable that nonexempt businesses must pay more than their share of the costs in order for us to recover the costs not paid by exempt businesses. We realize that increases in inspection fees will increase the upfront cost of doing business. In the past, however, many businesses were subsidized by taxpayers and were not charged.

We received 16 comments stating that the new fees will discourage small shipments. We are aware that some businesses may run on a very low profit margin. This may be particularly true when importing or exporting a limited number of wildlife specimens. While the inspection fee increase is not intended to restrict or eliminate the international trade of wildlife, it may have an economic effect on those dealing in small shipments or transactions. However, the Service must expend time and resources to process these shipments. In addition, the costs of providing services to the international wildlife trade community are not dependent upon the size of the shipment.

It may be necessary for some businesses to reassess how they are conducting their activities to ensure that the most productive and efficient procedures are being used. While the Service understands that the increased inspection fees may impact some businesses, we must raise the inspection fees to ensure that we can adequately address our responsibilities under various wildlife laws and regulations. We do not anticipate that these inspection fees will greatly affect the number of specimens in international trade, although the number of shipments may be reduced due to consolidation.

Some commenters proposed that we exempt small businesses or establish a minimal processing fee. As we stated earlier in the rule, the majority of businesses importing and exporting wildlife are considered small businesses. The base inspection fees cover the basic minimum service we provide. Our inspection fee costs are calculated to represent average costs of providing the service. We cannot predict or control the frequency of

unusually small importations or exportations. To ensure that our basic costs are always covered, we charge the base inspection fee. At a minimum, any service we provide involves a fixed set of costs. These fixed costs include the direct costs of providing the service and the indirect costs of support providing the service. We cannot establish a lower minimum fee, because doing so would prevent us from recovering the full costs of providing the services.

Two commenters stated that the proposed inspection fees should have a sliding scale based upon the value or the quantity of specimens in a particular shipment. The base inspection fees resulting from our economic analysis apply to all shipments of wildlife regardless of quantity or value of specimens in a particular shipment. We calculated the average costs of providing the service. Therefore, some of the inspection fees may appear too high or too low based upon an individual's experience, but in fact the fees represent the average cost of providing the service for the type of shipment and type of port.

There is no direct correlation between the number of wildlife items in a shipment or the value of the shipment and the complexity of the inspection or costs of services that we must provide. A fee based upon quantity or value would automatically overcharge many large or high-value shipments and undercharge shipments of low value or quantity. Importers importing their routine shipment should not be required to bear the higher costs associated with inspections of live or protected species shipments simply because their routine shipment contains more specimens or specimens of a higher value.

We received one comment stating that inspection fees should distinguish between dealers and collectors. Imports and exports for personal use are exempt from base inspection fees at designated ports or ports acting as designated ports. If, however, collectors are importing and exporting for commercial purposes, including trade and barter, then they must be licensed and pay appropriate fees. For example, collectors who import small numbers of specimens that are promptly sold over the Internet are operating in no less of a commercial manner than is a dealer in wildlife specimens. In addition, the cost of providing services to a collector is no different than the cost of providing such services to a dealer. We consider it unfair to require dealers and other members of the wildlife trade community to bear a disproportionate share of the costs in order to exempt collectors. We therefore are making no changes to the rule based upon this comment.

We received seven comments opposed to the proposed premium inspection fee for shipments containing live specimens or protected species. The inspection of shipments that contain live specimens requires considerably more knowledge, time, and equipment than is required for a routine shipment. In addition to the increased time required for inspection of the shipment, and oftentimes the need for additional officers, the inspection of these premium shipments in many cases requires the use of equipment that ensures the safety of the wildlife inspector conducting the inspection. Inspection of shipments containing protected species also requires considerably more time and knowledge. In addition, the costs of services supporting these types of shipments are considerably higher than for routine shipments.

The majority of commenters stated that the time it takes to inspect their shipment is no more than for other shipments and that any ''rookie'' could inspect their shipment. Other commenters indicated that the fees represented an unfair allocation of the costs to the Service or were not related to our costs. Other commenters felt the fees unfairly targeted certain segments of the trade. We calculated the average time to inspect these premium shipments, which on average is considerably longer than for a routine shipment. The time includes pre-inspection research and document review often conducted with the assistance of senior inspectors, as well as the actual physical inspection of the shipment.

Since the costs have been averaged for all shipments of a particular premium type, some users may view the fees as higher than the costs for their individual shipment. Under the current system, the higher costs to process these premium shipments are borne predominantly by the taxpayers but also by importers and exporters dealing in non-premium shipments. As stated in the proposed rule, these fees reflect both the increase in costs as well as the inclusion of cost components that had not been included before. This rule seeks to recover the costs associated with these special services and equipment from those directly responsible for the shipments. Therefore, we feel that the premium fees for live and protected specimens are warranted and have been set at reasonable levels. See § 14.94(f) for a definition of premium fees.

We received one comment that the travel and per diem costs associated with a nonstaffed nondesignated port were unfair if there were multiple importers and exporters requesting inspection at the same time. The commenter suggested that we prorate travel and per diem expenses when multiple importers or exporters are involved. We agree with the commenter and have updated the regulations to reflect this change. Although this circumstance is rare, we will charge prorated travel, transportation, and per diem costs when a wildlife inspector travels to process shipments for multiple importers or exporters at the same location. However, each shipment will be assessed the nondesignated port base inspection fee and, if applicable, the appropriate premium inspection fees.

We received two comments suggesting that we ''abandon normal work schedules'' for wildlife inspectors thus eliminating the need for overtime charges. The majority of activities involving the clearance of imports and exports, such as working with customs brokers and CBP, in addition to frequent communication with the regulated public, are conducted during normal business hours. We recognize, however, that some shipments, particularly those with live specimens, are imported or exported outside normal business hours. The Service does not have the staff resources to provide regular service 7 days a week, 24 hours a day, at all locations. In addition, other Federal inspection service agencies do not work these hours without charging overtime.

However, in several locations, our wildlife inspectors do work shifts to process express shipments. Under Federal law, we must compensate wildlife inspectors who regularly work overtime hours. In order to recover the costs for these additional salary and benefit expenses, whether our inspectors are working overtime or are working a normal shift during generally understood overtime hours, we must have the users of these overtime services compensate the government through overtime charges. We believe it is more equitable to have the importers and exporters of after hours shipments pay for these additional services rather than requiring higher fees for all shipments.

We received five comments questioning how the proposed overtime and inspection fees apply to multiple shipments. As we previously stated, and is currently the practice, if an importer or exporter has multiple shipments at the same time and the same location, they will only be assessed one overtime fee for the inspection of those shipments. However, we will assess each shipment the appropriate base

inspection fee and, if applicable, the appropriate premium inspection fees.

**Calculation of Inspection Fees**

As stated in the proposed rule, we conducted an economic analysis of the costs associated with the services provided to the legal wildlife trade community, and we created an inspection fee template (§ 14.94(h)) that formed the basis for the determination of this inspection fee increase. The economic analysis used data on shipment types and quantities, inspection times required for different types of shipments, and direct and indirect costs associated with the services provided to the legal wildlife trade community.

In order to calculate these inspection fees, we analyzed the actual total costs of providing services to the legal wildlife trade community during fiscal year 2005 as compared to the actual total money that we collected for activities authorized by the wildlife inspection program during fiscal year 2005.

The total costs include wildlife inspector salaries and benefits; the appropriate portion of our managers' salaries and benefits; direct costs such as vehicle operation and maintenance, equipment purchase and replacement, data entry and computer support for the Service's electronic filing system, communications costs, office supplies, uniforms, and administrative costs; and indirect costs such as office space. We calculated these costs using a Service-wide standard of 22 percent of direct costs. The total cost of providing services to the legal wildlife trade community during fiscal year 2005 was $20,083,627.

The total amount of money that we collected for activities authorized by the wildlife inspection program during fiscal year 2005 was $8,724,289. This total includes application fees for import/export licenses, designated port exception permits, and CITES permits and certificates, as well as inspection and overtime fees. At the time of our analysis, our data did not distinguish between license and permit fees and inspection fees. However, it is readily apparent that whatever portion of this total is derived from inspection fees, it falls well below the $20,083,627 we spent on the wildlife trade compliance program during fiscal year 2005. Subsequent to the proposed rule, we instituted a revenue tracking system to separate inspection fees, including overtime, from designated port exception permit application fees and CITES document application fees.

The inspection of shipments that contain species protected by Federal law or international treaty or live specimens requires considerably more knowledge, time, and equipment than is required for a routine shipment. In addition to the increased time required for document inspection and handling of the shipment, the inspection of these ''premium'' shipments requires more thorough knowledge of Federal law or international treaty, or, in the case of shipments containing live specimens, the use of equipment that ensures the safety of the wildlife inspector conducting the inspection. Inspection of live shipments routinely requires the services of more than one wildlife inspector and may also require timely consultation with outside experts.

In addition, there are other costs associated with the inspection of premium shipments. In many instances, foreign documents that are presented for clearance of shipments containing protected species under CITES must be verified with foreign governments, a process that can be extremely time consuming. These foreign documents must be stored and recorded in our electronic database. Data on shipments containing wildlife protected under CITES must be analyzed for quality and reported internationally on an annual basis as one of our obligations as a party nation to this international treaty.

Since the trade compliance portion of the wildlife inspection program is to be ''self-sustaining to the extent possible,'' we created an inspection fee structure that will provide 100-percent cost recovery by the end of the 5-year period 2008–2012. If we had developed an inspection fee structure to provide 100-percent cost recovery immediately, the initial premium fees would have been substantially higher than the premium fees described in this final rule.

During the development of the inspection fee structure, we estimated the inflation rate based upon the GDP. The GDP indices are obtained from the Economic Report of the President, which projects the growth of real GDP. For the 5-year period covered in this final rule, the GDP indices were as follows: 2.1 percent for 2008, 2009, and 2010, and 2.2 percent for 2011 and 2012. We decided to use inflation using the GDP indices as the only factor contributing to the increased costs by the end of the 5-year period. This is a conservative approach since wildlife inspector salaries and benefits could increase at a substantially greater rate than inflation by the end of the 5-year period. While salaries may increase consistent with inflation, promotions would increase salaries considerably more than inflation.

In order to calculate these inspection fees, we estimated what the fiscal year 2005 base inspection fees and premium inspection fees would need to be to provide 100-percent cost recovery by the end of the 5-year period, and inflated those fees to 2008 dollars. We used this approach, because this rulemaking will not be finalized until 2008, and if, at that time, we used 2005 dollars consistent with actual total costs during fiscal year 2005, 100-percent cost recovery by the end of the 5-year period would not be possible.

It is extremely difficult to estimate what portion of the money we collected for activities authorized by the wildlife inspection program was derived from travel and per diem expenses and overtime fees we received. Currently, our data do not distinguish between license and permit fees and inspection fees. However, these amounts are a very small portion of the total amount that is derived from inspection fees, and will have little impact on the total amount of money that we collect for activities authorized by the wildlife inspection program. Therefore, during the development of the inspection fee structure, we decided not to include overtime fees or salary, travel, and per diem expenses collected at a nonstaffed, nondesignated port.

During the development of the inspection fee template, we considered the impact that increased inspection fees would have on small businesses. Essentially all of the businesses that engage in commerce by importing or exporting wildlife are considered small businesses according to the Small Business Administration (SBA). Examples of some of these businesses can be placed in the following SBA categories: ''Zoos and Botanical Gardens,'' with an SBA size standard of $6.0 million in average annual receipts; ''Merchant wholesalers, nondurable goods,'' with an SBA size standard of 100 employees; ''Leather and allied product manufacturers,'' with an SBA size standard of 500 employees; and ''Clothing and Clothing Accessories Stores,'' with an SBA size standard ranging from $6.0 million to $7.5 million in average annual receipts.

Since essentially all of these businesses are small, we believe that those companies that deal with more complex shipments requiring additional services from us, such as those containing species that are protected by Federal law or international treaty or live specimens, should assume a greater share of the costs associated with the additional services. The alternative is to

spread these additional costs among all importers and exporters.

To help determine how realistic our inspection fee increases are, we calculated what the inspection fees in place since 1996 would be equal to in the beginning of and by the end of the 5-year period, based only on inflation using the GDP indices. This calculation yielded an inspection fee of $70 for 2008, and an inspection fee of $76 by the end of the 5-year period in 2012. Both of these projected fees are quite close to the base inspection fee of $85. Recognizing that the 1996 inspection fees were based only on the salary and benefits of a journeyman-level wildlife inspector and did not take into account all of the other costs associated with the services provided to the legal trade community, we think the base inspection fee, which is based on all of the associated costs of the wildlife inspection program, is reasonable.

**Comments on Calculation of Inspection Fees**

We received one comment suggesting that the Service's Office of Law Enforcement should have a better way to track import/export license, CITES permit, and inspection fees. We agree with the commenter and have already implemented internal controls to track these fees since the publication of the proposed rule.

We received one comment stating that the Service did not address the criteria under the User Fee Statute when establishing the new inspection fees. We disagree. As stated previously, the criteria under the User Fee Statute include that the fees be fair, and that they be based upon actual costs to the government, the value of the service to the recipient, and public policy or interests that are being served. We consider these fees to be fair for reasons stated in this final rule. The fees reflect the actual cost to the government for the specific services provided, and they were established at levels that will provide 100-percent cost recovery for the wildlife trade compliance program, as authorized by the User Fee Statute. In addition, if we do not increase inspection fees, funds will not be available to continue to provide inspection services at a level sufficient to meet customer demand.

**Exemptions to Inspection Fees (New Section, § 14.94(k))**

During the development of the inspection fee template, we decided that some individuals or organizations, or certain commodities, should continue to be exempt from inspection fees. These longstanding exemptions reflect the lack of regular inspection services provided and the limited numbers of shipments for which services are required.

Government agencies at the Federal, State, local, or tribal level have been exempt from inspection fees in the past and will continue to be exempt from the inspection fees, including overtime fees. The retention of this exemption complements other Service regulations.

Individuals who import or export shipments of 100 or fewer raw furs or raw, salted, or crusted mammal hides or skins between the United States, Canada, or Mexico have been exempt from inspection fees in the past and will continue to be exempt from designated port base inspection fees. However, this exemption applies only to shipments of mammal furs, hides, or skins lawfully taken from the wild by those individuals or their family members in the United States, Canada, or Mexico, from species that are not protected under parts 17, 18, or 23 of title 50. These individuals will still require an import/export license and be responsible for overtime fees for any shipments inspected outside normal working hours.

Individuals or organizations that import or export shipments of wildlife for noncommercial purposes at designated ports that do not contain species that are protected by Federal law or international treaty, along with individuals or organizations that import or export live specimens, will continue to be exempt from designated port inspection fees. These individuals or organizations will still be responsible for overtime fees for any shipments inspected outside normal working hours, as well as all fees for import or export through a nondesignated port.

Individuals or organizations that import or export shipments of wildlife for noncommercial purposes at designated ports that contain species that are protected by Federal law or international treaty, along with individuals or organizations that import or export live specimens, will pay premium inspection fees when importing or exporting via air, ocean, rail, or truck cargo. However, these shipments will continue to be exempt from base inspection fees. Examples of these individuals or organizations would include but not be limited to: individuals importing or exporting personal pets that may or may not be protected species; hunters importing or exporting protected game species; or public museums, zoos, and scientific or educational institutions importing or exporting protected species or live specimens.

Inspection of these premium shipments requires considerably more knowledge, time, and equipment than is required for a routine shipment. It should be noted that the Service does not consider these individuals or organizations to be exempt from paying for other services that provide benefits. Our regulations in part 13 already require individuals or organizations to pay application fees for permits that authorize them to engage in activities not otherwise authorized for the general public. We note that other agencies do not make a distinction between commercial and noncommercial individuals or organizations when considering inspection fees for import and export. Based upon these findings, we decided to charge premium fees but exempt these shipments from base inspection fees as long as the shipments are imported or exported through a designated port. These shipments will continue to be subject to overtime fees and all fees for import or export through a nondesignated port.

Individuals or organizations who import or export shipments that contain protected species or live specimens for noncommercial purposes at designated ports by using the mail, by traveling as passengers, or by using a personal vehicle will be exempt from designated port base inspection fees and premium inspection fees. However, they will still be responsible for overtime fees for any inspections that take place outside normal working hours. These shipments are currently exempt from designated port inspection fees other than overtime charges. We decided to retain this exemption under these circumstances because we do not consistently provide inspection services at mail facilities or passenger terminals, or for personal vehicles.

Until the effective date of this final rule, our regulations exempt certain captive-bred mammals from designated port inspection fees as part of an exemption from the import/export license requirements. With this final rule, however, we are establishing the import/export license requirement for these types of shipments. Although most businesses have not taken advantage of the exemption as discussed earlier, any exempted shipments still require inspection and clearance. This exemption has also had the unintended consequence of creating a monetary incentive to falsely declare certain mammals and their products as captive-bred.

By policy, we currently exempt the export of sturgeon and paddlefish that are captive-bred in aquaculture facilities from inspection fees, including

nondesignated port fees, if the shipments are for immediate human or animal consumption. This exemption applies to caviar, meat, and other food items, but does not cover live fish. By policy, we also currently exempt the export of American bison, ostrich, and emu meat produced in ranching operations in the United States from inspection fees if the meat is intended for human consumption. All of these shipments still require inspection and clearance by us.

Our ability to effectively provide inspection and clearance services and the necessary support for these services depends on inspection fees. When we exempted these types of shipments from inspection fees, the costs associated with inspection and clearance have been borne either by the taxpayers through appropriated funds or by other importers and exporters. The services provided to these exempt businesses are specialized services that do not directly benefit the public as a whole and, as such, the costs should not be borne by the taxpayer. As discussed earlier, the majority of importers and exporters of wildlife are small businesses. We do not believe it equitable that nonexempt businesses must pay more than their share of the costs in order for us to recover the costs not paid by exempt businesses.

**Comments on § 14.94(k)**

We received one comment regarding our proposed retention of the exemption for individuals or organizations who import or export shipments that contain protected species or live specimens for noncommercial purposes at designated ports by using the mail, by traveling as passengers, or by using a personal vehicle. The commenter stated that passengers on international flights should be assessed premium inspection fees since the majority of these shipments contain protected species. We disagree with this comment and will retain the exemption as proposed. As we stated earlier, we do not consistently provide inspection services for noncommercial shipments imported or exported at mail facilities or passenger terminals, or by personal vehicles.

One commenter specifically opposed retaining the exemption for individuals who import or export shipments of 100 or fewer raw furs or raw, salted, or crusted mammal hides or skins between the United States, Canada, or Mexico. Two other commenters generally opposed the retention and stated that if cost recovery was our objective, then we should remove all exemptions. One commenter stated that this exemption could allow unscrupulous businesses to break up their shipments to get around license fees. One commenter approved of the continuation of this exemption, while two commenters requested that we extend the current exemption from inspection fees for shipments of raw furs or raw, salted, or crusted hides or skins to include shipments of processed or manufactured furs of similar size and value. We decline to accept the recommendations made in these comments.

The current exemption from inspection fees for shipments consisting of raw furs or raw, salted, or crusted hides or skins, or separate fur or skin parts lawfully taken from the wild in the United States, Canada, or Mexico, is intended to provide assistance to subsistence hunters and trappers. We believe retention of this exemption is warranted. However, when we consider the difficulties that are inherent in subsistence hunting, we do not think that commercial importers or exporters of processed or manufactured furs should be entitled to the same assistance extended to subsistence hunters. Finally, we have the ability to monitor the volume of importing and exporting by a business or individual and have not detected any abuse of this exemption. Therefore, we are making no changes to the rule based upon these comments.

We received four comments from the U.S. white sturgeon farming community stating that we should not remove the exemption from inspection fees for exports of sturgeon and paddlefish that are captive-bred in aquaculture facilities and are intended for immediate human or animal consumption. We also received four comments in favor of removing the exemption. Two commenters in favor stated that the businesses required inspection services and should therefore pay for this service as do other importers and exporters. Two other commenters stated that if cost recovery was our objective, then we should remove all exemptions.

The commenters opposed to the removal of the exemption argued that since the species are farmed, they are not wildlife and are not subject to the fees. The commenters also stated that poaching is already controlled at the source and farming protects endangered species by decreasing pressure on wild stock. Though we recognize that farming of white sturgeon may relieve pressure on wild stocks, we would remind the commenters that the ESA, under which permission must be obtained to engage in the business of importing or exporting wildlife, defines wildlife to include specimens that are born or bred in captivity. In addition, CITES requires CITES documents for international trade of all sturgeon and paddlefish regardless of whether the species are captive-bred. Finally, the commenters argued that the proposed new fees were too high. See the preamble discussion on the inspection fee schedule (Our Changes to Inspection Fees (§ 14.94—What fees apply to me?)) for additional discussion of fees.

As stated above, we currently exempt the export of sturgeon and paddlefish that are captive-bred in aquaculture facilities from inspection fees, including nondesignated port fees, if the shipments are for immediate human or animal consumption. However, these shipments still require inspection and clearance by us, and exporters often use ports with little or no staff available. As we have previously stated, we do not find it equitable that nonexempt businesses must pay more than their share of the costs in order for us to recover the costs not paid by exempt businesses.

Since foreign sturgeon aquaculture facilities must pay inspection fees when their goods are imported, removal of the exemption for domestic businesses will establish a level playing field. Therefore, we are removing the inspection fee exemption for businesses that export food items derived from aquacultured sturgeon and paddlefish.

Four commenters supported the elimination of the inspection fee exemption for businesses that export meat from American bison, ostrich, and emu. Two commenters stated that if cost recovery was our objective, then we should remove all exemptions. One commenter stated that those who utilize the inspection services must bear the cost, while another commenter stated that these businesses require inspection and clearance and are operating commercially.

We agree with the commenters. As we have stated throughout this final rule, we do not find it equitable that nonexempt businesses must pay more than their share of the costs in order for us to recover the costs not paid by exempt businesses. In addition, since both imports and re-exports with an origin other than the United States are subject to the inspection fees, removal of the exemption for domestic businesses will establish a level playing field. Therefore, we are removing the inspection fee exemption for businesses that export food items derived from ranch-raised American bison, ostrich, and emu.

**Other Relevant Comments**

We received one comment stating that the regulations should contain a

provision that would allow prior disclosures to be made without penalty if non-compliance is found internally by businesses. As we stated in our final rule of August 23, 2007 (72 FR 48401), on the implementation of CITES, we cannot accept this recommendation because this provision would undermine our enforcement efforts and our obligations under international and domestic laws. We treat specimens traded contrary to law the same as other forms of illegally traded goods.

We received 22 comments regarding an exemption from all Service import or export requirements for ranch-raised elk and deer and their products of Canadian origin. The commenters suggested we could reduce our costs by exempting their commodities from regulation. We also received one comment requesting that shipments containing mother of pearl products should be exempt from all Service import or export requirements.

The only wildlife species completely exempt from Service import/export requirements are domesticated species that have become modified, through selective breeding and a long historical association with humans, from the wild species from which they were derived. The domesticated species can differ from the wild species in color, form, function, and/or behavior to such an extent that the domesticated species is unable to survive in the wild without human care. The Service does not consider ranch-raised elk and deer or mother of pearl to meet these requirements. In addition, granting an exemption for products only of Canadian origin might create a protectionist effect for Canadian goods.

We received one comment stating that the Service should reduce or eliminate inspection fees for the import and export of dead insect specimens. We decline to adopt this suggestion. As stated in our proposed rule, the goal of this fee increase is to recover the costs of the compliance portion of the Service's wildlife inspection program. We do not consider it to be fair or equitable for importers or exporters of wildlife other than dead insect specimens to bear the additional costs incurred by reducing or eliminating fees for dead insect specimens. These shipments require inspection and clearance by us as do all other wildlife shipments; therefore, we are making no changes to the rule based upon this comment.

We received one comment requesting that the funds collected by the Service remain in the port where they are collected. The commenter indicated that some ports receive subsidized funding from customs brokers associations. We decline to adopt this recommendation. Inspection fees monies are collected to support the entire import/export compliance program, and not all of the costs are resident in a particular port. We note that the Service does not receive any funding from customs brokers associations.

One commenter questioned whether this rule applied to plants, and requested confirmation of any other changes involving hunting and fishing, other than the need for individuals or organizations that import or export shipments for noncommercial purposes that contain protected species to pay premium fees. This rule applies only to fish and wildlife as defined in 50 CFR 10.12 and does not apply to plants. With respect to additional provisions that might affect hunting or fishing, the commenter should read § 14.91, which provides examples of license requirements related to hunters and taxidermists.

One commenter suggested that the Service should eliminate inspections on Canada-U.S. shipments except for CITES species. We decline to adopt this suggestion. The Service must enforce the ESA. The ESA provides us with broad authority to regulate the import and export of fish and wildlife through licensing importers and exporters, inspecting shipments, and charging and retaining reasonable fees for processing applications and performing inspections. This authority is not limited to endangered or threatened species or those protected under CITES. As previously stated, this broad authority requires importers and exporters who wish to engage in the international trade of wildlife to obtain permission to do so. Eliminating inspections of shipments to and from Canada would undermine our obligations under U.S. law and would unfairly discriminate against shippers trading with countries other than Canada.

## Required Determinations

### Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

### Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

This final rule will not have a significant economic effect on a substantial number of small businesses as defined under the Regulatory Flexibility Act. An initial Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. During the development of the inspection fee template, we considered the impact that increased inspection fees would have on small businesses. Essentially all of the businesses that engage in commerce by importing or exporting wildlife or wildlife products would be considered small businesses according to the Small Business Administration (SBA). Examples of some of these businesses can be placed in the following SBA categories: ''Zoos and Botanical Gardens,'' with an SBA size standard of $6.0 million in average annual receipts; ''Merchant wholesalers, nondurable goods,'' with an SBA size standard of 100 employees; ''Leather and allied product manufacturers,'' with an SBA size standard of 500 employees; and ''Clothing and Clothing Accessories Stores,'' with an SBA size standard ranging from $6.0 million to $7.5 million in average annual receipts.

This final rule will not have a significant economic effect on these businesses. In most cases, the increased inspection fees will represent a small fraction of the value of the affected wildlife shipment. In addition, the small entities directly affected by this final rule are not likely to bear the full burden of the inspection fee increases because some or most of the cost increases will be passed on to the purchasers of the wildlife.

### Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

This final rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act. This final rule:

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

The removal of two exemptions from our import/export license requirements for businesses that import or export certain captive-bred mammals or their products and circuses that import or

export wildlife will not adversely affect those businesses.

For fiscal year 2005, our records indicate that 2,628 shipments of captive-bred chinchilla, fisher, fox, marten, mink, muskrat, and nutria were imported or exported by 351 businesses. However, 296 of these businesses already have import/export licenses because they also trade in species other than these captive-bred mammals. We are proposing that the remainder of these businesses must obtain an import/export license, at a cost of $100 per year. These changes will result in an additional cost to these businesses of $5,500 as importers or exporters of these captive-bred mammals or their products (351 · 296 = 55 businesses × $100 = $5,500).

We estimate that approximately 30 circuses will import or export animals during a given year. We are proposing that these circuses must obtain an import/export license. These changes will result in an additional cost to these circuses of $3,000 as importers or exporters of circus animals.

The total cost to businesses and circuses based upon the removal of two exemptions from our import/export license requirements will be approximately $8,500.

We have determined that routine shipments must be charged a base inspection fee based upon the type of port. Shipments containing protected species or live specimens must be charged a premium inspection fee in addition to the base inspection fee. If a shipment contains both protected species and live specimens, we charge two premium inspection fees in addition to the base inspection fee. The fee structure requires an $85 base inspection fee for inspections at designated ports and a $19 premium inspection fee.

The greatest increased costs contained in the fee structure apply to wildlife shipments imported or exported at nonstaffed, nondesignated ports. Assuming that every shipment we inspect occurs at one of these ports, the total net annual economic effect in the worst-case scenario will be approximately $20 million.

For inspections at these ports, our regulations have required an administrative fee of $55 plus all costs associated with the inspection and clearance, including salary, travel, and per diem for the wildlife inspector conducting the inspection. The new fee structure requires a $133 base inspection fee for inspections at these ports. Assuming that every shipment at these ports contained species that are protected by Federal law or international treaty and live specimens, these shipments will require an additional $38 in premium inspection fees, for a total of $171 per shipment.

The worst-case scenario for inspections at nonstaffed, nondesignated ports, as described above, and not including travel and per diem, will result in an additional $116 in inspection fees per shipment (the difference between $171 and $55) under the new fee structure. We estimate that we inspect approximately 170,000 shipments per year nationwide. Assuming that all shipments are inspected at nonstaffed, nondesignated ports, the net annual economic effect could equal $19,720,000 under the new fee structure. While the new fee structure of $133 to use these ports does require the additional payment of travel and per diem expenses, it does not require the additional payment of the salary of the wildlife inspector conducting the inspection. In many cases, the base fee of $133 will be considerably less than the salary of the wildlife inspector conducting the inspection.

In reality, nearly one-half of our inspections are conducted at designated ports for shipments that do not contain species that are protected by Federal law or international treaty or live specimens, so the net annual economic effect of the new fee structure is considerably less than $19,720,000. For commercial shipments at designated ports, our regulations have required an inspection fee of $55. The new fee structure requires an $85 base inspection fee for inspections at designated ports. These shipments will result in an additional $30 in inspection fees per shipment (the difference between $85 and $55) under the new fee structure. For fiscal year 2005, we inspected 83,203 shipments at designated ports that did not contain species that are protected by Federal law or international treaty or live specimens. The net annual economic effect for inspections of these shipments will/could equal $2,496,090 under the new fee structure.

As described above, the removal of two exemptions from our import/export license requirements for businesses that import or export certain captive-bred mammals or their products and circuses means that these entities must pay inspection fees authorized under their import/export license.

For fiscal year 2005, our records indicate that 2,628 shipments of certain captive-bred mammals or their products were imported or exported by 351 businesses. These new regulation changes will result in an additional cost to these businesses of $223,380 when they import or export shipments of certain captive bred mammals or their products at designated ports (2,628 shipments × $85 base inspection fee at designated ports).

Our records indicate that, at most, there could be 75 shipments of circus animals imported or exported during a given year by approximately 30 circuses. Circuses will likely be assessed two premium inspection fees per shipment, since most of their shipments will contain live specimens that are protected by Federal law or international treaty. Under the worst-case scenario, these changes will result in an additional cost to these circuses of $9,225, when they import or export circus animals at designated ports (75 shipments × $85 base inspection fee at designated ports + 75 shipments × $38 premium inspection fee).

For fiscal year 2005, our records indicate that 7,800 shipments that contained species that are protected by Federal law or international treaty or live specimens were imported or exported for noncommercial purposes at designated ports via air, ocean, rail, or truck cargo. With the effective date of this final rule, these persons must pay premium inspection fees for these shipments. In many cases, these shipments will contain species that are protected by Federal law or international treaty and live specimens. Under the worst-case scenario, these changes will result in an additional cost to these persons of $296,400, when they import or export these shipments at designated ports (7,800 shipments × $38 premium inspection fee).

For fiscal year 2005, our records indicate that 145 shipments of American bison, ostrich, emu, or sturgeon and paddlefish products were exported. These changes will result in an additional cost to these businesses of $12,325 when they export shipments of American bison, ostrich, or emu meat at designated ports (145 shipments × $85 base inspection fee at designated ports).

The total cost to businesses, circuses, and persons importing or exporting species that are protected by Federal law or international treaty or live specimens for noncommercial purposes, based upon the removal of license fee exemptions, will be approximately $541,330.

Considering that nearly one-half of the shipments that we inspect account for an annual economic effect of just under $2.5 million, it is safe to assume that all of the other types of shipments that we inspect at all of our other ports, when combined with this amount, will total far less than $100 million. The

removal of import/export license exemptions and inspection fee exemptions accounts for an additional $549,830. To summarize, this final rule will have an annual economic effect of far less than $100 million.

Though this final rule will not have an annual economic effect of $100 million, we recognize that these fee increases will have a negative effect on small entities. Since essentially all of the businesses that engage in commerce by importing or exporting wildlife would be considered small businesses, and considering that the wildlife trade compliance program is to be ''self-sustaining to the extent possible,'' we have no option but to raise inspection fees to cover the increasing costs associated with the wildlife trade compliance program. It would not be appropriate to pass these increased costs on to the general public, who are not the primary beneficiaries of these services.

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 final rule will increase costs for individual industries and potentially consumers; however, because the wildlife trade compliance program is to be ''self-sustaining to the extent possible,'' we have no option but to raise inspection fees to cover the increasing costs associated with the wildlife trade compliance program. If we do not increase inspection fees, funds will not be available to continue to provide these services at a level sufficient to meet customer demand.

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

This final rule will not have significant adverse effects on the ability of U.S.-based enterprises to compete with foreign-based enterprises, because foreign-based enterprises that are subject to U.S. jurisdiction must comply with the same regulatory requirements as U.S.-based enterprises who import or export wildlife. In addition, this final rule removes the exemption from an import/export license requirements and payment of inspection fees for shipments of certain captive-bred mammals or their products. Due to shipping and other business practices, foreign-sourced mammals or their products imported into the United States are more likely to be declared as captive-bred and appropriate for the current exemption than exports of U.S.-sourced mammals or their products. The removal of the exemption will result in equal treatment of foreign-sourced and U.S.-sourced mammals or their products.

**Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)**

Under the Unfunded Mandates Reform Act:

a. This final rule will not significantly or uniquely affect small governments. A Small Government Agency Plan is not required.

We are the lead Federal agency for implementing regulations that govern and monitor the importation and exportation of wildlife and carrying out the United States' obligations under CITES. Therefore, this final rule has no effect on small governments' responsibilities.

b. This final rule will not produce a Federal requirement that may result in the combined expenditure by State, local, or tribal governments of $100 million or greater in any year, so it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

This rule will not result in any combined expenditure by State, local, or tribal governments.

**Executive Order 12630 (Takings)**

Under E.O. 12630, this final rule does not have significant takings implications. A takings implication evaluation is not required. Under E.O. 12630, this final rule does not affect any constitutionally protected property rights. This final rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property.

**Executive Order 13132 (Federalism)**

Under E.O. 13132, this final rule does not have significant Federalism effects. A Federalism evaluation is not required. This final rule will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

**Executive Order 12988 (Civil Justice Reform)**

Under E.O. 12988, the Office of the Solicitor has determined that this final rule does not overly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. Specifically, this final rule has been reviewed to eliminate errors and ensure clarity, has been written to minimize disagreements, provides a clear legal standard for affected actions, and specifies in clear language the effect on existing Federal law or regulation.

**Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)**

This final rule does not contain any new information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has approved the information collection requirements contained in this subpart I and assigned OMB Control Number 1018–0092, which expires on November 30, 2010. The Service may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

**National Environmental Policy Act**

We analyzed this rule under the criteria of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(C)) and part 516 of the Department of the Interior's Departmental Manual (DM), Chapter 8. This final rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental impact statement/assessment is not required.

A categorical exclusion from NEPA documentation applies to publication of these amendments to our import/export regulations, because the changes are technical and procedural in nature, and the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis (516 DM 2, Appendix 1.10). Concerning the actions that are the subject of this rulemaking, NEPA has been complied with at the project level where each change was developed. This is consistent with the Department of the Interior instructions for compliance with NEPA where actions are covered sufficiently by an earlier environmental document (516 DM 3.2A).

**Executive Order 13175 (Tribal Consultation) and 512 DM 2 (Government-to-Government Relationship With Tribes)**

Under the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no adverse effects. Individual tribal members must meet the same regulatory requirements as other individuals who import or export wildlife.

**Executive Order 13211 (Energy Supply, Distribution, or Use)**

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule will clarify the import/export license and fee requirements, adjust the inspection fee schedule, and update license and inspection fee exemptions. This final rule is not a significant regulatory action under E.O. 12866, and it is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

**List of Subjects in 50 CFR Part 14**

Animal welfare, Exports, Fish, Imports, Labeling, Reporting and recordkeeping requirements, Transportation, Wildlife.

**Regulation Promulgation**

■ For the reasons described above, we are amending part 14, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below.

## PART 14—IMPORTATION, EXPORTATION, AND TRANSPORTATION OF WILDLIFE

■ 1. The authority citation for part 14 continues to read as follows:

**Authority:** 16 U.S.C. 668, 704, 712, 1382, 1538(d)–(f), 1540(f), 3371–3378, 4223–4244, and 4901–4916; 18 U.S.C. 42; 31 U.S.C. 9701.

■ 2. Revise subpart I to read as follows:

**Subpart I—Import/Export Licenses and Inspection Fees**

Sec.
14.91 When do I need an import/export license?
14.92 What are the exemptions to the import/export license requirement?
14.93 How do I apply for an import/export license?
14.94 What fees apply to me?

## Subpart I—Import/Export Licenses and Inspection Fees

### § 14.91 When do I need an import/export license?

(a) The Endangered Species Act (16 U.S.C. 1538(d)(1)) makes it unlawful for any person to engage in business as an importer or exporter of certain fish or wildlife without first having obtained permission from the Secretary. For the purposes of this subchapter, engage in business means to import or export wildlife for commercial purposes.

(b) Except as provided in § 14.92, if you engage in the business of importing or exporting wildlife for commercial purposes (see § 14.4), you must obtain an import/export license prior to importing or exporting your wildlife shipment.

(c) The following table includes some examples of when an import/export license is required:

| If I import into the United States or export from the United States | . . . do I need an import/export license? |
|---|---|
| (1) Wildlife in the form of products such as garments, bags, shoes, boots, jewelry, rugs, trophies, or curios for commercial purposes. | Yes. |
| (2) Wildlife in the form of hides, furs, or skins for commercial purposes | Yes. |
| (3) Wildlife in the form of food for commercial purposes | Yes. |
| (4) As an animal dealer, animal broker, pet dealer, or pet or laboratory supplier | Yes. |
| (5) As an individual owner of a personally owned live wildlife pet for personal use | No. |
| (6) As a collector or hobbyist for personal use | No. |
| (7) As a collector or hobbyist for commercial purposes, including sale, trade or barter | Yes. |
| (8) As a laboratory researcher or biomedical supplier for commercial purposes | Yes. |
| (9) As a customs broker or freight forwarder engaged in business as a dispatcher, handler, consolidator, or transporter of wildlife or if I file documents with the Service on behalf of others. | No. |
| (10) As a common carrier engaged in business as a transporter of wildlife | No. |
| (11) As a taxidermist, outfitter, or guide importing or exporting my own hunting trophies for commercial purposes | Yes. |
| (12) As a taxidermist, outfitter, or guide transporting or shipping hunting trophies for clients or customers | No. |
| (13) As a U.S. taxidermist receiving a U.S. client's personal hunting trophies after import clearance for processing | No. |
| (14) As a U.S. taxidermist importing wildlife from or exporting wildlife to foreign owners who are requesting my services | Yes. |
| (15) As a foreign owner of wildlife exporting my personal hunting trophies from the United States to my home | No. |
| (16) As a circus for exhibition or resale purposes | Yes. |
| (17) As a Federal, State, municipal, or tribal agency | No. |
| (18) As a public museum, or public scientific or educational institution for noncommercial research or educational purposes | No. |

### § 14.92 What are the exemptions to the import/export license requirement?

(a) *Certain wildlife.* Any person may engage in business as an importer or exporter of the following types of wildlife without obtaining an import/export license:

(1) Shellfish (see §10.12 of this chapter) and nonliving fishery products that do not require a permit under parts 16, 17, or 23 of this subchapter, and are imported or exported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes;

(2) Live farm-raised fish and farm-raised fish eggs of species that do not require a permit under parts 16, 17, or 23 of this subchapter, that meet the definition of ''bred-in-captivity'' as stated in § 17.3 of this subchapter and that are for export only; and

(3) Live aquatic invertebrates of the Class Pelecypoda, commonly known as oysters, clams, mussels, and scallops, and their eggs, larvae, or juvenile forms, that do not require a permit under parts 16, 17, or 23 of this subchapter, and are exported only for the purposes of propagation or research related to propagation; and

(4) Pearls that do not require a permit under parts 16, 17, or 23 of this subchapter.

(b) *Certain persons.*

(1) The following persons may import or export wildlife without obtaining an import/export license, provided that these persons keep records that will fully and correctly describe each importation or exportation of wildlife made by them and the subsequent disposition made by them with respect to the wildlife.

(i) Public museums, or other public, scientific, or educational institutions, importing or exporting wildlife for noncommercial research or educational purposes; and

(ii) Federal, State, tribal, or municipal agencies.

(2) Subject to applicable limitations of law, duly authorized Service officers at

all reasonable times will, upon notice, be given access to these persons' places of business, an opportunity to examine their inventory of imported wildlife or the wildlife to be exported, the records described in paragraph (1) of this section, and an opportunity to copy those records.

**§ 14.93 How do I apply for an import/export license?**

(a) *Application form.* You must submit a completed FWS Form 3–200–3, including the certification found on the form and in § 13.12(a) of this subchapter, to the appropriate regional Special Agent in Charge under the provisions of this subpart and part 13 of this subchapter.

(b) *Import/export license conditions.* In addition to the general permit conditions in part 13 of this subchapter, you must comply with the following conditions:

(1) You must comply with all requirements of this part, all other applicable parts of this subchapter, and any specific conditions or authorizations described on the face of, or on an annex to, the import/export license;

(2) You must pay all applicable license and inspection fees as required in § 14.94;

(3) You are responsible for providing current contact information to us, including a mailing address where you will receive all official notices the Service sends;

(4) You must keep, in a U.S. location, the following records that completely and correctly describe each import or export of wildlife that you made under the import/export license and, if applicable, any subsequent disposition that you made of the wildlife, for a period of 5 years:

(i) A general description of the wildlife, such as ''live,'' ''raw hides,'' ''fur garments,'' ''leather goods,'' ''footwear,'' or ''jewelry'';

(ii) The quantity of the wildlife, in numbers, weight, or other appropriate measure;

(iii) The common and scientific names of the wildlife;

(iv) The country of origin of the wildlife, if known, as defined in § 10.12 of this subchapter;

(v) The date and place the wildlife was imported or exported;

(vi) The date of the subsequent disposition, if applicable, of the wildlife and the manner of the subsequent disposition, whether by sale, barter, consignment, loan, delivery, destruction, or other means;

(vii) The name, address, telephone, and e-mail address, if known, of the person or business who received the wildlife;

(viii) Copies of all permits required by the laws and regulations of the United States; and

(ix) Copies of all permits required by the laws of any country of export, re-export, or origin of the wildlife.

(5) You must, upon notice, provide authorized Service officers with access to your place(s) of business at all reasonable times and give us an opportunity to examine your inventory of imported wildlife or the wildlife to be exported, the records required to be kept by paragraph (b)(4) of this section, and an opportunity to copy these records subject to applicable limitations of the law;

(6) You must submit a report containing the information you must keep in paragraph (b)(4) of this section within 30 days of receiving a written request from us; and

(7) An import/export license gives you general permission to engage in business as an importer or exporter of wildlife. An import/export license is in addition to, and does not supersede, any other license, permit, or requirement established by Federal, State, or tribal law for the import or export of wildlife.

(c) *Duration of import/export license.* Any import/export license issued under this section expires on the date shown on the face of the import/export license. In no case will the import/export license be valid for more than 1 year after the date of issuance.

(d) *Issuance, denial, suspension, revocation, or renewal of import/export license.* We may deny, suspend, revoke, restrict, or deny renewal of an import/export license to any person named as the holder, or a principal officer or agent of the holder, under any of the criteria described in part 13 of this chapter or under the following criteria:

(1) Failure to pay fees, penalties, or costs required by this part;

(2) You repeatedly fail to notify our Service officers at the appropriate port at least 48 hours prior to the estimated time of arrival of a live or perishable wildlife shipment under § 14.54(a) or at least 48 hours prior to the estimated time of exportation of any wildlife under § 14.54(f);

(3) You repeatedly import or export certain types of wildlife without meeting the requirements of this part or other applicable parts of this subchapter.

**§14.94 What fees apply to me?**

(a) *Import/export license application fees.* You must pay the application and amendment fees, as defined in § 13.11(d)(4), for any required import/export license processed under § 14.93 and part 13 of this subchapter.

(b) *Designated port exception permit application fees.* You must pay the application and amendment fees, as defined in § 13.11(d)(4), for any required designated port exception permit processed under subpart C of this part.

(c) *Designated port base inspection fees.* Except as provided in paragraph (k) of this section, an import/export license holder must pay a base inspection fee, as defined in § 14.94(h)(1), for each wildlife shipment imported or exported at a designated port or a port acting as a designated port. You can find a list of designated ports in § 14.12 and the criteria that allow certain ports to act as designated ports in § §14.16–14.19, § 14.22, and § 14.24 of this part.

(d) *Staffed nondesignated port base inspection fees.* You must pay a nondesignated port base inspection fee, as defined in § 14.94(h)(2), for each wildlife shipment imported or exported at a staffed nondesignated port, using a designated port exception permit issued under subpart C of this part. This fee is in place of, not in addition to, the designated port base fee.

(e) *Nonstaffed, nondesignated port base inspection fees.* You must pay a nondesignated port base inspection fee, as defined in § 14.94(h)(3), for each wildlife shipment imported or exported at a nonstaffed, nondesignated port using a designated port exception permit issued under subpart C of this part. You must also pay all travel, transportation, and per diem costs associated with inspection of the shipment. These fees are in place of, not in addition to, the designated port base fee. The Service will prorate charges for travel, transportation, and per diem costs if multiple importers or exporters require inspection at the same time at the same location. All applicable base and premium fees apply to each shipment.

(f) *Premium inspection fees.* You must pay a premium inspection fee in addition to any base inspection fees required in paragraphs (c), (d), and (e) of this section, as defined in § 14.94(h)(4), for the following types of shipments:

(1) Except as provided in paragraph (k) of this section, any shipment containing live or protected species, as defined in § 14.94(h)(4), imported or exported by an import/export license holder at a designated port or a port acting as a designated port. You can find a list of designated ports in § 14.12 and the criteria that allow certain ports to act as designated ports in § §14.16–14.19, § 14.22, and § 14.24;

(2) Any shipment containing live or protected species, as defined in § 14.94(h)(4), imported or exported via air, ocean, rail, or truck cargo, by persons not requiring an import/export license under § 14.91, at a designated port or a port acting as a designated port. You can find a list of designated ports in § 14.12 and the criteria that allow certain ports to act as designated ports in § §14.16–14.19, § 14.22, and § 14.24;

(3) Any shipment containing live or protected species, as defined in § 14.94(h)(4), imported or exported at a nondesignated port using a designated port exception permit issued under subpart C of this part.

(4) You must pay two premium inspection fees in addition to any base inspection fees required in paragraphs (c), (d), and (e) of this section, as defined in § 14.94(h)(4), if your wildlife shipment contains live and protected species.

(g) *Overtime fees.* You must pay fees for any inspections, including travel time, that begin before normal working hours, that extend beyond normal working hours, or are on a Federal holiday, Saturday, or Sunday.

(1) Overtime fees are in addition to any base inspection fees or premium inspection fees required for each shipment. We will charge these fees regardless of whether or not you have an import/export license.

(2) Our ability to perform inspections during overtime hours will depend upon the availability of Service personnel. If we cannot perform an inspection during normal working hours, we may give you the option of requesting an overtime inspection.

(3) The overtime fee is calculated using a 2-hour minimum plus any actual time in excess of the minimum. It incorporates the actual time to conduct an inspection and the travel time to and from the inspection location.

(4) The Service will charge any overtime, including travel time, in excess of the minimum in quarter-hour increments of the hourly rate. The Service will round up an inspection time of 10 minutes or more beyond a quarter-hour increment to the next quarter-hour and will disregard any time over a quarter-hour increment that is less than 10 minutes.

(5) The Service will charge only one overtime fee when multiple shipments are consigned to or are to be exported by the same importer or exporter and we inspect all at the same time at one location. The overtime fee will consist of one 2-hour minimum or the actual time for inspection of all the applicable shipments, whichever is greater. All applicable base and premium fees will apply to each shipment.

(6) We will charge 1 hour of time at 1½ times the hourly labor rate for inspections beginning less than 1 hour before normal working hours.

(7) We will charge a minimum of 2 hours of time at an hourly rate of 1½ times the average hourly labor rate for inspections outside normal working hours, except for inspections performed on a Federal holiday.

(8) We will charge a minimum of 2 hours of time at an hourly rate of 2 times the average hourly labor rate for inspections performed on a Federal holiday.

(h) *Fee schedule.*

| Inspection fee schedule | Fee cost per shipment per year | | | | |
|---|---|---|---|---|---|
| | 2008 | 2009 | 2010 | 2011 | 2012 and beyond |
| (1) Designated port base inspection fee (see § 14.94 (c)). | $85 | $87 | $89 | $91 | $93. |
| (2) Staffed nondesignated port base inspection fee (see § 14.94(d)). | $133 | $136 | $139 | $142 | $145. |
| (3) Nonstaffed nondesignated port base inspection fee (see § 14.94(e)). | $133 | $136 | $139 | $142 | $145. |
| (4) Premium inspection fee at any port (see § 14.94 (f)): | | | | | |
| (i) *Protected species.* Any species that requires a permit under parts 15, 16, 17, 18, 21, 22, or 23 of this chapter;. | $19 | $37 | $56 | $74 | $93. |
| (ii) *Live species.* Any live wildlife, including live viable eggs and live pupae. | $19 | $37 | $56 | $74 | $93. |
| (5) Overtime inspection fee (see § 14.94(g)): | | | | | |
| (i) Inspections beginning less than 1 hour before normal work hours. | $48 | $49 | $51 | $52 | $53. |
| (ii) Inspections after normal work hours, including Saturday and Sunday. (2 hour minimum charge plus fee for additional time). | $96 min. + $48/hr. | $98 min. + $49/hr. | $101 min. + $51/hr. | $103 min. + $52/hr. | $105 min. + $53/hr. |
| (iii) Inspections on Federal holidays. (2 hour minimum charge plus fee for additional time). | $128 min. + $64/hr. | $131 min.+ $65/hr. | $133 min. + $67/hr. | $136 min. + $68/hr. | $139 min. + $70/hr. |

(i) The Service will not refund any fee or any portion of any license or inspection fee or excuse payment of any fee because importation, exportation, or clearance of a wildlife shipment is refused for any reason.

(j) All base inspection fees, premium inspection fees, and overtime fees will apply regardless of whether or not a physical inspection of your wildlife shipment is performed, and no fees will be prorated except as provided in paragraphs (e) and (g)(5) of this section.

(k) *Exemptions to inspection fees.*

(1) *Certain North American-origin wild mammal furs or skins.* Wildlife shipments that meet all of the following criteria are exempt from the designated port base inspection fee (however, these shipments are not exempt from the designated port overtime fees or the import/export license application fee):

(i) The wildlife is a raw fur; raw, salted, or crusted hide or skin; or a separate fur or skin part, lawfully taken from the wild in the United States, Canada, or Mexico that does not require permits under parts 17, 18, or 23 of this chapter; and

(ii) You, as the importer or exporter, or a member of your immediate family, such as your spouse, parents, siblings, and children, took the wildlife from the

wild and are shipping the wildlife between the United States and Canada or Mexico; and

(iii) You have not previously bought or sold the wildlife described in paragraph (k)(1)(i) of this section, and the shipment does not exceed 100 raw furs; raw, salted, or crusted hides or skins; or fur or skin parts; and

(iv) You certify on Form 3–177, Declaration for Importation or Exportation of Fish or Wildlife, that your shipment meets all the criteria in this section.

(2) You do not have to pay base inspection fees, premium inspection fees, or overtime fees if you are importing or exporting wildlife that is exempt from import/export license requirements as defined in § 14.92(a) or you are importing or exporting wildlife as a government agency as defined in § 14.92(b)(1)(ii).

(3) You do not have to pay base inspection fees, premium inspection fees, or overtime fees if you are importing or exporting wildlife that meets the criteria for ''domesticated animals'' as defined in § 14.4.

Dated: October 16, 2008.

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–29070 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 061228342–7068–02]**

**RIN 0648–XM06**

## Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2007–2009 Specifications

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

**ACTION:** Temporary rule; adjustment of 2008 and 2009 Atlantic herring (herring) area total allowable catches (TACs).

**SUMMARY:** NMFS restores 900 mt of unallocated research set-aside (RSA) to the 2008 and 2009 herring Area 2 TACs and 1,800 mt of unallocated RSA to the 2008 and 2009 herring Area 3 TACs. The adjustments are intended to reallocate herring RSA quota to the herring commercial fishery.

**DATES:** Effective December 9, 2008, through December 31, 2009.

**FOR FURTHER INFORMATION CONTACT:** Carrie Nordeen, Policy Analyst, (978) 281–9272, fax (978) 281–9135, e-mail: *carrie.nordeen@noaa.gov* .

**SUPPLEMENTARY INFORMATION:** The 2007–2009 herring specifications (72 FR 17807, April 10, 2007) allocated RSA to each of the four herring management areas for 2008–2009 as follows: 1,350 mt to Area 1A, 300 mt to Area 1B, 900 mt to Area 2, and 1,800 mt to Area 3. In early 2008, NMFS received four research proposals in response to the 2008/2009 Herring RSA Program request for proposals; NMFS's Northeast Fisheries Science Center selected one proposal to be funded through the 2008/2009 Herring RSA Program. The project, conducted by the Gulf of Maine Research Institute, entitled ''The Effects of Fishing on Herring Aggregations,'' requested and was awarded all of the RSA for Areas 1A and 1B (1,350 mt and 300 mt, respectively), but did not request RSA for Areas 2 and 3 (900 mt and 1,800 mt, respectively).

The regulations at § 648.207 stipulate that, in the event that the approved research projects do not make use of any or all of the RSA, the unutilized portion of the RSA shall be reallocated back to its respective management area(s). When multi-year TACs are specified and there is unutilized herring RSA available, NMFS, at the request of the New England Fishery Management Council (Council), could publish another request for funding proposals (RFP) for either the second or third years of the 3–year specifications. The Council also may decide not to publish another RFP, in which case NMFS may release the unutilized portion of the set-aside back to its respective management area(s).

At its October 7–9, 2008, meeting, the Council discussed the unallocated 2008 and 2009 herring RSA in Areas 2 and 3. Because there willis not be insufficient time between October and the end of the 2008 fishing year and/or the start of the 2009 fishing year to publish another RFP, evaluate the proposals, and award RSA, the Council requested that NMFS release the unallocated RSA for Areas 2 and 3 back to its respective management areas, such that it would be available for harvest by the commercial fishery. Therefore, this action restores 900 mt of herring to the Area 2 TAC and 1,800 mt of herring to the Area 3 TAC for the 2008 and 2009 fishing years. The resulting 2008 and 2009 herring TACs are 30,000 mt for Area 2, and 60,000 mt for Area 3.

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

This action restores unallocated herring RSA to herring Management Areas 2 and 3 for the 2008 and 2009 fishing years, such that it is available for harvest by the commercial herring fishery. Regulations at § 648.207 stipulate that unutilized RSA shall be reallocated back to its respective management area(s). In October 2008, the Council requested that NMFS release the unallocated RSA to the commercial herring fishery. 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. Regulations at § 648.201(a) stipulate that NMFS shall prohibit vessels from possessing, catching, transferring, or landing herring from a management area when catch from that management area reaches 95 percent of its management area TAC. If implementation of this action is delayed to solicit public comment, the commercial herring fishery in Areas 2 and 3 may close prematurely in 2008, thereby undermining the economic objectives of the Atlantic Herring Fishery Management Plan. There was insufficient time to solicit prior public comment because of the timing of the Council's request that NMFS release the unallocated RSA quota to the commercial fishery. The AA further finds, pursuant to 5 U.S.C. 553(d)(3) good cause to waive the 30–day delayed effectiveness period for the reason stated above.

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

Dated: December 2, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–29133 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 73, No. 237
Tuesday, December 9, 2008

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

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0182]**

## Privacy Act of 1974: Implementation of Exemptions; Immigration and Customs Enforcement Search, Arrest, and Seizure Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Proposed Rule Making.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the Immigration and Customs Enforcement (ICE) Search, Arrest, and Seizure Records system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed.

**DATES:** Comments must be received on or before January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0182, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Lyn Rahilly, Privacy Officer, (202–732–3300), Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20024, e-mail: *ICEPrivacy@dhs.gov.* For privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), DHS and its component agency ICE have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records pertaining to ICE's arrests of individuals, and searches, detentions, and seizures of property pursuant to ICE's law enforcement authorities. As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for ICE to cover these records. The collection and maintenance of this information will assist ICE in meeting its obligation to record its actions regarding searches of individuals and property, arrests of individuals, and detentions and seizures of property and goods pursuant to ICE's law enforcement authorities.

In this notice of proposed rulemaking, DHS is now proposing to exempt Search, Arrest, and Seizure Records, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for Search, Arrest, and Seizure Records. Some information in Search, Arrest, and Seizure Records relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable

exemptions may be waived on a case by case basis.

A notice of system of records for Search, Arrest, and Seizure Records is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

### Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

14. The Department of Homeland Security/United States Immigration and Customs Enforcement Search, Arrest, and Seizure Records system of records consists of electronic and paper records and will be used by DHS and its components. Search, Arrest, and Seizure Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; and national security and intelligence activities. Search, Arrest, and Seizure Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; Refusal to comply with a request for access to records; failure to maintain accurate, relevant, timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: November 28, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29047 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF HOMELAND SECURITY

## Office of the Secretary

## 6 CFR Part 5

**[Docket No. DHS–2008–0187]**

## Privacy Act of 1974: Implementation of Exemptions; U.S. Immigration and Customs Enforcement Intelligence Records System (IIRS)

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement, is giving concurrent notice of a new system of records pursuant to the Privacy Act of 1974 for the U.S. Immigration and Customs Enforcement Intelligence Records System (IIRS) and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 8, 2009.

**ADDRESSES:** You may submit comments, identified by DHS–2008–0187 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Lyn Rahilly, Privacy Officer, U.S. Immigration and Customs Enforcement, 425 I Street, NW., Washington, DC 20536, e-mail: *ICEPrivacy@dhs.gov,* or Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The U.S. Immigration and Customs Enforcement (ICE) Intelligence Records System (IIRS) system of records contains information generated or received by the ICE Office of Intelligence, or other offices within ICE that support the law enforcement intelligence mission, that is analyzed and disseminated to ICE executive management and operational units for law enforcement, intelligence, counterterrorism, and other homeland security purposes. Using various databases and tools, ICE produces formal law-enforcement intelligence reports that are the end-result of the intelligence process. These reports, the underlying data on which they are based, and the work papers used or created by the analysts and agents, are all included within the IIRS system of records.

IIRS also contains data maintained in the Office of Intelligence's Intelligence Fusion System (IFS), a software application and data repository that supports research and analysis of information from a variety of sources within and outside of DHS to support law enforcement investigations, administration of immigration and naturalization laws and other laws administered or enforced by DHS, and production of DHS intelligence products. IFS is specifically designed to make the intelligence research and analysis process more efficient by allowing searches of a broad range of data through a single interface. IFS can also identify links (relationships) between individuals or entities based on commonalities, such as identification numbers, addresses, or other information. These commonalities in and of themselves are not suspicious, but in the context of additional information they sometimes help DHS agents and analysts to identify potentially criminal activity and identify other suspicious activities. These commonalities can also form the basis for a DHS-generated intelligence product that may lead to further investigation or other appropriate follow-up action by ICE, DHS, or other Federal, State, or local agencies.

DHS personnel may access IFS only if they hold positions that involve the execution of law enforcement responsibilities, the administration of immigration and naturalization laws and other laws enforced by DHS, or the production of DHS intelligence products. While IFS does increase the efficiency of data research and analysis, it does not allow DHS personnel to obtain any data they could not otherwise access in the course of their job responsibilities. IFS does not seek to predict future behavior or ''profile'' individuals, *i.e.,* look for individuals who meet a certain pattern of behavior that has been pre-determined to be suspect.

## II. Privacy Act

In this notice of proposed rulemaking, DHS now is proposing to exempt IIRS, in part, from certain provisions of the Privacy Act. The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency. The Privacy Act also allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a notice of proposed rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for IIRS. Some information in IIRS relates to official DHS national security, law enforcement, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of law enforcement intelligence and investigative techniques; to protect the identities and physical safety of confidential informants and of border management and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for the Department's IIRS System is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552.

2. At the end of Appendix C to Part 5, add the following new paragraph 14 to read as follows:

### Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

14. The ICE Intelligence Records System (IIRS) consists of electronic and paper records and will be used by the Department of Homeland Security (DHS). IIRS is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; and national security and intelligence activities. IIRS contains information that is collected by other federal and foreign government agencies and may contain personally identifiable information. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant, timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 1, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29060 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0179]**

## Privacy Act of 1974: Implementation of Exemptions; United States Immigration and Customs Enforcement Confidential and Other Sources of Information

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Proposed Rule Making.

**SUMMARY:** The Department of Homeland Security is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the United States Immigration and Customs Enforcement (ICE) Confidential and Other Sources of Information (COSI) system of records and this

proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed.

**DATES:** Comments must be received on or before January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0179, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Lyn Rahilly, Privacy Officer, (202–732–3300), Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20024, e-mail: *ICEPrivacy@dhs.gov.* For privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, section 1512, 116 Stat. 2310 (November 25, 2002), the DHS and its component agency ICE have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to information received from confidential and other sources. As a law enforcement investigatory agency, ICE collects and maintains information regarding possible violations of law from a number of sources, including confidential sources, State, local, tribal and Federal law enforcement agencies and members of the public.

As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for ICE to cover these records. This new system of records will allow ICE to collect and maintain records concerning the identities of and information received from documented confidential sources and other sources who supply information to ICE regarding possible violations of law or otherwise in support of law enforcement investigations and activities.

In this notice of proposed rulemaking, DHS is now proposing to exempt Confidential and Other Sources of Information, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for Confidential and Other Sources of Information. Some information in Confidential and Other Sources of Information relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for Confidential and Other Sources of Information is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

### Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

14. The Department of Homeland Security/United States Immigration and Customs Enforcement Confidential and Other Sources of Information DHS/ICE–003 system of records consists of electronic and paper records and will be used by DHS and its components. Confidential and Other Sources of Information (COSI) is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; and investigations, inquiries, and proceedings thereunder; national security and intelligence activities. COSI contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable

information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant, timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: November 28, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29053 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF HOMELAND SECURITY

## Office of the Secretary

## 6 CFR Part 5

**[Docket No. DHS–2008–0181]**

## Privacy Act of 1974: Implementation of Exemptions; United States Immigration and Customs Enforcement Law Enforcement Support Center Alien Criminal Response Information Management System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the United States Immigration and Customs Enforcement (ICE) Law Enforcement Support Center (LESC) Alien Criminal Response Information Management System (ACRIMe) system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed.

**DATES:** Comments must be received on or before January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0181, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or

comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Lyn Rahilly, Privacy Officer (202–732–3300), Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20024, e-mail: *ICEPrivacy@dhs.gov*. For privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records concerning the operation of the ICE LESC. The LESC is ICE's 24-hour national enforcement operations facility. Although Title 8 U.S. Code immigration violations were the original focus of the LESC and ACRIMe under the Immigration and Naturalization Service (INS), the mission of the LESC now supports the full range of ICE's law enforcement operations. Specifically, the LESC provides assistance including, but not limited to, immigration status information to local, State and Federal law enforcement agencies on aliens suspected, arrested, or convicted of criminal activity, Customs violations, and violations of other laws within ICE's jurisdiction. This notice updates the preexisting system of records notice for the LESC Database published by the legacy INS, which owned the LESC prior to the creation of DHS. The LESC transferred to ICE with the creation of DHS and the LESC database is now known as the Alien Criminal Response Information Management System (ACRIMe).

The ACRIMe Database facilitates the response of LESC personnel to specific inquiries from law enforcement agencies that seek to determine the immigration status of an individual and whether the individual is under investigation and/or wanted by ICE or other law enforcement agencies. ACRIMe also supports ICE's efforts to identify aliens with prior criminal convictions that may qualify them for removal from the U.S. as aggravated felons. In addition, this system of records helps to facilitate the processing of aliens for deportation or removal proceedings.

The ACRIMe Database also facilitates the collection, tracking, and distribution of information about possible violations of customs and immigration law reported by the general public to the toll-free DHS/ICE Tip-line. ACRIMe logs requests for assistance from criminal justice personnel who contact the LESC on the full range of ICE law enforcement missions. ACRIMe supports the entry of both administrative (immigration) and criminal arrest warrants into the Federal Bureau of Investigation's National Crime Information Center (NCIC) system. Finally, it also enables ICE to collect and analyze data to evaluate the effectiveness and quality of LESC services and ICE's immigration law enforcement efforts.

Consistent with DHS's information sharing mission, information stored in ACRIMe may be shared with other DHS components, as well as appropriate Federal, State, local, tribal, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

In this notice of proposed rulemaking, DHS is now proposing to exempt Law Enforcement Support Center Alien Criminal Response Information Management System, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for LESC ACRIMe. Some information in LESC ACRIMe relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for LESC ACRIMe is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

## Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

14. The DHS, ICE LESC ACRIMe system of records consists of electronic and paper records and will be used by DHS and its components. Law Enforcement Support Center Alien Criminal Response Information Management System is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; and national security and intelligence activities. Law Enforcement Support Center Alien Criminal Response Information Management System contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), and (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in identifying or establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant, timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: November 28, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29058 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF ENERGY

## 10 CFR Part 430

**[Docket No. EERE–2008–BT–TP–0010]**

**RIN 1904–AB76**

## Energy Conservation Program for Consumer Products: Test Procedures for Clothes Dryers and Room Air Conditioners

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of proposed rulemaking and notice of public meeting.

**SUMMARY:** In order to implement recent amendments to the Energy Policy and Conservation Act (EPCA), the U.S. Department of Energy (DOE) proposes to amend its test procedures for residential clothes dryers and room air conditioners to provide for measurement of standby mode and off mode power use by these products. The amendments would incorporate into the DOE test procedures relevant provisions from the International Electrotechnical Commission's (IEC) Standard 62301, ''Household electrical appliances—Measurement of standby power'' (First Edition 2005–06), as well as language to clarify application of these provisions specifically for measuring standby mode and off mode power consumption in clothes dryers and room air conditioners. DOE will hold a public meeting to discuss and receive comments on the issues presented in this notice.

**DATES:** DOE will accept comments, data, and information regarding the notice of

proposed rulemaking (NOPR) before and after the public meeting, but no later than February 23, 2009. *See* section V, ''Public Participation,'' of this NOPR for details.

DOE will hold a public meeting on Wednesday, December 17, 2008, from 9 a.m. to 4 p.m., in Washington, DC. DOE must receive requests to speak at the public meeting before 4 p.m., Wednesday, December 10, 2008. DOE must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Wednesday, December 10, 2008.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. (Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the public meeting should advise DOE as soon as possible by contacting Ms. Edwards to initiate the necessary procedures.)

Any comments submitted must identify the NOPR on Test Procedures for Clothes Dryers and Room Air Conditioners, and provide the docket number EERE–2008–BT–TP–0010 and/or Regulatory Information Number (RIN) 1904–AB76. Comments may be submitted using any of the following methods:

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

2. *E-mail: AHAM2-2008-TP-0010@hq.doe.gov.* Include docket number EERE–2008–BT–TP–0010 and/or RIN 1904–AB76 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed paper original.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. Please submit one signed paper original.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V, ''Public Participation,'' of this document.

*Docket:* For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information about visiting the Resource Room.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stephen Witkowski, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–7463. *E-mail: Stephen.Witkowski@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9507. *E-mail: Eric.Stas@hq.doe.gov.*

For information on how to submit or review public comments and on how to participate in the public meeting, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2945. *E-mail: Brenda.Edwards@ee.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

I. Background and Authority
II. Summary of the Proposal
III. Discussion
A. Products Covered by the Test Procedure Changes
B. Effective Date for the Amended Test Procedures
C. Incorporating by Reference IEC Standard 62301 (First Edition, 2005–06) for Measuring Standby Mode and Off Mode Power in Clothes Dryers and Room Air Conditioners
D. Determination of Modes To Be Incorporated
1. Clothes Dryer Mode Definitions
2. Room Air Conditioner Mode Definitions
E. Adding Specifications for the Test Methods and Measurements for Clothes Dryer and Room Air Conditioner Standby Mode and Off Mode Testing
1. Clothes Dryers
2. Room Air Conditioners
F. Calculation of Energy Use Associated With Standby Modes and Off Mode
1. Clothes Dryers
2. Room Air Conditioners
G. Measures of Energy Consumption
1. Clothes Dryers
2. Room Air Conditioners
H. Correction of Text Describing Energy Factor Calculation for Clothes Dryers
I. Correction of Text Reference to Room Air Conditioner Test Standard
J. Compliance With Other EPCA Requirements
1. Test Burden
2. Potential Incorporation of IEC Standard 62087
3. Integration of Standby Mode and Off Mode Energy Consumption Into the Energy Efficiency Metrics
IV. Procedural Requirements
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act of 1995
D. Review Under the National Environmental Policy Act of 1969
E. Review Under Executive Order 13132
F. Review Under Executive Order 12988
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act, 1999
I. Review Under Executive Order 12630
J. Review Under the Treasury and General Government Appropriations Act, 2001
K. Review Under Executive Order 13211
L. Review Under Section 32 of the Federal Energy Administration Act of 1974
V. Public Participation
A. Attendance at the Public Meeting
B. Procedure for Submitting Requests To Speak
C. Conduct of Public Meeting
D. Submission of Comments
E. Issues on Which DOE Seeks Comment
1. Incorporation of IEC Standard 62301
2. Standby Mode Definitions
3. Clothes Dryer Standby Modes
4. Room Air Conditioner Standby Modes
5. Delay Start Test Procedure
6. Test Room Conditions
7. Energy Use Calculation for Standby and Off Modes for Clothes Dryers
8. Energy Use Calculation for Standby and Off Modes for Room Air Conditioners
9. New Integrated Measures of Energy Consumption and Energy Efficiency
VI. Approval of the Office of the Secretary

## I. Background and Authority

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.*; ''EPCA'' or, in context, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles,'' including clothes dryers and room air conditioners (all of which are referred to below as ''covered products'').[1] (42 U.S.C. 6291(1)–(2) and 6292(a)(2) and (8))

Under the Act, this program consists essentially of three parts: (1) Testing; (2) labeling; and (3) Federal energy conservation standards. The testing requirements consist of test procedures that, pursuant to EPCA, manufacturers

[1] All references to EPCA refer to the statute as amended including through the Energy Independence and Security Act of 2007, Public Law 110–140.

of covered products must use as the basis for certifying to DOE that their products comply with applicable energy conservation standards adopted under EPCA and for representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with EPCA standards. Under 42 U.S.C. 6293, EPCA sets forth criteria and procedures for DOE's adoption and amendment of such test procedures. EPCA provides that ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary [of Energy], and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments thereon, with a comment period no less than 60 days and not to exceed 270 days. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine ''to what extent, if any, the proposed test procedure would alter the measured energy efficiency * * * of any covered product as determined under the existing test procedure.'' (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

DOE's test procedures for clothes dryers are found at 10 CFR part 430, subpart B, appendix D. DOE established its test procedure for clothes dryers in a final rule published in the **Federal Register** on May 19, 1981. 46 FR 27324. The test procedure includes provisions for determining the energy factor (EF) for clothes dryers, which is a measure of the total energy required to dry a standard test load of laundry to a ''bone dry'' [2] state.

DOE's test procedures for room air conditioners are found at 10 CFR part 430, subpart B, appendix F. DOE established its room air conditioner test procedure on June 1, 1977, and redesignated and amended it on June 29, 1979. 42 FR 27898; 44 FR 37938. The existing room air conditioner test procedure incorporates by reference two industry test standards: (1) American National Standard (ANS) (since renamed American National Standards Institute (ANSI)) Z234.1–1972, ''Room Air Conditioners;'' [3] and (2) American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 16–69, ''Method of Testing for Rating Room Air Conditioners.'' [4] The DOE test procedure includes provisions for determining the energy efficiency ratio (EER) of room air conditioners, which is the ratio of the cooling capacity in British thermal units (Btu) to the power input in watts (W).

As currently drafted, the test procedures for the products at issue in this rulemaking generally do not account for standby mode and off mode energy consumption, except in one narrow product class. Specifically, for gas dryers with continuously burning pilot lights, DOE's current test procedure for clothes dryers addresses the standby energy use of such pilot lights, but otherwise, neither this test procedure nor DOE's test procedure for room air conditioners addresses energy use in the standby or off modes.

The Energy Independence and Security Act of 2007 [5] (EISA 2007) amended EPCA, and in relevant part, directs DOE to amend its test procedures to include measures of standby mode and off mode energy consumption. The EISA 2007 amendments to EPCA further direct DOE to amend the test procedures to integrate such energy consumption into a single energy descriptor for that product. If that is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Any such amendment must consider the most current versions of the International Electrotechnical Commission (IEC) Standard 62301 and IEC Standard 62087 [''Methods of measurement for the power consumption of audio, video, and related equipment'' (Second Edition, 2008–09)].[6] *Id*. For clothes dryers and room air conditioners, DOE must prescribe any such amendment to the test procedures by March 31, 2009. (42 U.S.C. 6295(gg)(2)(B)(ii))

On October 9, 2007, DOE published a notice in the **Federal Register** announcing the availability of a framework document to initiate rulemaking to consider amended energy conservation standards for residential clothes dryers and room air conditioners (hereafter the October 2007 Framework Document). 72 FR 57254. The issuance of a framework document is the first step in conducting an appliance standards rulemaking. In the October 2007 Framework Document, DOE identified specific ways in which it could revise its test procedures for these two products and requested stakeholder comment on whether it should adopt such revisions. Specifically, DOE sought comment on potential amendments to the clothes dryer test procedure to: (1) Reflect lower remaining moisture content in clothes loads; (2) account for fewer use cycles; and (3) add the capability to test vent-less clothes dryers. (Framework Document, No. 1 at pp. 4–6) [7] For room air conditioners, DOE requested input on potential amendments to the test procedure to: (1) Incorporate the most recent ANSI and ASHRAE test standards; (2) reduce the annual operating hours; and (3) measure part-load performance. (Framework Document, No. 1 at pp. 6–7)

Because the October 2007 Framework Document was issued before the enactment of EISA 2007, these potential revisions did not address standby mode or off mode energy use. DOE is continuing to consider all such potential revisions, but in this rulemaking, DOE's proposal is limited to amending its test procedures for clothes dryers and room air conditioners to include methods for measuring standby mode and off mode power consumption, thereby allowing the agency to meet the EISA 2007 deadline of March 31, 2009 for adopting such amendments. DOE plans to publish a separate **Federal Register** notice to address the balance of the test procedure issues, including those on which it requested comment in the October 2007 Framework Document.

Both test procedure rulemakings are anticipated to support a concurrent energy conservation standards rulemaking for residential clothes dryers

[2] ''Bone dry'' is defined in the DOE clothes dryer test procedure as ''a condition of a load of test clothes which has been dried in a dryer at maximum temperature for a minimum of 10 minutes, removed and weighed before cool down, and then dried again for 10-minute periods until the final weight change of the load is 1 percent or less.'' (10 CFR subpart B, appendix D, section 1.2)

[3] ANSI standards are available for purchase at *http://www.ansi.org*.

[4] ASHRAE standards are available for purchase at *http://www.ashrae.org*.

[5] Public Law 110–140 (enacted Dec. 19, 2007).

[6] IEC standards are available for purchase at: *http://www.iec.ch*.

[7] A notation in this form provides a reference for information that is in the docket of DOE's rulemaking to develop standards for clothes dryers and room air conditioners (Docket No. EERE–2007–BT–STD–0010), which is maintained in the Resource Room of the Building Technologies Program. This notation indicates that the statement preceding the reference was made in DOE's Framework Document, which is document number 1 in the docket, and appears at pages 4–6 of that document.

and room air conditioners. For clothes dryers, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA to establish prescriptive standards for clothes dryers, requiring that gas dryers manufactured on or after January 1, 1988 not be equipped with a constant burning pilot and further requiring that DOE conduct two cycles of rulemakings to determine if more stringent standards are justified. (42 U.S.C. 6295(g)(3) and (4)) On May 14, 1991, DOE published a final rule in the **Federal Register** establishing the first set of performance standards for residential clothes dryers (56 FR 22250); the new standards became effective on May 14, 1994. 10 CFR 430.32(h). DOE initiated a second standards rulemaking for residential clothes dryers by publishing an advance notice of proposed rulemaking (ANOPR) in the **Federal Register** on November 14, 1994. 59 FR 56423. However, pursuant to the priority-setting process outlined in DOE's ''Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' (the ''Process Rule''),[8] DOE classified the clothes dryer standards rulemaking as a low priority for its fiscal year 1998 priority-setting process. As a result, DOE suspended the standards rulemaking activities for them. DOE has since resumed the rulemaking activities, and has recently initiated the second cycle of clothes dryer standards rulemakings. 72 FR 57254 (October 9, 2007).

NAECA established performance standards for room air conditioners that became effective on January 1, 1990, and directed DOE to conduct two cycles of rulemakings to determine if more stringent standards are justified. (42 U.S.C. 6295(c)(1) and (2)) On March 4, 1994, DOE published a NOPR for several products, including room air conditioners. 59 FR 10464. As a result of the Process Rule, DOE suspended activities to finalize standards for room air conditioners. DOE subsequently resumed rulemaking activities related to room air conditioners, and on September 24, 1997, DOE published a final rule establishing an updated set of performance standards, with an effective date of October 1, 2000. 62 FR 50122; 10 CFR 40.32(b). Concurrent with the clothes dryer rulemaking, DOE has recently initiated the second cycle of room air conditioner standards rulemakings. 72 FR 57254.

EISA 2007 includes amendments to EPCA that direct DOE to incorporate standby and off mode energy use into any final rule establishing or revising a standard for a covered product adopted after July 1, 2010. (42 U.S.C. 6295(gg)(3)) DOE anticipates publishing the next final rule revising efficiency standards for clothes dryers and room air conditioners by June 30, 2011. Because publication of the final rule revising efficiency standards will fall after July 1, 2010 (the date after which any final rule establishing or revising a standard must incorporate standby and off mode energy use), this final rule must incorporate standby and off mode energy use, thereby necessitating the adoption of relevant standby and off mode provisions into the test procedures for these products.

## II. Summary of the Proposal

In today's NOPR, DOE proposes to amend the test procedures for clothes dryers and room air conditioners in order to: (1) Provide a foundation for DOE to develop and implement energy conservation standards that address the energy use of these products when in standby mode and off mode; and (2) address the statutory requirement to expand test procedures to incorporate measures of standby mode and off mode power consumption. The following paragraphs summarize these proposed changes.

In amending the current test procedures, DOE proposes to incorporate by reference into both the clothes dryer and room air conditioner test procedures specific clauses from IEC Standard 62301, ''Household electrical appliances—measurement of standby power'' (First Edition, 2005–06) regarding test conditions and test procedures for measuring standby mode and off mode power consumption. DOE also proposes to incorporate into each test procedure the definitions of ''active mode,'' ''standby mode,'' and ''off mode'' that are set forth in section 325(gg)(1)(A) of EPCA. (42 U.S.C. 6295(gg)(1)(A)) Further, DOE proposes to include in each test procedure additional language that would clarify the application of clauses from IEC Standard 62301 for measuring standby mode and off mode power consumption.[9]

For clothes dryers, DOE is proposing definitions for different standby modes—a general ''inactive'' mode, a ''cycle finished'' mode, and a ''delay start'' mode—each of which would be separately tested under the procedure, along with energy use in the off mode. Furthermore, DOE proposes to clarify testing in the delay start mode by requiring that the delay time be set at 5 hours and that the test be conducted for 60 minutes, after waiting at least 5 minutes for power input to stabilize. Finally, DOE proposes to establish new methods to calculate clothes dryer energy use and energy efficiency that include the energy used in the standby modes and the off mode.

For room air conditioners, DOE proposes definitions for different standby modes—a general ''inactive'' mode, a ''delay start'' mode, and an ''off-cycle'' mode—each of which would be separately tested under the procedure, along with energy use in the off mode. DOE also proposes to specify the test duration for cases in which the measured power is unstable (*i.e.*, varies more than 5 percent during a 5-minute period), and proposes that standby mode and off mode testing be conducted with roomside air temperature at 74 ± 2 degrees Fahrenheit (°F) to reflect typical operating conditions for room air conditioners. In addition, DOE proposes to specify that, during standby mode and off mode testing for which setting the thermostat or temperature setpoint[10] is applicable, the setpoint for the room air conditioner is to be set at 79 °F, in order to provide uniform testing conditions. Finally, DOE proposes to establish new methods to calculate energy use and energy efficiency, which include energy use in the standby modes and the off mode.

Under 42 U.S.C. 6295(gg)(2)(C), EPCA provides that amendments to the test procedures to include standby mode and off mode energy consumption will not determine compliance with previously established standards. (U.S.C. 6295(gg)(2)(C)) Because the proposed amended test procedures would not alter existing measures of energy consumption or efficiency, today's notice would not affect a manufacturer's ability to demonstrate compliance with previously established standards. These amended test procedures would become effective, in terms of adoption into the CFR, 30 days after the date of publication in the **Federal Register** of the final rule in this test procedures rulemaking. However, DOE's amended test procedure regulations codified in the CFR would

[8] 61 FR 36974 (July 15, 1996) (*establishing* 10 CFR part 430, subpart C, appendix A).

[9] EISA 2007 directs DOE to also consider IEC Standard 62087 when amending its test procedure to include standby mode and off mode energy consumption. *See* 42 U.S.C. 6295(gg)(2)(A). However, IEC Standard 62087 addresses the methods of measuring the power consumption of audio, video, and related equipment. As explained subsequently in this notice, the narrow scope of this particular IEC Standard reduces its relevance to today's proposal.

[10] The term ''setpoint'' refers to the desired value in a closed-loop feedback system and is typically used in the context of regulating temperature or pressure.

clarify that the procedures and calculations for standby mode and off mode energy consumption need not be performed to determine compliance with the current energy conservation standards for clothes dryers and room air conditioners, because the current energy conservation standards do not account for standby and off mode power consumption. Instead, manufacturers would be required to use the test procedures' standby and off mode provisions to demonstrate compliance with DOE's energy conservation standards on the effective date of a final rule establishing amended energy conservation standards for these products that address standby and off mode power consumption.

## III. Discussion

### *A. Products Covered by the Test Procedure Changes*

Today's proposed amendments to DOE's clothes dryer test procedure cover both electric and gas clothes dryers, which DOE's regulations define as:

*Electric clothes dryer* means a cabinet-like appliance designed to dry fabrics in a tumble-type drum with forced air circulation. The heat source is electricity and the drum and blower(s) are driven by an electric motor(s).

*Gas clothes dryers* means a cabinet-like appliance designed to dry fabrics in a tumble-type drum with forced air circulation. The heat source is gas and the drum and blower(s) are driven by an electric motor(s).

*10 CFR 430.2*

These definitions and the proposed amendments thereto cover both vented and vent-less clothes dryers, as well as combination washer/dryers.

Today's proposed amendments to DOE's room air conditioner test procedure cover products that meet the following definition from DOE's regulations:

*Room air conditioner* means a consumer product, other than a ''packaged terminal air conditioner,'' which is powered by a single phase electric current and which is an encased assembly designed as a unit for mounting in a window or through the wall for the purpose of providing delivery of conditioned air to an enclosed space. It includes a prime source of refrigeration and may include a means for ventilating and heating.

*10 CFR 430.2*

This definition and the proposed amendments thereto cover room air conditioners designed for single- or double-hung windows with or without louvered sides and with or without reverse cycle, as well as casement-slider and casement-only window-type room air conditioners.

### *B. Effective Date for the Amended Test Procedures*

As indicated above, EPCA requires DOE to amend the test procedures for clothes dryers and room air conditioners to incorporate measurement of standby mode and off mode energy use in a final rule issued no later than March 31, 2009. Such action is necessary to permit manufacturers to certify that equipment complies with any newly established energy conservation standards that take into account standby and off mode energy use. When DOE is developing energy conservation standards and determines that test procedure amendments are required, DOE strives to issue a final rule amending the test procedure before issuing a proposed rule for energy conservation standards. The effective date of the modified clothes dryer and room air conditioner test procedures would be 30 days after the date of publication in the **Federal Register** of a final rule in this test procedures rulemaking. However, DOE's amended test procedure regulations codified in the CFR would clarify that the procedures and calculations for standby mode and off mode energy consumption need not be performed to determine compliance with the current energy conservation standards for clothes dryers and room air conditioners, because the current energy conservation standards do not account for standby and off mode power consumption.[11] The proposed notes regarding the applicability of the test procedure provisions on standby mode and off mode energy use in Appendix D (clothes dryers) and Appendix F (room air conditioners) will be removed in subsequent notices of final rulemaking that amend the energy conservation standards for these products.

[11] Pursuant to a court consent decree, DOE must complete a standards rulemaking for residential clothes dryers and room air conditioners by June 30, 2011. As part of the rulemaking considering amended energy conservation standards for these products, DOE will also address the issue of standby and off mode power consumption. If adopted, such standards would be effective in June 2014, at which time the standby and off mode provisions of the test procedures would become mandatory for determining compliance with the amended energy conservation standards.

### *C. Incorporating by Reference IEC Standard 62301 (First Edition, 2005–06) for Measuring Standby Mode and Off Mode Power in Clothes Dryers and Room Air Conditioners*

Per EPCA, DOE considered the most current versions of IEC Standard 62301 and IEC Standard 62087 for measuring power consumption in standby mode and off mode. (42 U.S.C. 6295(gg)(2)(A)) DOE noted that IEC Standard 62301 provides for measuring standby power in electrical appliances, including clothes dryers and room air conditioners, and, thus, is applicable to the proposed amendments to the clothes dryer and room air conditioner test procedures. DOE also reviewed IEC Standard 62087, which specifies methods of measuring the power consumption of TV receivers, video cassette recorders (VCRs), set top boxes, audio equipment, and multi-function equipment for consumer use. IEC Standard 62087 does not, however, include measurement for the power consumption of electrical appliances such as clothes dryers and room air conditioners. Therefore, DOE determined that IEC Standard 62087 was unsuitable for the proposed amendments to the clothes dryer and room air conditioner test procedures.

DOE proposes to incorporate by reference into the DOE test procedures for clothes dryers and room air conditioners specific clauses from IEC Standard 62301 for measuring standby mode and off mode power. Specifically, these clauses provide test conditions and test procedures for measuring the average standby mode and average off mode power consumption. Regarding testing conditions, section 4 of IEC Standard 62301 provides conditions for the supply voltage, frequency, and voltage waveform, and power measurement meter tolerances to provide for repeatable and precise measurements of standby mode and off mode power consumption. Section 5 of IEC Standard 62301 regarding test procedures provides a method for measuring power consumption when the power measurement is stable, as well as a method of measuring when the power measurement is unstable.

Other provisions of IEC Standard 62301 are not applicable to measuring standby mode and off mode power testing of clothes dryers and room air conditioners. Hence, not all provisions of IEC Standard 62301 are incorporated by reference into the DOE test procedures. For example, IEC Standard 62301 provides general conditions for power supply voltage and frequency, which the current DOE test procedure

for clothes dryers already addresses. IEC Standard 62301 also provides requirements for information to be recorded in a test report, which are beyond the scope of DOE's test procedure. Consequently, only the applicable sections and clauses (as stated above) are incorporated by reference in today's proposed rule.

Specifically, DOE proposes to incorporate by reference in the DOE test procedure for clothes dryers the following sections from IEC Standard 62301: From section 4 (''General conditions for measurements''), paragraph 4.2, ''Test room,'' paragraph 4.4, ''Supply voltage waveform,'' and paragraph 4.5, ''Power measurement accuracy;'' and section 5 (''Measurements''), paragraph 5.1, ''General'' and paragraph 5.3, ''Procedure.'' DOE proposes to reference these same provisions in the DOE test procedure for room air conditioners, as well as section 4, paragraph 4.3, ''Power supply.''

The EPCA requirement to consider IEC Standard 62301 in developing modified test procedures for clothes dryers and room air conditioners presents a potential conflict in defining ''standby mode.'' EPCA defines ''standby mode'' as the condition in which a product is connected to a main power source and offers one or more of the following user-oriented or protective functions: (1) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; and/or (2) to provide continuous functions, including information or status displays (including clocks) or sensor-based functions. (42 U.S.C. 6295(gg)(1)(A)(iii)). In contrast, paragraph 3.1 of the current version of IEC Standard 62301 defines ''standby mode'' as the ''lowest power consumption mode which cannot be switched off (influenced) by the user and that may persist for an indefinite time when an appliance is connected to the main electricity supply and used in accordance with the manufacturer's instructions.'' In addition, prior to EISA 2007, DOE adopted a definition for ''standby mode'' nearly identical to that of IEC Standard 62301 in the dishwasher test procedure, in which ''standby mode'' ''means the lowest power consumption mode which cannot be switched off or influenced by the user and that may persist for an indefinite time when an appliance is connected to the main electricity supply and used in accordance with the manufacturer's instructions.'' (10 CFR part 430, subpart B, appendix C, section 1.14). DOE welcomes comment on the appropriate approach for resolving these inconsistencies between EPCA, the IEC Standard 62301 which EPCA references, and the precedent set by the dishwasher test procedure. While EPCA specifies that DOE may consider the definition for ''standby mode'' provided in the most current version of IEC Standard 62301 in updating its test procedure, DOE proposes to adopt the broader, statutory definition of ''standby mode'' provided in EPCA for reasons of greater specificity and clarity, and to include that definition in the test procedures for clothes dryers and room air conditioners.

Further, the agency notes that, while section 325(gg)(2)(A) of EPCA (42 U.S.C. 6295(gg)(2)(A)) requires that the amended test procedures consider the most current version of IEC Standard 62301, the IEC is developing an updated version of this standard, IEC Standard 62301 (Second Edition). This updated version of IEC Standard 62301 is expected to include definitions of ''off mode,'' ''network-connected standby mode,'' and ''disconnected mode,'' and would also revise the current IEC Standard 62301 definition of ''standby mode.'' However, because the IEC anticipates that this new version of Standard 62301 will likely be published in July 2009, this later version of the standard will be unavailable in time for DOE to consider it and to still meet the EISA 2007 deadline for issuance of a final rule amending the relevant test procedure to include measures of standby mode and off mode energy consumption by March 31, 2009. See 42 U.S.C. 6295(gg)(2)(B)(ii). Hence, the First Edition 2005–06 of IEC Standard 62301 will be the ''current version'' at the time of publication of the final rule, so consideration thereof will comply with EPCA. Accordingly, DOE plans to use the First Edition 2005–06 of IEC Standard 62301 in today's proposed test procedure. After the final rule is published, amendments to the referenced standards would be adopted by DOE only if the agency later incorporates them into its procedures.

In reviewing alternative standby power test procedures for potential amendments to the DOE test procedure, DOE also investigated both testing conditions and testing methods specified in the test procedures used by countries that are considered to be international leaders in reducing standby power consumption. These countries include Japan, Korea, and Australia, all of which use procedures similar to those of IEC Standard 62301, and/or reference that standard.

*D. Determination of Modes To Be Incorporated*

As noted above, DOE proposes to incorporate into the clothes dryer and room air conditioner test procedure the definitions of ''active mode,'' ''standby mode,'' and ''off mode'' specified by EPCA. EPCA defines ''active mode'' as ''the condition in which an energy-using product—

(I) Is connected to a main power source;

(II) Has been activated; and

(III) Provides 1 or more main functions.''

(42 U.S.C. 6295(gg)(1)(A)(i))

EPCA defines ''standby mode'' as ''the condition in which an energy-using product—

(I) Is connected to a main power source; and

(II) Offers 1 or more of the following user-oriented or protective functions:

(aa) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer.

(bb) Continuous functions, including information or status displays (including clocks) or sensor-based functions.''

(42 U.S.C. 6295(gg)(1)(A)(iii)) This definition differs from the one provided in IEC Standard 62301 by permitting the inclusion of multiple standby modes.

EPCA defines ''off mode'' as ''the condition in which an energy-using product —

(I) Is connected to a main power source; and

(II) Is not providing any standby mode or active mode function.'' [12]

(42 U.S.C. 6295(gg)(1)(A)(ii))

DOE recognizes that these definitions for ''active mode,'' ''standby mode,'' and ''off mode'' were developed to be broadly applicable for many energy-using products. For specific products

[12] DOE notes that some features that provide consumer utility, such as displays and remote controls, are associated with standby mode and not off mode. A clothes dryer or room air conditioner is considered to be in ''off mode'' if it is plugged in to a main power source, is not being used for an active function such as drying clothing or providing cooling, and is consuming power for features other than a display, controls (including a remote control), or sensors required to reactivate it from a low power state. For example, a clothes dryer with mechanical controls and no display or continuously-energized moisture sensor, but that consumed power for components such as a power supply when the unit was not activated, would be considered to be in off mode when not providing an active function. For room air conditioners, a unit with mechanical controls and no display or remote control but with a power supply which is consuming energy, for example, could be considered to be in off mode while not providing an active function.

with multiple functions, these broad definitions could lead to unintended consequences if the meaning of ''main functions'' is narrowly interpreted, as illustrated by the following example:

A ''room air conditioner,'' as defined in section III.A, provides delivery of conditioned air to an enclosed space. This product includes a prime source of refrigeration and may include a means for ventilating and heating. A narrow interpretation of this definition would be that the main function of providing delivery of conditioned air is strictly a cooling function. Such an interpretation would imply that delivery of cooled air is the only active mode under the EPCA definition, as amended by EISA 2007. Under such an interpretation, operation of the room air conditioner fan without operation of the compressor would likely be considered an off mode, since it does not strictly fit the definition of standby mode and because off mode includes all modes which are not standby mode or active mode.

To address this potential problem, DOE proposes to amend to the clothes dryer and room air conditioner test procedures to clarify the range of main functions that would be classified as active mode functions. DOE further proposes to amend the clothes dryer and room air conditioner test procedures to define multiple standby modes that would be separately tested under the procedures. DOE welcomes comment on the above approach.

1. Clothes Dryer Mode Definitions

DOE proposes the following mode definitions for clothes dryers:

''Active mode'' means a mode in which the clothes dryer is performing the main function of tumbling the clothing with or without heated or unheated forced air circulation to remove moisture from the clothing and/or remove or prevent wrinkling of the clothing;

''Inactive mode'' means a standby mode other than delay start mode or cycle finished mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or provides continuous status display;

''Cycle finished mode'' means a standby mode that provides continuous status display following operation in active mode;

''Delay start mode'' means a standby mode that facilitates the activation of active mode by timer; and

''Off mode'' means a mode in which the clothes dryer is not performing any active or standby function.

2. Room Air Conditioner Mode Definitions

For room air conditioners, DOE proposes the following mode definitions:

''Active mode'' means a mode in which the room air conditioner is performing the main function of cooling or heating the conditioned space, or circulating air through activation of its fan or blower, with or without energizing active air-cleaning components or devices such as ultraviolet (UV) radiation, electrostatic filters, ozone generators, or other air-cleaning devices;

''Inactive mode'' means a standby mode other than delay start mode or off-cycle mode that facilitates the activation of active mode by remote switch (including remote control) or internal sensor or provides continuous status display;

''Delay start mode'' means a standby mode in which activation of an active mode is facilitated by a timer;

''Off-cycle mode'' means a standby mode in which the room air conditioner: (1) Has cycled off its main function by thermostat or temperature sensor; (2) does not have its fan or blower operating; and (3) will reactivate the main function according to the thermostat or temperature sensor signal;

''Off mode'' means a mode in which a room air conditioner is not performing any active or standby function.

Off-cycle mode could be considered part of an active mode in which a room air conditioner is cycling its compressor on and off to maintain an average room temperature. However, since the current test procedure treats the cooling mode as occuring only when the compressor is operating, DOE proposes the off-cycle mode to account for the time when the space is being conditioned and the compressor and fan are not operating.

*E. Adding Specifications for the Test Methods and Measurements for Clothes Dryer and Room Air Conditioner Standby Mode and Off Mode Testing*

DOE is proposing test procedures for measuring all standby and off modes associated with clothes dryers and room air conditioners. This section discusses product-specific clarifications of the procedures of IEC Standard 62301 when used to measure standby and off mode energy use for clothes dryers and room air conditioners.

1. Clothes Dryers

DOE understands that displays on clothes dryers may reduce power consumption by dimming after a certain period of user inactivity. For those clothes dryers for which the power input in inactive mode varies in this fashion during testing, DOE proposes that the test be conducted after the power level has dropped to its low level.

DOE understands that clothes dryers with a delay start capability may use varying amounts of power during delay start mode depending on the delay time, the time displayed, and/or display indication of mode status. Paragraph 5.3.1 of section 5.3 ''Procedure'' of IEC Standard 62301 instructs a test technician to ''[c]onnect the product to be tested to the metering equipment, and select the mode to be measured. After the product has been allowed to stabilize for at least 5 min., monitor the power consumption for not less than an additional 5 min.'' The lack of specificity in this language regarding the test period could allow a manufacturer to measure standby power consumption by selecting delay start times with relatively low power consumption, producing test results that would neither be comparable to those obtained using other time periods nor represent the true standby power consumption of its clothes dryers. Consequently, to ensure comparable and valid results, DOE proposes to include in the clothes dryer test procedure a specification for the delay start time to be set at 5 hours, and for power to be monitored for 60 minutes after waiting at least 5 minutes for power input to stabilize.

In determining the specifications for delay start parameters, DOE considered the possibility that display power input would depend on the time displayed, which is typically the time in hours remaining before the start. Displays may be one or two digits. Some two-digit displays may show whole numbers for remaining delay hours of 10 or more and both the ones and tenths digits for remaining delay hours of 9.9 or less. By analyzing the number of light emitting diodes (LEDs) activated in LED displays of the remaining hours over a range of delay times, DOE concluded that the average number of LEDs lit for the range of all possible delay times would be best approximated by the average LEDs lit for either single-digit or two-digit displays in a 60-minute test if the delay time is set at 5 hours. DOE also is aware that some clothes dryers with the delay start feature do not allow delay time greater than 5 hours.

DOE proposes to adopt the test room ambient temperature specified by IEC Standard 62301 for standby mode and off mode testing. Under these conditions, the test room ambient temperature would be 73.4 ± 9 °F, which is slightly different from the

ambient temperature currently specified for DOE's drying performance tests of clothes dryers (75 ± 3 °F). Today's proposal, however, permits manufacturers who opt to test simultaneously for all three conditions to do so using the current ambient temperature requirements for drying tests, since these are within the limits specified by IEC Standard 62301. Alternatively, the proposed temperature specifications would allow a manufacturer that opts to conduct standby mode and off mode testing separately from drying tests more latitude in maintaining ambient conditions. DOE requests comment on the appropriateness of this proposed modified test room ambient temperature range.

2. Room Air Conditioners

A given unit or model of a room air conditioner with a temperature, clock, or timer display may use varying amounts of standby power depending on the numbers being displayed. During preliminary testing conducted by DOE for room air conditioners (''RAC Standby Testing''), for a two-digit display capable of displaying temperature or delay start time, standby power use for different digit combinations was observed to vary by as much as 22 percent. (RAC Standby Testing, No. 1 at p.1) Paragraph 5.3.1 of section 5.3 ''Procedure'' of IEC Standard 62301 instructs a test technician to ''[c]onnect the product to be tested to the metering equipment, and select the mode to be measured. After the product has been allowed to stabilize for at least 5 min., monitor the power consumption for not less than an additional 5 min.'' As with clothes dryers, the lack of specificity in this IEC Standard 62301 language regarding the test period or control setting could allow a manufacturer to measure standby power consumption by selecting temperatures or time periods with relatively low power consumption, thereby producing test results that would not be comparable to those obtained using other temperatures or time periods and that would not represent the true standby power consumption of its room air conditioners. In addition, different manufacturers could take different approaches in selecting cycles for testing.

Another concern arises when a room air conditioner has a delay start mode. To ensure comparable and valid results, DOE proposes to include in this test procedure a separate test in the delay start mode, in which the unit is set to a delay start time of 5 hours and the power is monitored for 60 minutes after allowing the power input level to stabilize for at least 5 minutes. The rationale for specifying the 5-hour delay start time and the 60-minute measurement time is the same as that presented above regarding selection of parameters for clothes dryer testing in delay start mode (*i.e.*, the average power consumption of a display for these conditions would be most representative of average power consumption under the entire range of possible delay hours).

DOE recognizes that different room air conditioners provide different temperature displays when operating. Some room air conditioners display actual room temperature, while others display setpoint temperature. DOE proposes to address the possibility of these different approaches by requiring that the test room temperature be maintained at 74 ± 2 °F and that the room setpoint temperature be set at 79 °F. DOE selected this test room temperature, which is lower than the room air temperature which is specified for the existing DOE cooling performance tests (80 ± 0.5 °F), because DOE has tentatively concluded that the display energy consumption associated with the proposed room temperature range would be the most representative of an average display energy consumption over all reasonable room temperature conditions. DOE considered that a different number of LEDs may be energized in an LED display, depending on actual room or setpoint temperature. For the specified room temperature range and setpoint, the average power consumption for the possible combinations of LEDs energized would be close to the average power consumption for the full range of reasonable actual room and setpoint temperatures displayed (*i.e.*, 70 °F to 85 °F). Hence, the chosen room ambient and setpoint temperatures would ensure that: (1) The power consumption of any display, whether indicating actual or setpoint temperature, represents an average power consumption associated with the range of typical user room temperatures and setpoints; and (2) the room air conditioner will not cycle the compressor on, since the setpoint will be higher than actual room ambient temperature. DOE also notes that, although the 80 ± 0.5 °F room air temperature specified by the current test procedure falls within the allowable range specified in IEC Standard 62301 (73.4 ± 9 °F), the proposed test room temperature would be more representative of conditions in which a room air conditioner would likely be in standby mode, since it is reasonable to assume the unit would be in active mode if the room air temperature were near 80 °F. DOE requests comment on the appropriateness of this proposed modified test room ambient temperature range.

DOE believes that IEC Standard 62301 is otherwise suitable to address possible variation in the power levels associated with the off and standby modes, requiring only appropriate lengthening of the sample period, averaging of the power input, and measurement of a number of complete cycles, if necessary, to capture cyclic power input.

*F. Calculation of Energy Use Associated With Standby Modes and Off Mode*

Measurements of energy consumption associated with each standby and off mode for clothes dryers and room air conditioners are expressed in W. The total energy impact of the power expended in these modes depends on both the power level in W of each mode and the time spent in each mode. This section discusses the approach proposed for clothes dryers and room air conditioners for calculating energy use associated with standby modes and off mode and the numbers of hours proposed to be associated with each mode.

1. Clothes Dryers

Energy use for clothes dryers is expressed in terms of total energy use per drying cycle; measurements of standby and off mode energy use will be expressed in this fashion as well, in order to maintain consistency. Energy used during a drying cycle is directly measured as energy use per cycle in the test procedure, although adjustments are made to the directly measured energy to account for differences between test and field conditions. The energy use associated with continuously burning pilot lights of gas dryers is measured and is converted to an energy use per cycle by dividing calculated annual gas energy use by the representative average number of drying cycles per year (*i.e.*, 416). 10 CFR part 430, subpart B, appendix D, section 4.4. This procedure for gas pilot lights provides an approach for calculating standby power consumption.

In the existing test procedure, energy use per cycle for continuously burning pilot lights is calculated by multiplying the energy use measured for a period of one hour by an established number of hours per year that the dryer is not in drying mode, and dividing by the representative average cycles per year. The existing test procedure established that a gas clothes dryer is in the drying mode 140 hours per year, and that the

balance of the year (8,620 hours) is the established number of hours associated with the pilot light energy consumption.

DOE proposes to adopt a similar approach for measuring energy consumption during standby and off modes for clothes dryers. Specifically, DOE proposes to adopt the current 140 hours associated with drying (*i.e.*, the active mode) and to associate the remaining 8,620 hours of the year with the standby and off modes. DOE is proposing this approach because it believes that the number of drying hours established in the existing test procedure for gas dryers is a reasonable representation of the active mode hours for all dryers, and because, to date, DOE has not identified any other reliable data regarding average dryer cycle times. DOE welcomes information and data on such average cycle times, as well as annual dryer usage.

In order to establish the number of hours per year in each standby and off mode, as defined in section III.D.1, DOE investigated studies of dryer usage patterns and found only one study of the time spent by clothes dryers in different standby modes.[13] This publication presents results of a household survey conducted in 2000, which measured standby modes for 35 clothes dryers with an average age of 11 years. The daily time spent in each mode in this study averaged one quarter hour for ''drying,'' zero hours for ''delay start'' and ''active standby'' modes, and the remaining hours split 5 percent for ''end of program'' mode and 95 percent for off mode. The ''active standby mode'' of the study is equivalent to the ''inactive mode'' defined in section III.D.1 of this notice, and the ''end of program mode'' is equivalent to the ''cycle finished mode'' in section III.D.1. DOE has tentatively concluded from these results that clothes dryers spend little time in cycle finished mode and probably spend little time in delay start mode. The average age of the clothes dryers in the study suggests that most of these dryers had electromechanical rather than electronic controls (prevalent among dryers currently on the market), indicating that the dryers in the study would not likely have had inactive mode or delay start mode. Hence, DOE does not infer from those results that modern clothes dryers spend negligible time in inactive mode, and the findings are by themselves inconclusive regarding the time modern clothes dryers spend in delay start mode.

A different study on clothes washers provides some additional evidence suggesting a small number of hours associated with clothes dryer delay start mode.[14] This study monitored time clothes washers in Australia and New Zealand spent in different modes, and showed that the average amount of time spent in delay start mode per wash cycle was approximately 5 minutes. DOE believes that the results for clothes washers may be applicable for clothes dryers as well, because of the similarities between the control capabilities for both types of products and comparable consumer usage patterns when a clothing load is washed and dried.

Based on these two information sources, DOE has tentatively concluded that a typical modern clothes dryer spends a small amount of time in delay start mode. Using an estimated 5 minutes per cycle, the total annual amount of time spent in delay start mode using the representative 416 cycles per year is 34 hours. The remaining time not associated with active mode or delay start mode can be split as suggested by the Australian study: 5 percent allocated to cycle finished mode and 95 percent allocated to off or inactive mode.

Table III.1 presents a comparison of the annual energy use associated with all modes. The approximate range of wattages associated with the standby and off modes are based on the references cited previously in this section and on ''Clothes Dryers Background/Issues/Standby,'' presented by Robert Foster of Energy Efficiency Strategies at the $E_3$ White Goods Forum in Sydney, Australia, in February 2007.[15] Active mode annual energy use is calculated based on 416 cycles per year in a standard-size electric dryer with a minimum standard EF of 3.01. Per-cycle energy use for such a clothes dryer is calculated as 7 pounds (lbs) divided by 3.01 lbs per kilowatt-hour (kWh), which is equal to 2.33 kWh. The typical average power level during active mode is calculated as 967 kWh per year of annual energy use divided by 140 hours in active mode, which is equal to 6,907 W.

TABLE III.1—ESTIMATE OF ANNUAL ENERGY USE OF CLOTHES DRYER MODES

| Mode | Hours | Typical power (*W*) | Annual energy use (*kWh*) |
|---|---|---|---|
| Active | 140 | 6,907 | 967 |
| Delay Start | * 34 | 3 | 0.1 |
| Cycle Finished | ** 429 | 3 | 1 |
| Off and Inactive | † 8,157 | 0.5 to 3 | 4 to 24 |

* 5 minutes per cycle × 416 cycles per year.
** 5 percent of remaining time (0.05 × (8,760 · 140 · 34) = 429).
† 95 percent of remaining time (0.95 × (8,760 · 140 · 34) = 8,157).

To determine the annual hours per mode for clothes dryers for which not all standby modes are possible, DOE estimated values based upon reallocating the hours for modes that are not present according to the ratios discussed previously (*i.e.*, that cycle finished mode, if present, would account for 5 percent of annual hours not allocated to active and delay start modes, and off/inactive modes would account for the remaining 95 percent). DOE's logic for this distribution of hours is as follows:

- If delay start is not possible, cycle finished mode would be 0.05 × (8,760 total hours · 140 active mode hours) = 431 hours. The remaining 8,189 hours would be allocated for off/inactive modes.
- If cycle finished mode is not possible, delay start mode, which is assumed to be a fixed value of 5 minutes per cycle for each of the 416 cycles per

[13] *Standby Product Profile—Clothes Dryers* (Report 2003/09). National Appliance and Equipment Energy Efficiency Committee (NAEEEC) of Australia (October 2003). Available at: *http://www.energyrating.gov.au/library/pubs/sb200309-dryers.pdf.*

[14] *''A Submission to NAEEEC on Mode Times for Use When Determining Standby Energy Consumption of Clothes Washers, Dishwashers, and Dryers,''* Australian Electrical and Electronic Manufacturers' Association (March 11, 2005), Appendix B.

[15] Available at *http://www.energyrating.gov.au/pubs/2007-whitegoods-foster4.pdf.*

year specified in the DOE test procedure, would account for 34 hours. Thus, off/inactive modes would be 8,760 total hours · 140 active mode hours · 34 delay start mode hours = 8,586 hours.

• If neither delay start nor cycle finished modes are possible, then off/inactive modes would simply be 8,760 total hours · 140 active mode hours = 8,620 hours.

Table III.2 summarizes the allocation of hours to different possible modes under each scenario.

TABLE III.2—ESTIMATE OF ANNUAL HOURS OF POSSIBLE CLOTHES DRYER MODES

| Mode | All modes possible | No delay start mode | No cycle finished mode | No delay start or cycle finished modes |
|---|---|---|---|---|
| Active | 140 | 140 | 140 | 140 |
| Delay Start * | 34 | 0 | 34 | 0 |
| Cycle Finished ** | 429 | 431 | 0 | 0 |
| Off and Inactive † | 8,157 | 8,189 | 8,586 | 8,620 |

* 5 minutes per cycle × 416 cycles per year.
** 5 percent of remaining time.
† 95 percent of remaining time.

Information to guide allocation of the hours for clothes dryers that have both inactive and off modes is currently unavailable. Two operational scenarios exist: (1) A clothes dryer reverts to an off mode after a specified time in inactive mode; or (2) a clothes dryer stays in inactive mode unless the user switches the appliance back to off mode. DOE does not have information regarding the percentage of clothes dryers being sold that fall into each of these categories. DOE welcomes comment and additional information on this point. Because of this limitation, for purposes of its analysis, DOE proposes to allocate half of the hours determined for off/inactive modes to each of the two modes.

In summary, DOE proposes to calculate clothes dryer energy use per cycle associated with standby and off modes by: (1) Calculating the product of wattage and allocated hours for all possible standby and off modes; (2) summing the results; (3) dividing the sum by 1,000 to convert from Wh to kWh; and (4) dividing by 416 cycles per year. The number of hours for off/inactive modes would be allocated entirely to either off mode or inactive mode, as appropriate, if only one of these modes is possible for the clothes dryer. If both modes are possible, the off/inactive mode hours would be divided evenly between the two.

DOE invites comments on this proposed methodology and associated factors, including accuracy, allocation of annual hours, and test burden. If, based on comments, DOE determines that this approach is unreasonable, DOE would consider the following alternative methodology.

The comparison of annual energy use of different clothes dryer modes shows that delay start and cycle finished modes represent a relatively small number of hours at low power consumption levels. For clothes dryers currently on the market, these levels are distinct from but comparable to those for off/inactive modes. Thus, DOE could adopt an approach that would be limited to specification of hours for only off and inactive modes when calculating energy use associated with standby and off modes. In that case, all of the non-active hours (8,620 hours total) would be allocated to the inactive and off modes. DOE invites comment on whether such an alternative would be representative of the standby and off mode power consumption of clothes dryers currently on the market.

2. Room Air Conditioners

DOE is not aware of reliable data for hours spent in different standby and off modes in room air conditioners. Therefore, DOE estimated relative magnitudes of energy use in standby and off modes in the following example, illustrated for a representative 8,000 Btu/hour (hr), 9 EER unit that has delay start, off-cycle, and inactive modes.

DOE is aware that a room air conditioner may be unplugged for a certain percentage of time, and, therefore, will not be in either standby mode or off mode. DOE does not have data regarding the amount of ''unplugged'' time for a typical room air conditioner. For the purposes of this analysis, DOE estimates that approximately half of room air conditioners are unplugged for half of the year. The ''unplugged'' time associated with these units is averaged over all units. Hence, the average number of plugged-in hours per year for a room air conditioner would be estimated as 8,760 total hours · (½ of units that are unplugged × 4,380 unplugged hours) = 6,570 hours.

The prime cooling season is estimated to last 90 days a year, which equals 2,160 hours. During this time, it is estimated that room air conditioners spend 750 hours in cooling mode, according to the current test procedure. In addition, DOE estimates that 10 percent of room air conditioners that have a delay start mode function will use this function for 10 hours a day during the cooling season. Averaged over all units with this functionality, this represents 90 days × 10 hr/day × 10 percent of units = 90 hours. Therefore, cooling mode hours plus delay start hours total 840 hours for units that incorporate the delay start function. The remaining cooling season hours in this example are 2,160 cooling season hours · 840 combined cooling mode and delay start mode hours = 1,320 hours. For this representative unit, DOE assumes that these remaining cooling season hours divide equally into: (1) Fan-only mode (an active mode in which the compressor shuts down when operating in constant-fan mode or user selection of fan-only operation); (2) off-cycle mode; and (3) inactive mode (and/or off mode for units that have such capability). One-third of 1,320 equals 440, so for this example, the number of off-cycle mode hours is 440, and the number of inactive and/or off mode hours during the cooling season is also 440.

The cooling season inactive and/or off mode hours are summed with the additional inactive and/or off mode hours when the unit is plugged in outside of the cooling season. These additional hours are 6,570 plugged-in hours · 2,160 cooling season hours = 4,410 hours. Hence, for this example, total inactive and/or off mode hours are 440 inactive and/or off mode hours during cooling season + 4,410 plugged-in hours outside of the cooling season = 4,850 hours. The hours for the relevant modes and estimates of power input and energy use for this example are summarized in Table III.3 below.

While the hours per mode presented in this illustration are estimates based on limited study data, DOE believes that energy patterns illustrated in this example are representative for most room air conditioners with delay start and off-cycle mode capability. The typical average power level during active mode is calculated as the 8,000 Btu/hr cooling capacity ÷ 9 Btu/hr/W EER = 889 W.

TABLE III.3—ESTIMATE OF ANNUAL ENERGY USE OF ROOM AIR CONDITIONER MODES FOR A REPRESENTATIVE UNIT WITH 8,000 BTU/HR CAPACITY AND 9 EER

| Mode | Hours | Typical power (*W*) | Annual energy use (*kWh*) |
|---|---|---|---|
| Active Cooling | 750 | 889 | 667 |
| Delay Start | 90 | 2 | 0.2 |
| Off-Cycle | 440 | 2 | 0.9 |
| Off and Inactive | 4,850 | 0.5 to 2 | 2.5 to 10 |

To determine the annual hours per mode for room air conditioners for which not all standby modes are possible, DOE estimated values based upon reallocating the hours for modes that are not present according to the ratios discussed previously (*i.e.*, that off-cycle mode, if present, would account for one-third of annual cooling season hours not allocated to active and delay start modes, and off/inactive modes would account for another one third of the annual cooling season hours not allocated to active and delay start modes plus the 4,410 plugged-in non-cooling season hours). DOE's logic for this distribution of hours is as follows:

- If delay start is not possible, off-cycle mode would equal ⅓ × (2,160 cooling season hours · 750 cooling mode hours) = 470 hours. Off/inactive modes would then account for 470 off-cycle mode hours + 4,410 plugged-in non-cooling season hours = 4,880 hours.
- If off-cycle mode is not possible, off/inactive modes would equal ½ × (2,160 cooling season hours · 750 cooling mode hours · 90 delay start mode hours) + 4,410 plugged-in non-cooling season hours = 5,070 hours.
- If neither delay start nor off-cycle modes are possible, then off/inactive modes would equal ½ × (2,160 cooling season hours · 750 cooling mode hours) + 4,410 plugged-in non-cooling season hours = 5,115 hours.

Table III.4 summarizes the allocation of hours to different possible modes under each scenario.

TABLE III.4—ESTIMATE OF ANNUAL ENERGY USE OF ROOM AIR CONDITIONER MODES

| Mode | All modes possible | No delay start mode | No off-cycle mode | No delay start or off-cycle modes |
|---|---|---|---|---|
| Active, Cooling | 750 | 750 | 750 | 750 |
| Active, Fan-Only** | 440 | 470 | 660 | 705 |
| Delay Start* | 90 | 0 | 90 | 0 |
| Off-Cycle** | 440 | 470 | 0 | 0 |
| Off and Inactive** | 4,850 | 4,880 | 5,070 | 5,115 |

*10% of units will use delay start for 10 hours/day during the 90-day cooling season. The 90-day cooling season represents 2,160 hours.
** (2,160 cooling season hours · 750 cooling mode hours · delay start mode hours) divided by the number of these three modes which are present (fan-only, off-cycle, and off/inactive). Off and inactive modes are treated as one, and also include all of the 4,410 plugged in hours outside of the cooling season.

DOE is unaware of any room air conditioners that incorporate both off and inactive modes. Typically, room air conditioners with remote control can be controlled whenever they are plugged in; hence, these units do not include an off mode. If a room air conditioner allows the user to switch off remote control operation, such a product would be capable of both inactive and off mode. For these units, DOE proposes that the plugged-in off/inactive hours be allocated equally to the inactive and off modes for such a product.

In summary, DOE proposes to calculate room air conditioner energy use associated with standby and off modes by: (1) Calculating the products of wattage and allocated hours for all possible standby and off modes; (2) summing the results; and (3) dividing the sum by 1,000 to convert from Wh to kWh. The number of allocated hours for off/inactive modes would be allocated entirely to either off mode or inactive mode, as appropriate, if only one of these modes is possible for the room air conditioner. If both modes are possible, the off/inactive mode hours would be divided evenly between the two.

DOE invites comments on this proposed methodology and associated factors, including accuracy, allocation of annual hours, and test burden. If, based on comments, DOE determines that this approach is unreasonable, DOE would consider the following alternative methodology.

Similar to clothes dryers, the comparison of annual energy use of different room air conditioner modes shows that delay start and off-cycle modes represent a relatively small number of hours at low power consumption levels. For room air conditioners currently on the market, these levels are distinct from but comparable to those for off/inactive modes. Thus, DOE could adopt an approach that would be limited to specification of hours for only off and inactive modes when calculating energy use associated with standby and off modes. In that case, all of the non-active hours (5,115 hours total) would be allocated to the inactive and off modes. DOE invites comment on whether such an alternative would be representative of the standby and off mode power consumption of room air conditioners currently on the market.

### *G. Measures of Energy Consumption*

The DOE test procedures for clothes dryers and room air conditioners currently provide for the calculation of

several measures of energy consumption. For clothes dryers, the test procedure incorporates various measures of per-cycle energy consumption, including total per-cycle electric dryer energy consumption, per-cycle gas dryer electrical energy consumption, per-cycle gas dryer gas energy consumption, per-cycle gas dryer continuously burning pilot light gas energy consumption, total per-cycle gas dryer gas energy consumption expressed in Btu, and total per-cycle gas dryer gas energy consumption expressed in kWh. 10 CFR part 430, subpart B, appendix D, sections 4.1–4.5. The test procedure also provides an EF, which is equal to the clothes load in pounds divided by either the total per-cycle electric dryer energy consumption or by the total per-cycle gas dryer energy consumption expressed in kWh. 10 CFR 430.23(d). For room air conditioners, the test procedure calculates annual energy consumption in kWh and an EER. 10 CFR 430.23(f).

Under 42 U.S.C. 6295(gg)(2)(A), EPCA directs that the ''[t]est procedures for all covered products shall be amended pursuant to section 323 to include standby mode and off mode energy consumption, taking into consideration the most current versions of Standards 62301 and 62087 of the International Electrotechnical Commission, with such energy consumption integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that—(i) the current test procedures for a covered product already fully account for and incorporate the standby mode and off mode energy consumption of the covered product; or (ii) such an integrated test procedure is technically infeasible for a particular covered product, in which case the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible.''

DOE explored whether the existing measures of energy consumption for clothes dryers and room air conditioners can be combined with standby mode and off mode energy use to form a single metric. DOE notes that certain test procedures combine measures of energy consumption and standby energy use to derive an overall ''energy efficiency measure'' (*e.g.*, gas kitchen ranges and ovens incorporate pilot gas consumption in EF, electric ovens include clock power in EF, and gas clothes dryers include pilot gas consumption). When the difference in energy use between the primary function of those products and the standby power is so large that the standby power has little impact on the overall measure of energy efficiency, as is the case for clothes dryers and room air conditioners (illustrated in section III.F), the combined measure of energy efficiency is a meaningful measure. Therefore, DOE is proposing a combined metric addressing active, standby, and off modes for clothes dryers and room air conditioners, as discussed below.

1. Clothes Dryers

DOE proposes to establish the following measures of energy consumption for clothes dryers that integrate energy use of standby and off modes with energy use of main functions of the products. ''Per-cycle integrated total energy consumption expressed in kWh'' will be defined as the sum of per-cycle standby and off mode energy consumption and either total per-cycle electric dryer energy consumption or total per-cycle gas dryer energy consumption expressed in kWh, depending on which type of clothes dryer is involved. ''Integrated energy factor'' (IEF) will be defined as the (clothes dryer test load weight in lb)/(per-cycle integrated total energy in kWh).

2. Room Air Conditioners

DOE proposes to establish the following measures of energy consumption for room air conditioners that integrate energy use of standby and off modes with energy use of main functions of the products. ''Integrated annual energy consumption'' will be defined as the sum of annual energy consumption and standby and off mode energy consumption. ''Integrated energy efficiency ratio'' (IEER) will be defined as (cooling capacity in Btu/hr × 750 hours average time in cooling mode) / (integrated annual energy consumption × 1,000 Wh per kWh).

*H. Correction of Text Describing Energy Factor Calculation for Clothes Dryers*

Specific references used in the current DOE test procedure regulation contain certain errors that today's proposal seeks to correct. In particular, the reference to sections 2.6.1 and 2.6.2 of 10 CFR part 430, subpart B, appendix D in the calculation of EF for clothes dryers found at section 430.23(d)(2) is incorrect and should refer instead to sections 2.7.1 and 2.7.2. Section 2.6 provides instructions for the test clothes to be used in energy testing of clothes dryers, whereas section 2.7 provides instructions on test loads. The EF of clothes dryers is measured in pounds of clothes per kWh. Since the EF calculation requires the weight of the test load, DOE proposes to correct these references in 10 CFR 430.23(d)(2).

*I. Correction of Text Referencing Room Air Conditioner Test Standard*

The room air conditioner test procedure currently references ASHRAE Standard 16–69, ''Method of Testing for Rating Room Air Conditioners.'' The text in 10 CFR part 430, subpart B, appendix F, section 1, however, incorrectly identifies ASHRAE as ''American Society of Heating, Refrigerating and Air Conditioning in Engineers.'' The actual name of the referenced organization is ''American Society of Heating, Refrigerating and Air-Conditioning Engineers.'' DOE proposes to correct this reference in 10 CFR part 430, subpart B, appendix F, section 1 (which is being redesignated as section 2 in the proposed amendments).

*J. Compliance With Other EPCA Requirements*

1. Test Burden

Section 323(b)(3) of EPCA requires that ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use * * * or estimated annual operating cost of a covered product during a representative average use cycle or period of use * * * and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) For the reasons that follow, DOE has tentatively concluded that amending the relevant DOE test procedures to incorporate clauses regarding test conditions and methods found in IEC Standard 62301, along with the proposed modifications, would satisfy this requirement.

The proposed amendments to the DOE test procedure incorporate a test standard that is accepted internationally for measuring standby power in standby modes and off mode. Based on DOE's testing and analysis of IEC Standard 62301, DOE determined that the proposed amendments to the clothes dryer and room air conditioner test procedures would produce standby and off mode average power consumption measurements that are representative of an average use cycle, both when the measured power is stable and when the measured power is unstable (*i.e.*, when power varies by more than 5 percent during 5 minutes). Also, the test methods and equipment that the amendment would require for measuring standby power in these products are not substantially different from, or can be even less burdensome to implement than, the test methods and

equipment in the current DOE test procedures for measuring the products' energy consumption. Therefore, the proposed test procedures would not require manufacturers to make a major investment in test facilities and new equipment. Accordingly, DOE has tentatively concluded that the amended test procedures would produce test results that measure the standby/off mode power consumption of a covered product during a representative average use cycle, as well as total annual energy consumption, and that testing under the test procedures would not be unduly burdensome to conduct.

2. Potential Incorporation of IEC Standard 62087

Section 325(gg)(2)(A) of EPCA directs DOE to consider IEC Standard 62087 when amending test procedures to include standby mode and off mode power measurements (42 U.S.C. 6295(gg)(2)(A)). As discussed in section III.C of this notice, DOE reviewed IEC Standard 62087 ''Methods of measurement for the power consumption of audio, video, and related equipment'' (Second Edition 2008–09) and determined that it would not be applicable to measuring power consumption of electrical appliances such as clothes dryers and room air conditioners. Therefore, DOE has determined that referencing IEC Standard 62087 is not necessary for the proposed amendments to the test procedures that are the subject of this rulemaking.

3. Integration of Standby Mode and Off Mode Energy Consumption Into the Efficiency Metrics

Section 325(gg)(2)(A) requires that standby mode and off mode energy consumption be ''integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product'' unless the current test procedures already fully account for the standby mode and off mode energy consumption or if such an integrated test procedure is technically infeasible (42 U.S.C. 6295(gg)(2)(A)). For clothes dryers, DOE is proposing to incorporate the standby and off mode energy consumption into a ''per-cycle integrated total energy consumption expressed in kilowatt-hours'' and into an IEF, as discussed in section III.G of this notice. For room air conditioners, DOE is proposing to incorporate the standby and off mode energy consumption into a metric for ''integrated annual energy consumption'' and into an IEER, as discussed in section III.G.

Furthermore, EPCA provides that test procedure amendments adopted to comply with the new EPCA requirements for standby and off mode energy consumption will not determine compliance with previously established standards. (42 U.S.C. 6295(gg)(2)(C)) Pursuant to this provision, the test procedure amendments pertaining to standby mode and off mode energy consumption that DOE proposes to adopt in this rulemaking would not apply to, and would have no impact on, existing standards. In other words, existing energy standards for clothes dryers and room air conditioners, which are based on EF and EER, respectively, would not be altered by today's proposal. Instead, the test procedures' provisions for standby/off mode would be required to be used for demonstrating compliance with DOE's energy conservation standards upon the effective date of a subsequent standards rulemaking for clothes dryers and room air conditioners that account for standby mode and off mode power consumption. Thus, the proposed test procedure amendments comply with this EPCA requirement.

## IV. Procedural Requirements

### *A. Review Under Executive Order 12866*

Today's proposed regulatory action is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this proposed action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

### *B. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE's procedures and policies may be viewed on the Office of the General Counsel's Web site (*http://www.gc.doe.gov*).

DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule prescribes test procedures that will be used to test compliance with energy conservation standards for the products that are the subject of this rulemaking.

DOE has tentatively concluded that the proposed rule would not have a significant impact on either small or large manufacturers under the provisions of the Regulatory Flexibility Act. The proposed rule would amend DOE's test procedures by incorporating testing provisions to address standby mode and off mode energy consumption. The procedures involve measuring power input when the clothes dryer or room air conditioner is in standby and off modes during testing. These tests can be conducted in the same facilities used for the current energy testing of these products, but could also be conducted in separate facilities consisting of little more than a temperature-controlled space. The power meter required for these tests might require greater accuracy than the power meter used for current energy testing, but the investment required for a possible instrumentation upgrade would be modest. The duration of the standby and off mode testing is relatively short in comparison to the time required to conduct current energy testing. Thus, such requirements for equipment and time to conduct the additional tests would not be expected to impose a significant economic impact. Accordingly, DOE does not believe that the proposed rule would have a significant economic impact on entities subject to the applicable testing requirements.

Further, the Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121, which relies on size standards and codes established by the North American Industry Classification System (NAICS). The threshold number for NAICS classification for 335224, which applies to household laundry equipment manufacturers and includes clothes dryer manufacturers, is 1,000 employees. Additionally, two other NAICS classifications could apply to manufacturers involved in the production of room air conditioners, including 333415 (air conditioning and warm air heating equipment and commercial and industrial refrigeration equipment) and 335228 (other major household appliance manufacturing). The employee thresholds for

classification as a small entity under these NAICS codes are 750 and 500 employees, respectively.

Searches of the SBA Web site [16] to identify manufacturers within these NAICS codes that manufacture clothes dryers and/or room air conditioners identified only Staber Industries of Groveport, Ohio as a relevant manufacturer. Staber manufactures laundry appliances, including clothes dryers. Most of the manufacturers supplying clothes dryers and room air conditioners are large multinational corporations. Only one small entity could be identified that could be affected by this test procedure modification, out of approximately 15 manufacturers supplying clothes dryers in the United States, and, for the reasons stated above, the incremental impacts on that manufacturer arising from the new proposed test procedure requirements are expected to be small.

For these reasons, DOE tentatively concludes and certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

*C. Review Under the Paperwork Reduction Act of 1995*

This proposed rulemaking will impose no new information collection or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

*D. Review Under the National Environmental Policy Act of 1969*

In this notice, DOE is proposing test procedure amendments that it expects would be used to develop and implement future energy conservation standards for clothes dryers and room air conditioners. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without changing its environmental effect, and, therefore, is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A5, which applies because this rule would establish revisions to existing test procedures that would not affect the amount, quality, or distribution of energy usage, and, therefore, would not result in any environmental impacts. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

*E. Review Under Executive Order 13132*

Executive Order 13132, ''Federalism,'' imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. 64 FR 43255 (August 10, 1999). The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States, and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process that it will follow in developing such regulations. 65 FR 13735. DOE examined this proposed rule and determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, Executive Order 13132 requires no further action.

*F. Review Under Executive Order 12988*

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation specifies the following: (1) The preemptive effect, if any; (2) any effect on existing Federal law or regulation; (3) a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) the retroactive effect, if any; (5) definitions of key terms; and (6) other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

*G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4; 2 U.S.C. 1501 *et seq.*) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a),(b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect such governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (The policy is also available at *http://www.gc.doe.gov*). Today's proposed rule contains neither an intergovernmental mandate nor a mandate that may result in an expenditure of $100 million or more in any year, so these requirements do not apply.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule

[16] A searchable database of certified small businesses is available online at: *http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm*.

that may affect family well-being. Today's proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 12630*

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's notice under OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Review Under Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the proposal is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's proposed regulatory action is not a significant regulatory action under Executive Order 12866. It has likewise not been designated as a significant energy action by the Administrator of OIRA. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

*L. Review Under Section 32 of the Federal Energy Administration Act of 1974*

Under section 301 of the DOE Organization Act (Pub. L. 95–91; 42 U.S.C. 7101 *et seq.*), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA). (15 U.S.C. 788) Section 32 essentially provides in part that, where a proposed rule authorizes or requires use of commercial standards, the rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedures addressed by this proposed action incorporate testing methods contained in the commercial standard, IEC Standard 62301. DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.*, whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE will consult with the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in this standard, before prescribing a final rule.

## V. Public Participation

*A. Attendance at the Public Meeting*

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this NOPR. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures.

*B. Procedure for Submitting Requests To Speak*

Any person who has an interest in today's notice, or who is a representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the public meeting. Such persons may hand-deliver requests to speak to the address shown in the **ADDRESSES** section at the beginning of this notice between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or e-mail to: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or *Brenda.Edwards@ee.doe.gov*. Persons who wish to speak should include in their request a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests persons scheduled to make an oral presentation to submit an advance copy of their statements at least one week before the public meeting. DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Program. Requests to give an oral presentation should ask for such alternative arrangements.

*C. Conduct of Public Meeting*

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will

permit other participants to comment briefly on any general statements. At the end of all prepared statements on each specific topic, DOE will permit participants to clarify their statements briefly and to comment on statements made by others.

Participants should be prepared to answer DOE's and other participants' questions. DOE representatives may also ask participants about other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

DOE will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Copies of the transcript are available for purchase from the transcribing reporter.

*D. Submission of Comments*

DOE will accept comments, data, and information regarding the proposed rule before or after the public meeting, but no later than the date provided at the beginning of this notice. Comments, data, and information submitted to DOE's e-mail address for this rulemaking should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Stakeholders should avoid the use of special characters or any form of encryption, and wherever possible, comments should include the electronic signature of the author. Comments, data, and information submitted to DOE via mail or hand delivery/courier should include one signed original paper copy. No telefacsimiles (faxes) will be accepted.

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document that includes all of the information believed to be confidential, and one copy of the document with that information deleted. DOE will determine the confidential status of the information and treat it accordingly.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information was previously made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

*E. Issues on Which DOE Seeks Comment*

DOE is particularly interested in receiving comments and views of interested parties on the following issues:

1. *Incorporation of IEC Standard 62301*. DOE invites comment on the adequacy of IEC Standard 62301 to measure standby power for clothes dryers and room air conditioners in general, and on the suitability of incorporating into DOE regulations the specific provisions described in section III of this notice.

2. *''Standby mode'' definitions*. DOE invites comment on the differences in definition of ''standby mode'' provided by EPCA and the definition provided in the current version of IEC Standard 62301.

3. *Clothes dryer standby modes*. DOE invites comment on the establishment of the following specific standby modes for clothes dryers: Inactive mode, delay start mode, and cycle finished mode. DOE further invites comment on the definitions proposed for these modes and on the question of whether there are any modes consistent with the ''active mode,'' ''standby mode,'' or ''off mode'' definitions under EPCA that have not been identified and that can represent significant energy use.

4. *Room air conditioner standby modes*. DOE invites comment on the establishment of the following specific standby modes for room air conditioners: Inactive mode, delay start mode, and off-cycle mode. DOE further invites comment on the definitions proposed for these modes and on the question of whether there are any modes consistent with the ''active mode,'' ''standby mode,'' or ''off mode'' definitions under EPCA that have not been identified and that can represent significant energy use.

5. *Delay start test procedure*. DOE seeks comment on the proposed clarification to IEC Standard 62301, in which DOE would specify in the clothes dryer and room air conditioner test procedures, the set delay start time, stabilization period, and test duration for delay start mode power measurements. (*See* section III.E of this notice.)

6. *Test room conditions*. DOE requests comment on the proposed room ambient temperature range for standby mode and off mode power measurements for room air conditioners and clothes dryers. (*See* section III.E of this notice.)

7. *Energy use calculation for standby mode and off mode for clothes dryers*. DOE invites comment on the approach for determining total energy use for standby mode and off mode for clothes dryers, including its accuracy and test burden. Given that individual units may be capable of different combinations of standby modes, DOE also invites comment and requests data on the estimates for annual hours associated with each mode, including the 140 hours specified by the current test procedure for active mode (drying).

8. *Energy use calculation for standby mode and off mode for room air conditioners*. DOE invites comment on the approach for determining total energy use for standby mode and off mode for room air conditioners, including its accuracy and test burden. Given that individual units may be capable of different combinations of standby modes, DOE also invites comment and requests data on the estimates for annual hours associated with each mode, including the estimate of ''unplugged'' time.

9. *New integrated measures of energy consumption and energy efficiency*. DOE invites comment on the proposed plan to establish new integrated measures of energy consumption and energy efficiency for clothes dryers and room air conditioners: ''Per-cycle integrated total energy consumption expressed in kilowatt-hours'' and ''integrated energy factor'' for clothes dryers; and ''integrated annual energy consumption'' and ''integrated energy efficiency ratio'' for room air conditioners.

## VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

## List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on December 1, 2008.

**Steven G. Chalk,**

*Deputy Assistant Secretary for Renewable Energy, Office of Technology Development, Energy Efficiency and Renewable Energy.*

For the reasons stated in the preamble, DOE proposes to amend part 430 of chapter II of title 10, of the Code of Federal Regulations, to read as set forth below:

## PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Section 430.22 is amended by adding paragraphs (b)(1)9, (b)(4)3, and (b)(5)10 to read as follows:

### § 430.22 Reference Sources.

* * * * *

(b) * * *

(1) * * *

9. American National Standard Z234.1–1972, ''Room Air Conditioners,'' Sections 4, 5, 6.1, and 6.5.

* * * * *

(4) * * *

3. IEC 62301, ''Household electrical appliances—Measurement of standby power,'' Section 4, General conditions for measurements, Paragraph 4.2, ''Test room,'' Paragraph 4.3, ''Power supply,'' Paragraph 4.4, ''Supply voltage waveform,'' and Paragraph 4.5, ''Power measurement accuracy;'' and Section 5, Measurements, Paragraph 5.1, ''General,'' Note 1, and Paragraph 5.3, ''Procedure'' (2005–06).

(5) * * *

10. American Society of Heating, Refrigerating and Air-Conditioning Engineers Standard 16–69, ''Method of Testing for Rating Room Air Conditioners.''

* * * * *

3. Part 430.23 is amended by:

a. Revising paragraph (d)(2).

b. Redesignating existing paragraph (d)(3) as (d)(4) and adding new paragraph (d)(3).

c. Revising paragraphs (f)(1), (f)(2), and (f)(3).

d. Redesignating existing paragraph (f)(4) as (f)(6) and adding new paragraphs (f)(4) and (f)(5).

The revisions and additions read as follows:

### § 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(d) *Clothes dryers.*

* * * * *

(2) The energy factor, expressed in pounds of clothes per kilowatt-hour, for clothes dryers shall be either the quotient of a 3-pound bone-dry test load for compact dryers, as described in 2.7.1 of appendix D to this subpart, or the quotient of a 7-pound bone-dry test load for standard dryers, as described in 2.7.2 of appendix D to this subpart, as applicable, divided by the clothes dryer energy consumption per cycle, as determined according to 4.1 for electric clothes dryers and 4.6 for gas clothes dryers of appendix D to this subpart, the resulting quotient then being rounded off to the nearest hundredth (.01).

(3) The integrated energy factor, expressed in pounds of clothes per kilowatt-hour, for clothes dryers shall be either the quotient of a 3-pound bone-dry test load for compact dryers, as described in 2.7.1 of appendix D to this subpart, or the quotient of a 7-pound bone-dry test load for standard dryers, as described in 2.7.2 of appendix D to this subpart, as applicable, divided by the clothes dryer integrated energy consumption per cycle, as determined according to 4.8 of appendix D to this subpart, the resulting quotient then being rounded off to the nearest hundredth (.01).

* * * * *

(f) *Room air conditioners.* (1) The estimated annual operating cost for room air conditioners, expressed in dollars per year, shall be determined by multiplying the following three factors:

(i) Electrical input power in kilowatts as determined in accordance with 5.2 of appendix F to this subpart;

(ii) The representative average-use cycle of 750 hours of compressor operation per year; and

(iii) A representative average unit cost of electrical energy in dollars per kilowatt-hour as provided by the Secretary, the resulting product then being rounded off to the nearest dollar per year.

(2) The energy efficiency ratio for room air conditioners, expressed in Btu's per watt-hour, shall be the quotient of:

(i) The cooling capacity in Btu's per hour as determined in accordance with 5.1 of appendix F to this subpart divided by:

(ii) The electrical input power in watts as determined in accordance with 5.2 of appendix F to this subpart, the resulting quotient then being rounded off to the nearest 0.1 Btu per watt-hour.

(3) The average annual energy consumption for room air conditioners, expressed in kilowatt-hours per year, shall be determined by multiplying together the following two factors:

(i) Electrical input power in kilowatts as determined in accordance with 5.2 of appendix F to this subpart; and

(ii) The representative average-use cycle of 750 hours of compressor operation per year, the resulting product then being rounded off to the nearest kilowatt-hour per year.

(4) The integrated annual energy consumption for room air conditioners, expressed in kilowatt-hours per year, shall be the sum of:

(i) The average annual energy consumption as determined in accordance with paragraph (f)(3) of this section; and

(ii) The standby mode and off mode energy consumption, as determined in accordance with 5.3 of appendix F to this subpart, the resulting sum then being rounded off to the nearest kilowatt-hour per year.

(5) The integrated energy efficiency ratio for room air conditioners, expressed in Btu's per watt-hour, shall be the quotient of:

(i) The cooling capacity in Btu's per hour as determined in accordance with 5.1 of appendix F to this subpart multiplied by the representative average-use cycle of 750 hours of compressor operation per year, divided by

(ii) The integrated annual energy consumption as determined in accordance with paragraph (f)(4) of this section multiplied by a conversion factor of 1,000 to convert kilowatt-hours to watt-hours, the resulting quotient then being rounded off to the nearest 0.1 Btu per watt-hour.

* * * * *

## Appendix D—[Amended]

4. Appendix D to subpart B of part 430 is amended:

a. By adding introductory text;

b. By revising section 1. Definitions;

c. In section 2. Testing Conditions, by:

1. Revising section 2.2;

2. Adding new sections 2.2.1 and 2.2.2;

3. Adding new section 2.3.1.1;

4. Adding new section 2.4.7;

5. Revising section 2.6.3(4);

d. In section 3. Test Methods and Measurements, by:

1. Revising section 3.5;

2. Adding new sections 3.6, 3.6.1, through 3.6.4;

e. In section 4, Calculation of Derived Results From Test Measurements, by:

1. Revising section 4.1;

2. Adding new sections 4.7 and 4.8.

The additions and revisions read as follows:

## Appendix D to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers

The procedures and calculations in sections 3.6, 3.6.1 through 3.6.4, 4.7, and 4.8 of this appendix D need not be performed to determine compliance with energy conservation standards for clothes dryers established prior to [EFFECTIVE DATE OF FINAL TEST PROCEDURE RULE].

*1. Definitions*

1.1 ''*Active mode*'' means a mode in which the clothes dryer is performing the main function of tumbling the clothing with or without heated or unheated forced air circulation to remove moisture from and/or remove or prevent wrinkling of the clothing.

1.2 ''*AHAM*'' means the Association of Home Appliance Manufacturers.

1.3 ''*Automatic termination control*'' means a dryer control system with a sensor which monitors either the dryer load temperature or its moisture content and with a controller which automatically terminates the drying process. A mark or detent which indicates a preferred automatic control setting must be present if the dryer is to be classified as having an ''automatic termination control.'' A mark is a visible single control setting on one or more dryer controls.

1.4 ''*Bone dry*'' means a condition of a load of test clothes which has been dried in a dryer at maximum temperature for a minimum of 10 minutes, removed and weighed before cool down, and then dried again for 10-minute periods until the final weight change of the load is 1 percent or less.

1.5 ''*Compact*'' or ''*compact size*'' means a clothes dryer with a drum capacity of less than 4.4 cubic feet.

1.6 ''*Cool down*'' means that portion of the clothes drying cycle when the added gas or electric heat is terminated and the clothes continue to tumble and dry within the drum.

1.7 ''*Cycle*'' means a sequence of operation of a clothes dryer which performs a clothes drying operation, and may include variations or combinations of the functions of heating, tumbling and drying.

1.8 ''*Cycle finished mode*'' means a standby mode that provides continuous status display following operation in active mode.

1.9 ''*Delay start mode*'' means a standby mode that facilitates the activation of active mode by a timer.

1.10 ''*Drum capacity*'' means the volume of the drying drum in cubic feet.

1.11 ''*HLD–1*'' means the test standard promulgated by AHAM and titled ''AHAM Performance Evaluation Procedure for Household Tumble Type Clothes Dryers'', June 1974, and designated as HLD–1.

1.12 ''*HLD–2EC*'' means the test standard promulgated by AHAM and titled ''Test Method for Measuring Energy Consumption of Household Tumble Type Clothes Dryers,'' December 1975, and designated as HLD–2EC.

1.13 ''*IEC 62301*'' means the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 (First Edition, 2005–06) (incorporated by reference at 10 CFR 430.22).

1.14 ''*Inactive mode*'' means a standby mode other than delay start mode or cycle finished mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display.

1.15 ''*Moisture content*'' means the ratio of the weight of water contained by the test load to the bone-dry weight of the test load, expressed as a percent.

1.16 ''*Moisture sensing control*'' means a system which utilizes a moisture sensing element within the dryer drum that monitors the amount of moisture in the clothes and automatically terminates the dryer cycle.

1.17 ''*Off mode*'' means a mode in which the clothes dryer is not performing any active or standby function.

1.18 ''*Standard size*'' means a clothes dryer with a drum capacity of 4.4 cubic feet or greater.

1.19 ''*Standby mode*'' means the condition in which a clothes dryer is connected to a main power source and offers one or more of the following user-oriented or protective functions:

(1) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer;

(2) Continuous functions, including information or status displays (including clocks) or sensor-based functions.

1.20 ''*Temperature sensing control*'' means a system which monitors dryer exhaust air temperature and automatically terminates the dryer cycle.

*2. Testing Conditions*

* * * * *

2.2 *Ambient temperature and humidity.*

2.2.1 For drying testing, maintain the room ambient air temperature at 75 ± 3°F and the room relative humidity at 50 ± 10 percent relative humidity.

2.2.2 For standby and off mode testing, maintain room ambient air temperature conditions as specified in Section 4, Paragraph 4.2 of IEC 62301.

* * * * *

2.3.1.1 *Supply voltage waveform.* For the clothes dryer standby mode and off mode testing, maintain the electrical supply voltage waveform indicated in Section 4, Paragraph 4.4 of IEC 62301.

* * * * *

2.4.7 *Standby mode and off mode watt meter.* The watt meter used to measure standby mode and off mode power consumption of the clothes dryer shall have the resolution specified in Section 4, Paragraph 4.5 of IEC 62301. The watt meter shall also be able to record a ''true'' average power as specified in Section 5, Paragraph 5.3.2(a) of IEC 62301.

* * * * *

2.6.3 *Test Cloth Preconditioning*

* * * * *

(4) Bone dry the load as prescribed in Section 1.4 and weigh the load.

* * * * *

*3. Test Procedures and Measurements*

* * * * *

3.5 *Test for automatic termination field use factor credits.* Credit for automatic termination can be claimed for those dryers that meet the requirements for either temperature sensing control, 1.20, or moisture sensing control, 1.16, and have the appropriate mark or detent feed defined in 1.3.

3.6 *Standby mode and off mode power.* Establish the testing conditions set forth in Section 2, ''Testing Conditions,'' of this appendix, omitting the requirement to disconnect all console light or other lighting systems on the clothes dryer that do not consume more than 10 watts during the clothes dryer test cycle in Section 2.1. If the clothes dryer waits in a higher power state at the start of standby mode or off mode before dropping to a lower power state, wait until the clothes dryer passes into the lower power state before starting the measurement, as discussed in Section 5, Paragraph 5.1, note 1 of IEC 62301. Follow the test procedure specified in Section 5, Paragraph 5.3 of IEC 62301 for testing in each possible mode as described in Sections 3.61 through 3.64. For units in which power varies over a cycle, as described in Section 5, Paragraph 5.3.2 of IEC 62301, use the average power approach described in Paragraph 5.3.2(a) of IEC 62301.

3.6.1 If a clothes dryer has an inactive mode, as defined in Section 1.14, measure and record the average inactive mode power of the clothes dryer, $P_{IA}$, in watts.

3.6.2 If a clothes dryer has an off mode, as defined in Section 1.17, measure and record the average off mode power of the clothes dryer, $P_{OFF}$, in watts.

3.6.3 If a clothes dryer has a delay start mode, as defined in section 1.9, test it in this mode by setting it to a delay start time of 5 hours, allowing at least 5 minutes for the power to stabilize, and then measure and record the average delay start mode power of the clothes dryer, $P_{DS}$, in watts, for the following 60 minutes.

3.6.4 If a clothes dryer has a cycle finished mode, as defined in Section 1.8, test it in this mode after termination of a drying cycle that does not include operation of the drum or blower after the drying cycle is completed. Measure and record the average cycle finished mode power of the clothes dryer, $P_{CF}$, in watts.

*4. Calculation of Derived Results From Test Measurements*

4.1 *Total per-cycle electric dryer energy consumption.* Calculate the total electric dryer energy consumption per cycle, $E_{ce}$, expressed in kilowatt-hours per cycle and defined as:

$E_{ce} = [66/(W_w \cdot W_d)] \times E_t \times FU$,

Where:

$E_t$ = the energy recorded in 3.4.5.

66 = an experimentally established value for the percent reduction in the moisture content of the test load during a laboratory test cycle expressed as a percent.

FU = Field use factor.

= 1.18 for time termination control systems.

= 1.04 for automatic control systems which meet the requirements of the definitions

for automatic termination controls in 1.3, 1.16, and 1.20.

$W_w$ = the moisture content of the wet test load as recorded in 3.4.2.

$W_d$ = the moisture content of the dry test load as recorded in 3.4.3.

* * * * *

4.7 *Per-cycle standby mode and off mode energy consumption*. Calculate the dryer combined standby mode and off mode energy consumption per cycle, $E_{TSO}$, expressed in kWh per cycle and defined as:

$E_{TSO} = [(P_{IA} \times S_{IA}) + (P_{OFF} \times S_{OFF}) + (P_{DS} \times S_{DS}) + (P_{CF} \times S_{CF})] \times K / 416$

Where:

$P_{IA}$ = dryer inactive mode power, in watts, as measured in section 3.6.1.

$P_{OFF}$ = dryer off mode power, in watts, as measured in section 3.6.2.

$P_{DS}$ = dryer delay start mode power, in watts, as measured in section 3.6.3.

$P_{CF}$ = dryer cycle finished mode power, in watts, as measured in section 3.6.4.

If the clothes dryer has both inactive mode and off mode, $S_{IA}$ and $S_{OFF}$ both equal $S_{TOT}/2$, where $S_{TOT}$ is the total inactive and off mode annual hours, determined from the following table;

If the clothes dryer has an inactive mode but no off mode, the inactive mode annual hours, $S_{IA}$, is equal to $S_{TOT}$ and the off mode annual hours, $S_{OFF}$, is equal to 0;

If the clothes dryer has an off mode but no inactive mode, $S_{IA}$ is equal to 0 and $S_{OFF}$ is equal to $S_{TOT}$;

$S_{DS}$ = dryer delay start mode annual hours, as determined from the following table;

$S_{CF}$ = dryer cycle finished mode annual hours, as determined from the following table;

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours; and

416 = representative average number of clothes dryer cycles in a year.

| Annual hours | Clothes dryer standby modes present | | | |
|---|---|---|---|---|
| | Delay start and cycle finished modes | No delay start mode | No cycle finished mode | No delay start or cycle finished modes |
| $S_{DS}$ | 34 | 0 | 34 | 0 |
| $S_{CF}$ | 429 | 431 | 0 | 0 |
| $S_{TOT}$ | 8,157 | 8,189 | 8,586 | 8,620 |

4.8 *Per-cycle integrated total energy consumption expressed in kilowatt-hours*. Calculate the per-cycle integrated total energy consumption, ECI, expressed in kilowatt-hours per cycle and defined for an electric clothes dryer as:

$E_{CI} = E_{ce} + E_{TSO}$,

Where:

$E_{ce}$ = the energy recorded in 4.1, and

$E_{TSO}$ = the energy recorded in 4.7,

and for a gas clothes dryer as:

$E_{CI} = E_{cg} + E_{TSO}$,

Where:

$E_{cg}$ = the energy recorded in 4.6, and

$E_{TSO}$ = the energy recorded in 4.7.

* * * * *

## Appendix F—[Amended]

5. Appendix F to subpart B of part 430 is amended by:
   a. Adding introductory text;
   b. Redesignating sections 1 through 4 as 2 through 5;
   c. Adding new sections 1 and 1.1 through 1.7;
   d. Revising newly redesignated section 2;
   e. Revising newly redesignated section 3;
   f. Revising newly redesignated section 4; and
   g. Adding new section 5.3.

The additions and revisions read as follows:

## Appendix F to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Room Air Conditioners

The procedures and calculations in sections 4.2, 4.2.1 through 4.2.4, and 5.3 of this appendix F need not be performed to determine compliance with energy conservation standards for room air conditioners established prior to [EFFECTIVE DATE OF FINAL TEST PROCEDURE RULE].

*1. Definitions*

1.1 ''*Active mode*'' means a mode in which the room air conditioner is performing the main function of cooling or heating the conditioned space, or circulating air through activation of its fan or blower, with or without energizing active air-cleaning components or devices such as ultraviolet (UV) radiation, electrostatic filters, ozone generators, or other air-cleaning devices.

1.2 ''*Delay start mode*'' means a standby mode in which activation of an active mode is facilitated by a timer.

1.3 ''*IEC 62301*'' means the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 (First Edition 2005–06) (incorporated by reference at 10 CFR 430.22).

1.4 ''*Inactive mode*'' means a standby mode other than delay start mode or off-cycle mode that facilitates the activation of active mode by remote switch (including remote control) or internal sensor or which provides continuous status display.

1.5 ''*Off mode*'' means a mode in which a room air conditioner is not performing any active or standby function.

1.6 ''*Off-cycle mode*'' means a standby mode in which the room air conditioner:

(1) Has cycled off its main function by thermostat or temperature sensor;

(2) Does not have its fan or blower operating; and

(3) Will reactivate the main function according to the thermostat or temperature sensor signal.

1.7 ''*Standby mode*'' means the condition in which a room air conditioner is connected to the main power source and offers one or more of the following user-oriented or protective functions:

(1) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; and/or

(2) Continuous functions, including information or status displays (including clocks) or sensor-based functions.

*2. Test Methods*

2.1 *Cooling mode*. The test method for testing room air conditioners in cooling mode shall consist of application of the methods and conditions in American National Standard (ANS) Z234.1–1972, ''Room Air Conditioners,'' Sections 4, 5, 6.1, and 6.5, and in American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 16–69, ''Method of Testing for Rating Room Air Conditioners.''

2.2 *Standby and off modes*. The method for testing room air conditioners in standby and off modes shall consist of application of the methods and conditions in IEC 62301, as modified by the requirements of this standard. The testing may be conducted in test facilities used for testing cooling mode. If testing is not conducted in such a facility, the test facility shall comply with IEC 62301 Section 4.2.

*3. Test Conditions*

3.1 *Cooling mode*. Establish the test conditions described in Sections 4 and 5 of ANS Z234.1–1972 and in accordance with ASHRAE Standard 16–69.

3.2 *Standby and off modes*.

3.2.1 *Test room conditions*. If the standby and off mode testing is conducted in a facility that is also used for testing cooling mode, or in a similar facility with separate room side and outdoor side compartments, maintain both the room side and outdoor side compartment temperatures at 74 ± 2 °F. If the unit is equipped with an outdoor air

ventilation damper, close this damper during testing. Requirements for maintaining temperature levels in the controlled-temperature air space outside the test compartments of a balanced ambient test chamber, as described in ASHRAE Standard 16–69, are waived for all standby and off mode testing. If the standby and off mode testing is conducted in a facility without separate compartments, maintain the ambient temperature at 74 ± 2 °F for testing all modes. Air velocities near the room air conditioner shall be no more than 100 feet per minute. The ambient air temperature variation from minimum to maximum shall be no more than 3 °F at locations within 12 inches of all sides of the room air conditioner at elevations from the bottom edge to the top edge of the air conditioner.

3.2.2 *Power supply*. Maintain power supply conditions specified in section 4.3 of IEC 62301. Use room air conditioner nameplate voltage and frequency as the basis for power supply conditions. Maintain power supply voltage waveform according to the requirements of section 4.4 of IEC 62301.

3.2.3 *Watt meter*. The watt meter used to measure standby mode and off mode power consumption of the room air conditioner shall have the resolution specified in Section 4, Paragraph 4.5 of IEC 62301. The watt meter shall also be able to record a ''true'' average power specified in Section 5, Paragraph 5.3.2(a) of IEC 62301.

3.2.4 Install the room air conditioner in the test facility either as required by ASHRAE Standard 16–69, if standby and off mode testing is conducted in a facility that is also used for testing the cooling mode, or, if standby and off mode testing is conducted in a facility without separate compartments, place the room air conditioner in the facility with a minimum of 2 feet of clearance to any walls or obstructions.

*4. Measurements.*

4.1 *Cooling mode*. Measure the quantities delineated in Section 5 of ANS Z234.1–1972.

4.2 *Standby and off modes*. Establish the testing conditions set forth in Section 3.2. For room air conditioners that drop from a higher power state to a lower power state as discussed in Section 5, Paragraph 5.1, note 1 of IEC 62301, allow sufficient time for the room air conditioner to reach the lower power state before proceeding with the test measurement. Follow the test procedure specified in Section 5, Paragraph 5.3 of IEC 62301. For units in which power varies over a cycle, as described in Section 5, Paragraph 5.3.2 of IEC 62301, use the average power approach in Paragraph 5.3.2(a). For testing all standby and off modes for which a control setpoint or thermostat can be adjusted for the room air conditioner, adjust the setpoint or thermostat to 79 °F.

4.2.1 If a room air conditioner has an inactive mode, as defined in Section 1.5, measure and record the average inactive mode power of the room air conditioner, $P_{IA}$, in watts.

4.2.2 If a room air conditioner has an off mode, as defined in Section 1.6, measure and record the average off mode power of the room air conditioner, $P_{OFF}$, in watts.

4.2.3 If a room air conditioner has a delay start mode, as defined in section 1.3, test it in this mode by setting it to a delay start time of 5 hours, allowing at least 5 minutes for the power input to stabilize, and then measure and record the average delay start mode power of the room air conditioner, $P_{DS}$, in watts, for the following 60 minutes.

4.2.4 If a room air conditioner has an off-cycle mode, as defined in Section 1.7, measure and record the average off-cycle mode power of the room air conditioner, $P_{CF}$, in watts.

*5. Calculations.*

* * * * *

5.3 *Standby mode and off mode annual energy consumption*. Calculate the standby mode and off mode annual energy consumption for room air conditioners, $E_{TSO}$, expressed in kilowatt-hours per year, according to the following:

$$E_{TSO} = [(P_{IA} \times S_{IA}) + (P_{OFF} \times S_{OFF}) + (P_{DS} \times S_{DS}) + (P_{OC} \times S_{OC})] \times K$$

Where:

$P_{IA}$ = room air conditioner inactive mode power, in watts, as measured in section 4.2.1

$P_{OFF}$ = room air conditioner off mode power, in watts, as measured in section 4.2.2.

$P_{DS}$ = room air conditioner delay start mode power, in watts, as measured in section 4.2.3.

$P_{OC}$ = room air conditioner off-cycle mode power, in watts, as measured in section 4.2.4.

If the room air conditioner has both inactive mode and off mode, $S_{IA}$ and $S_{OFF}$ both equal $S_{TOT}/2$, where $S_{TOT}$ is the total inactive and off mode annual hours, determined from the following table;

If the room air conditioner has an inactive mode but no off mode, the inactive mode annual hours, $S_{IA}$, is equal to $S_{TOT}$ and the off mode annual hours, $S_{OFF}$, is equal to 0;

If the room air conditioner has an off mode but no inactive mode, $S_{IA}$ is equal to 0 and $S_{OFF}$ is equal to $S_{TOT}$;

$S_{DS}$ = room air conditioner delay start mode annual hours, as determined from the following table;

$S_{OC}$ = room air conditioner off-cycle mode annual hours, as determined from the following table; and

K = 0.001 kWh/Wh conversion factor for watt-hours to kilowatt-hours.

| Annual hours | Room air conditioner standby modes present | | | |
|---|---|---|---|---|
| | Delay start and off-cycle modes | No delay start mode | No off-cycle mode | No delay start or off-cycle mode |
| $S_{DS}$ | 90 | 0 | 90 | 0 |
| $S_{OC}$ | 440 | 470 | 0 | 0 |
| $S_{TOT}$ | 4,850 | 4,880 | 5,070 | 5,115 |

[FR Doc. E8–28952 Filed 12–8–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

## 10 CFR Part 1004

**RIN 1901–AA32**

## Revision of Department of Energy's Freedom of Information Act Regulations

**AGENCY:** Office of FOIA and Privacy Act, Office of Information Resources, Department of Energy.

**ACTION:** Notice of proposed rulemaking and opportunity for comment.

**SUMMARY:** The Department of Energy (DOE) publishes a proposed rule to amend the existing regulations at Part 1004 that establish procedures by which records may be requested from all DOE offices pursuant to the Freedom of Information Act (FOIA). This proposed rule would streamline DOE's procedures for determining the releasability of information and update the fee requirements for the reproduction of documents.

This proposed rule would remove the so-called ''extra balancing test'' in section 1004.1 which states: ''To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.'' This sentence imposes an additional burden on DOE to reconsider a determination to legally withhold information in accordance with 5 U.S.C. 552.

In addition, this proposed rule would amend section 1004.9(a)(4) to raise the per page rate for paper copy reproductions and microform to paper copies to the rate of 20 cents per page.

Additional administrative changes which do not require notice and comment will be promulgated in the

Final Rule to bring DOE's regulations into compliance with the 1996 Amendments to the FOIA and to reflect minor alterations in DOE's internal organizational structure.

**DATES:** Public comment on this proposed rule will be accepted until January 8, 2009. See section III of the **SUPPLEMENTARY INFORMATION** section of this notice for additional information about public comment procedures.

**ADDRESSES:** You may submit comments, identified by RIN 1901–AA32, by any of the following methods:

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

2. *E-mail* to *kevin.hagerty@hq.doe.gov.* Include RIN 1901–AA32 in the subject line of the e-mail. Please include the full body of your comments in the text of the message or as an attachment.

3. *Mail:* Address written comments to Mr. Kevin Hagerty, U.S. Department of Energy, Office of Information Resources, Mailstop MA–90, Room 1G–051, 1000 Independence Avenue, SW., Washington, DC 20585. Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

This notice of proposed rulemaking, public comments, and any other material that DOE receives about this rulemaking are being made available on the Office of Information Resources Web site at: *http://www.management.energy.gov/foia_pa.htm.* You also may obtain copies of comments by contacting Ms. Verlette Gatlin.

**FOR FURTHER INFORMATION CONTACT:** Ms. Verlette Gatlin, Department of Energy, Office of Information Resources, Mailstop MA–90, Room 1G–051, 1000 Independence Avenue, SW., Washington, DC 20585; *verlette.gatlin@hq.doe.gov,* (202) 586–5958.

**SUPPLEMENTARY INFORMATION:**

I. Introduction
II. Discussion of Proposed Rule
III. Public Comment Procedures
IV. Regulatory Review

## I. Introduction

Part 1004 contains the regulations of the Department of Energy (DOE) that implement 5 U.S.C. 552. This part provides information concerning the procedures by which the public may request records from DOE offices, and the policies under which records shall be furnished to members of the public.

Section 1004.1, *Purpose and Scope,* requires DOE to perform an additional balancing test, to the extent permitted by law, when determining whether to withhold information under the nine enumerated exemptions to the FOIA. This additional test requires DOE to make available records that could be withheld under the FOIA exemptions, if DOE determines that disclosure would be in the public interest. DOE is proposing to remove the extra balancing test, because it goes beyond the requirements of the FOIA, and imposes unnecessary administrative requirements on DOE.

DOE also is proposing to amend 10 CFR 1004.9(a)(4), which provides for DOE to charge requesters for paper copy reproduction of documents. At present, the charge for paper to paper copies is five cents per page and the charge for microform to paper copies is ten cents per page. DOE is proposing to raise the per page rate for both paper copy reproductions and microform to paper copies to 20 cents per page.

## II. Discussion of Proposed Rule

In determining how to revise the existing regulation in 10 CFR 1004.1, DOE reached this conclusion because the extra balancing test does not alter the outcome of the decision to withhold information, as DOE already incorporates Department of Justice guidance in applying exemptions when determining whether or not to make a discretionary release of information. Therefore, the imposition of an extra balancing test is cumbersome and unnecessary.

In determining how to proceed in raising the per-page rate for paper reproductions, DOE compared the rates of fellow Cabinet-level agencies and found that the rate of 20 cents a page is comparable to the fees charged throughout the executive branch. Changing the per page rate from five and ten cents per page (as set in 1988) to twenty cents per page is a modest and reasonable increase that is more reflective of current costs and would bring DOE into conformity with the rest of the government. This change is wholly consistent with 5 U.S.C. 552(a)(4)(a)(ii)(I): ''fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use.''

## III. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this notice of proposed rulemaking. To help DOE review the comments, interested persons are asked to refer to specific proposed rule provisions, if possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

DOE has determined that this rulemaking does not present a substantial issue of fact or law, or is likely to have the kinds of substantial impacts, that warrant an opportunity for oral presentation of views, data, and arguments pursuant to 42 U.S.C. 7191(b).

## IV. Regulatory Review

### *A. Review Under Executive Order 12866*

Today's regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993), as amended by Executive Order 13258, 67 FR 9385 (February 26, 2002). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

### *B. Review Under the National Environmental Policy Act*

DOE has concluded that these proposed regulations fall into the class of actions that do not individually or cumulatively have a significant impact on the human environment as set forth in DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule is covered under the categorical exclusion in paragraph A5 of Appendix A to subpart D, 10 CFR part 1021, which applies to rulemaking that interprets or amends an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation

of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov*.

DOE has reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. In practice, the majority of FOIA requesters submitting requests to DOE qualify for a waiver of fees under 10 CFR 1004.9(b)(1)–(3). Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

*D. Review Under the Paperwork Reduction Act*

This rulemaking would impose no new information or recordkeeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

*E. Review Under the Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by States, tribal or local governments, in the aggregate, or by the private sector, of $100 million in any one year. The Act also requires Federal agencies to develop an effective process to permit timely input by elected officials of State, tribal, or local governments on a proposed significant intergovernmental mandate, and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that the proposed rule published today does not contain any Federal mandates affecting States, tribal, or local governments, or the private sector, and, thus, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

*F. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' 61 FR 4779 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; (4) and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Federal agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

*G. Review Under Executive Order 13132*

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibility among the various levels of government. No further action is required by Executive Order 13132.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This proposed rule would have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. DOE has determined that the proposed rule published today would not have a significant adverse effect on the supply, distribution, or use of energy and, thus, the requirement to prepare a Statement of Energy Effects does not apply.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most dissemination

of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

## IV. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

## List of Subjects in 10 CFR Part 1004

Electric power, Electric utilities, Energy, Freedom of Information, Reporting and recordkeeping requirements.

Issued in Washington, DC.

**Ingrid Kolb,**

*Director, Office of Management.*

For the reasons set forth in the preamble, the Department of Energy proposes to amend Part 1004 of Title 10 of the Code of Federal Regulations as set forth below.

## PART 1004—FREEDOM OF INFORMATION

1. The authority citation for part 1004 continues to read as follows:

**Authority:** 5 U.S.C. 552.

### § 1004.1 [Amended]

2. Section 1004.1 is amended by removing the last sentence.

### § 1004.9 [Amended]

3. Section 1004.9(a)(4) is amended by removing ''five'' and ''ten'' in the first sentence and adding in both places ''twenty''.

[FR Doc. E8–28940 Filed 12–8–08; 8:45 am]

BILLING CODE 6450–01–P

---

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2007–28077; Directorate Identifier 2007–NE–20–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Turbomeca S.A. Arriel 2B, 2B1, and 2B1A Turboshaft Engines

**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) provided by the aviation authority of France to identify and correct an unsafe condition on an aviation product. The MCAI states the following:

> Several cases of Gas Generator Turbine (HP Turbine) blade rearward displacement have been detected during borescope inspection or in repair centre following engine disassembly. Two of them resulted in blade rubs between the rear face of the fir-tree roots and the rear bearing support cover. High HP blade rearward displacement can potentially result in blade release due to fatigue of the blade, which would cause an uncommanded in-flight engine shutdown.

We are proposing this AD to prevent an uncommanded in-flight engine shutdown which could result in an emergency autorotation landing or, at worst, an accident.

**DATES:** We must receive comments on this proposed AD by January 8, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

### 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 the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *christopher.spinney@faa.gov*; telephone (781) 238–7175; fax (781) 238–7199.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–28077; Directorate Identifier 2007–NE–27–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 with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

### 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 2007–0109, dated April 19, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The EASA AD states:

> Several cases of Gas Generator Turbine (HP Turbine) blade rearward displacement have been detected during borescope inspection or in repair centre following engine disassembly. Two of them resulted in blade rubs between the rear face of the fir-tree roots and the rear bearing support cover.
>
> High HP blade rearward displacement can potentially result in blade release due to fatigue of the blade, which would cause an uncommanded in-flight engine shutdown.
>
> The evaluation of this condition has prompted to require a periodic borescope inspection in order to detect HP blade rearward displacement. Additionally, in case displacement is found above the specified limit, removal of Module 03 is required.

You may obtain further information by examining the EASA AD in the AD docket.

### Relevant Service Information

Turbomeca S.A. has issued Mandatory Service Bulletin No. 292 72

2825, Original Issue, dated April 5, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the EASA AD.

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

This product has been approved by the aviation authority of France, and is approved for operation in the United States. Pursuant to our bilateral agreement with France, they have notified us of the unsafe condition described in the EASA AD and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA, and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require inspecting for HP blade rearward displacement.

## Costs of Compliance

We estimate that this proposed AD would affect about 248 engines on helicopters of U.S. registry. We also estimate that it would take about 2 work-hours per engine to perform the proposed actions and that the average labor rate is $80 per work-hour. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $39,680. Our cost estimate is exclusive of possible warranty coverage.

## 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:

**Turbomeca S.A.:** Docket No. FAA–2007–28077; Directorate Identifier 2007–NE–20–AD.

### Comments Due Date

(a) We must receive comments by January 8, 2009.

### Affected ADs

(b) None.

### Applicability

(c) This AD applies to Turbomeca S.A. Arriel 2B, 2B1, and 2B1A turboshaft engines. These engines are installed on, but not limited to, Eurocopter AS 350 B3 and EC 130 B4 helicopters.

### Reason

(d) Several cases of Gas Generator Turbine (HP Turbine) blade rearward displacement have been detected during borescope inspection or in repair centre following engine disassembly. Two of them resulted in blade rubs between the rear face of the fir-tree roots and the rear bearing support cover. High HP blade rearward displacement can potentially result in blade release due to fatigue of the blade, which would cause an uncommanded in-flight engine shutdown.

We are issuing this AD to prevent an uncommanded in-flight engine shutdown which could result in an emergency autorotation landing or, at worst, an accident.

### Actions and Compliance

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

### Initial Inspection

(1) Perform an initial HP turbine borescope inspection according to Turbomeca S.A. Mandatory Service Bulletin (MSB) No. 292 72 2825, dated April 5, 2007 as follows:

(i) For engines with fewer than 500 hours and 450 cycles since new or since the last HP turbine borescope inspection, inspect before reaching 600 hours or 500 cycles whichever occurs first. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

(ii) For the remaining engines, inspect within the next 100 hours. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

### Repetitive Inspections

(2) Perform repetitive HP turbine borescope inspections according to Turbomeca S.A. MSB No. 292 72 2825, dated April 5, 2007:

(i) Within 600 hours or 500 cycles from the previous inspection, whichever occurs first, if the rearward displacement of the turbine blades was less than 0.2 mm. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

(ii) Within 100 hours of the previous inspection if the rearward displacement of the turbine blades was between 0.2 mm and 0.5 mm. Replace HP turbine modules with rearward turbine blade displacement greater than 0.5 mm.

(3) After each inspection, the compliance certificate must be sent to Turbomeca S.A. within 7 days, according to § 2.D(1)(c) of Turbomeca S.A. MSB No. 292 72 2825, dated April 5, 2007.

### FAA AD Differences

(f) We modified the drawdown times to be more consistent with the compliance times.

### Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) *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 EASA Airworthiness Directive 2007–0109, dated April 19, 2007, and Turbomeca S.A. MSB No. 292 72 2825, dated April 5, 2007, for related information.

(i) Contact Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA

01803; e-mail: *christopher.spinney@faa.gov*; telephone (781) 238–7175; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on December 2, 2008.

**Peter A. White,**

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

[FR Doc. E8–29102 Filed 12–8–08; 8:45 am]

BILLING CODE 4910–13–P

## SOCIAL SECURITY ADMINISTRATION

## 20 CFR Part 416

**[Docket No. SSA 2008–0034]**

**RIN 0960–AG66**

## Technical Revisions to the Supplemental Security Income (SSI) Regulations on Income and Resources

**AGENCY:** Social Security Administration.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** We propose to amend our Supplemental Security Income (SSI) regulations by making technical revisions to our rules on income and resources. Many of these revisions reflect legislative changes found in the Consolidated Appropriations Act of 2001, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), an amendment to the National Flood Insurance Act of 1968, the Energy Employees Occupational Illness Compensation Program Act of 2000, and the Social Security Protection Act of 2004 (SSPA). We further propose to amend the SSI home exclusion rules to extend the home exclusion to individuals who, because of domestic abuse, leave a home that would otherwise be an excludable resource. Finally, we propose to update our ''conditional-payment'' rule to eliminate the liquid resource requirement as a prerequisite to receiving conditional payments.

**DATES:** To be sure that we consider your comments, we must receive them no later than February 9, 2009.

**ADDRESSES:** You may submit comments by any one of four methods—Internet, facsimile, regular mail, or hand-delivery. Commenters should not submit the same comments multiple times or by more than one method. Regardless of which of the following methods you choose, please state that your comments refer to Docket No. SSA 2008–0034 to ensure that we can associate your comments with the correct regulation:

1. Federal eRulemaking portal at *http://www.regulations.gov*. (This is the most expedient method for submitting your comments, and we strongly urge you to use it.) In the ''Search Documents'' section of the Web page, type ''SSA 2008–0034'', select ''Go,'' and then click ''Send a Comment or Submission.'' The Federal eRulemaking portal issues you a tracking number when you submit a comment.

2. Telefax to (410) 966–2830.

3. Letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235–7703.

4. Deliver your comments to the Office of Regulations, Social Security Administration, 922 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days.

All comments are posted on the Federal eRulemaking portal, although they may not appear for several days after receipt of the comment. You may also inspect the comments on regular business days by making arrangements with the contact person shown in this preamble.

*Caution:* All comments we receive from members of the public are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov*. Therefore, you should be careful to include in your comments only information that you wish to make publicly available on the Internet. We strongly urge you not to include any personal information, such as your Social Security number or medical information, in your comments.

**FOR FURTHER INFORMATION CONTACT:** Donna Gonzalez, Social Insurance Specialist, Social Security Administration, Office of Income Security Programs, 252 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–7961, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov*.

**SUPPLEMENTARY INFORMATION:**

### Electronic Version

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

### Background

The primary goal of the SSI program is to ensure a minimum level of income to people who are age 65 or older, blind, or disabled, and who have limited income and resources. The law provides that SSI payments can be made only to people who have income and resources below specified amounts. Therefore, an individual's income and resources are major factors in deciding whether the individual is eligible to receive SSI payments and in computing the amount of those payments.

### Consolidated Appropriations Act of 2001, Public Law 106–554

This law amended section 1612(a)(1) of the Social Security Act (the Act) (42 U.S.C. 1382a(a)(1)) to change how we treat statutory employees under the SSI program. *See* Public Law 106–554, app. A, § 519 (Dec. 21, 2000). Statutory employees are certain independent contractors, including agent-drivers or commission-drivers, certain full-time life insurance salespersons, home workers, and traveling or city salespersons. Act at § 210(j)(3) (42 U.S.C. 410(j)(3)). We consider such individuals, by statute, to be employees, rather than self-employed independent contractors, for wage and income purposes. Previously, we treated statutory employees the same as employees for SSI eligibility and payment-amount purposes. For such employees, we considered their wages as their earned income. After this change to the Act, we now count as earned income the net earnings of self-employed individuals, including statutory employees, thereby allowing them to deduct business expenses before calculating their income. This provision became effective for tax years beginning on or after January 1, 2001.

### Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (EGTRRA)

The EGTRRA excludes the payment of a refundable child tax credit (CTC) from income for purposes of eligibility for public benefits funded in whole or part with Federal funds. Public Law 107–16, § 203, 115 Stat. 49 (June 7, 2001) (referring to Internal Revenue Code § 24, 26 U.S.C. 24). Such a payment is also excluded from resources for these purposes during the month the payment is received and the following month. This change became effective for SSI purposes for taxable years beginning on or after January 1, 2001.

### Social Security Protection Act of 2004 (SSPA), Public Law 108–203

The SSPA amended the Act to create a uniform 9-month resource exclusion period for certain tax refunds and for any unspent portion of past-due Social Security and SSI payments. Act at § 1613(a)(7) (42 U.S.C. 1382b(a)(7)), as amended by Public Law 108–203, § 431 (Mar. 2, 2004). This amendment

expands the exclusion established by the EGTRRA discussed above. In accordance with this provision, we published final rules in the **Federal Register** at 70 FR 41,135 (July 18, 2005), amending our resource exclusion rules at title 20, chapter III, part 416, subpart L of the Code of Federal Regulations. When we amended the regulations, we included this exclusion under § 416.1236(a), titled ''Exclusions from resources; provided by other statutes'' and added a new paragraph (24). As this exclusion is now required by the Act itself, we propose to amend our rules so that they correctly reflect the source of this exclusion.

**Amendment to the National Flood Insurance Act of 1968, Public Law 109–64**

The National Flood Insurance Act provides that payments made for flood mitigation activities are not counted as income or resources when determining eligibility and benefit amounts for any Federal means-tested program. National Flood Insurance Act, § 1324, as amended by Public Law 109–64, § 1 (Jan. 7, 2005). Effective October 1, 2005, this provision applies to SSI eligibility and payment-amount determinations.

**Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106–398**

In October 2000, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was established. Public Law 106–398, § 1, app., title XXXVI (Oct. 30, 2000) (section 1 adopting as Appendix H.R. 5408). Section 3646 of the Appendix provided that medical benefits and compensation payments made under the EEOICPA are not counted as income or resources for purposes of determining eligibility to receive, or for determining the amount of, certain Federal benefits, including SSI. This provision became effective on July 31, 2001.

**Domestic Violence Resource Exclusion**

Section 1613(a)(1) of the Act excludes from resources an individual's home and associated land. Regulations provide that the home is excluded so long as it serves as the individual's principal place of residence or the individual maintains an active intent to return to the residence. The home also is not counted as a resource, regardless of the individual's intent to return, if the individual resides in an institution and a spouse or dependent relative continues to maintain residence in the home during the period of institutionalization.

Advocacy groups have expressed concern regarding the counting of a home as a resource in instances where a victim of domestic abuse leaves the home and resides elsewhere. We agree with these concerns because, currently, an individual fleeing from domestic abuse may return to a potentially dangerous home environment simply to avoid losing SSI because of an ownership interest in the home. Therefore, we intend to amend our rules to address these concerns and provide that, when an individual has fled his or her home and provides evidence of domestic abuse, the home would remain an excludable resource despite the fleeing individual's physical absence from, and continuing ownership interest in, the home. This exclusion would continue until such time as the individual establishes a new principal place of residence or otherwise takes action rendering the home no longer excludable. This change would eliminate the need for SSA to develop a domestic abuse victim's intent to return and eliminate a potential financial disincentive to those attempting to leave an abusive situation.

**Conditional Payments**

Section 1613(b) of the Act, titled ''Disposition of Resources,'' gives the Agency broad authority to establish conditional-payment rules by regulation. Under this authority, we have created an exception to our ordinary resource rules. Part 416, subpart L, § 416.1240—§ 416.1245. This exception allows us to pay monthly SSI payments in certain circumstances when an individual possesses excess *non-liquid* resources. Individuals who meet all but the resource requirements for SSI may have little or nothing on which to live if most of their resources are non-liquid and difficult to convert to cash. The conditional-payment provision is used to provide individuals a period of time in which to sell such non-liquid resources and convert them to cash. We condition these payments on the individual's written agreement to sell excess non-liquid resources during that period and repay the conditional payments with the proceeds.

A prerequisite for receiving conditional payments is that the individual may not have countable *liquid* resources in excess of one-fourth the annual Federal benefit rate (FBR), which we commonly refer to as ''3 times the monthly FBR.'' The original purpose of the liquid-resource limit was to ensure that the individual truly needed the conditional-payment period. Because the disposal period for non-liquid resources other than real property is 3 months, we assumed that if the individual did not have liquid resources equal to 3 months worth of SSI payments, he had inadequate resources for day-to-day expenses and needed to dispose of some non-liquid resources for support. Conversely, if the individual had liquid resources worth more than three times the FBR, then he had adequate resources and did not need conditional payments.

Originally, 3 months worth of SSI payments was equal to only about 32% of the resource limit. However, since we established this rule over 30 years ago, the FBR has increased annually and the resource limit has grown slowly or not at all. The difference between the statutory resource limit and 3 times the FBR is now negligible—3 times the FBR now equals $1,911 or 96% of the resource limit. In 2009 the limit on liquid resources for conditional payments will exceed the statutory limit on total resources and therefore become meaningless. Accordingly, we are proposing to eliminate the liquid-resource test as a prerequisite for receiving conditional payments. Eliminating this requirement will simplify our conditional-payments provision.

**Explanation of Proposed Changes**

We propose the following changes to our rules on determining income and resources under the SSI program.

**Revisions to Subpart K—Income**

We propose revising § 416.1110(b) to update the definition of net earnings from self-employment to include the earnings of statutory employees, as provided under section 519 of the Consolidated Appropriations Act of 2001.

**Revisions to Appendix Subpart K—Income Excluded by Federal Laws Other Than the Act**

At the end of part 416, subpart K, we maintain an appendix, which lists types of income excluded under the SSI program as provided by Federal laws other than the Act. We update this list periodically; however, we apply the law in effect due to changes in Federal statutes, whether or not the list in the appendix has been amended to reflect the statutory changes. We propose revising the appendix to subpart K by adding three new paragraphs under the heading ''V. *Other*,'' which set forth SSI income exclusions as follows:

- New paragraph (m) would reflect the exclusion of a payment of a refundable CTC made to an individual under section 24 of the Internal Revenue Code of 1986, as provided in section 203

of the EGTRRA, Public Law 107–16, 26 U.S.C. 24 note;

- New paragraph (n) would reflect the exclusion of payments made for flood mitigation activities pursuant to section 1324 of the National Flood Insurance Act of 1968 (42 U.S.C. 4031), as added by Public Law 109–64;
- New paragraph (o) would reflect the exclusion of payments made to individuals under the EEOICPA of 2000 (42 U.S.C. 7385e).

**Revisions to Subpart L—Resources and Exclusions**

We propose amending § 416.1235, which currently refers to an exclusion of the earned income tax credit, by revising this section to read ''Exclusion of certain payments related to tax tax credits.'' This section would contain exclusions for payments related to the earned income credit and a new paragraph describing the exclusion for the payment of a refundable CTC, which is currently in our rules at § 416.1236(a)(24).

Section 416.1210 provides a list of general resources that we do not count when determining SSI eligibility. We propose adding a new paragraph (v) to describe the exclusion for the payment of a refundable CTC, with a reference to § 416.1235.

Section 416.1236(a) lists resource exclusions in the SSI program provided by other statutes. We propose removing current paragraph (24) from this section, which excludes from resources the payment of a refundable CTC, and we propose adding this exclusion to § 416.1235. We propose adding a new paragraph (24) and adding paragraph (25) to respectively reflect the exclusions of payments for flood mitigation activities made pursuant to section 1324 of the National Flood Insurance Act of 1968 (42 U.S.C. 4031) and payments made to individuals under the EEOICPA of 2000 (42 U.S.C. 7385e).

We also propose adding a new paragraph to § 416.1212 to extend the home exclusion to victims of domestic abuse who flee an abusive situation, but maintain an ownership interest in an otherwise excluded home. This exclusion would continue until the individual establishes a new principal place of residence or takes other action rendering the home no longer excludable.

Finally, our current rule at § 416.1240(a)(1) provides that, as a prerequisite to qualifying for conditional payments, an individual's total countable liquid resources may not exceed one-fourth the annual FBR. We propose amending § 416.1240(a) to eliminate the limitation on liquid resources within our SSI conditional-payment rule.

**Clarity of These Proposed Rules**

Executive Order (E.O.) 12866, as amended, requires each agency to write all rules in plain language. In addition to your substantive comments on these final rules, we invite your comments on how to make them easier to understand.

*For Example:*

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

**When Will We Start To Use These Rules?**

We will not use these rules until we evaluate the public comments we receive on them, determine whether they should be issued as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will apply them, and summarize and respond to the public comments. Until the effective date of any final rules, we will continue to use our current rules.

**Regulatory Procedures**

*Executive Order 12866*

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the criteria for a significant regulatory action under Executive Order 12866, as amended. Thus, they were subject to OMB review.

*Regulatory Flexibility Act*

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

*Paperwork Reduction Act*

These proposed rules impose no reporting or recordkeeping requirements subject to OMB clearance.

(Catalog of Federal Domestic Assistance Program No. 96.006, Supplemental Security Income)

**List of Subjects in 20 CFR Part 416**

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

Dated: September 17, 2008.

**Michael J. Astrue,**

*Commissioner of Social Security.*

For the reasons set forth in the preamble, we propose to amend subparts K and L of part 416 of chapter III of title 20 of the Code of Federal Regulations as follows:

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

### Subpart K—[Amended]

1. The authority citation for subpart K of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1602, 1611, 1612, 1613, 1614(f), 1621, 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j, 1383, and 1383b); sec. 211, Pub. L. 93–66, 87 Stat. 154 (42 U.S.C. 1382 note).

2. Revise § 416.1110 paragraph (b) to read as follows:

**§ 416.1110 What is earned income.**

* * * * *

(b) *Net earnings from self-employment.* Net earnings from self-employment are your gross income from any trade or business that you operate, less allowable deductions for that trade or business. Net earnings also include your share of profit or loss in any partnership to which you belong. For taxable years beginning before January 1, 2001, net earnings from self-employment under the SSI program are the same net earnings that we would count under the social security retirement insurance program and that you would report on your Federal income tax return. (See § 404.1080 of this chapter.) For taxable years beginning on or after January 1, 2001, net earnings from self-employment under the SSI program will also include the earnings of statutory employees. In addition, for SSI purposes only, we consider statutory employees to be self-employed individuals. Statutory employees are agent- or commission-drivers, certain full-time life insurance salespersons, home workers, and traveling or city salespersons. (See § 404.1008 of this chapter for a more

detailed description of these types of employees.)

* * * * *

## Appendix to Subpart K of Part 416—[Amended]

3. Amend the appendix to subpart K of part 416 by adding new paragraphs (m), (n), and (o) under Part V as follows:

## Appendix to Subpart K of Part 416—List of Types of Income Excluded Under the SSI Program as Provided by Federal Laws Other Than the Social Security Act

* * * * *

**V. Other**

* * * * *

(m) Payments of the refundable child tax credit made under section 24 of the Internal Revenue Code of 1986, pursuant to section 203 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 49, 26 U.S.C. 24 note).

(n) Assistance provided for flood mitigation activities as provided under section 1324 of the National Flood Insurance Act of 1968, pursuant to section 1 of Public Law 109–64 (119 Stat. 1997, 42 U.S.C. 4031).

(o) Payments made to individuals under the Energy Employees Occupational Illness Compensation Program Act of 2000, pursuant to section 1 [Div. C, Title XXXVI, section 3646] of Public Law 106–398 (114 Stat. 1654A–510, 42 U.S.C. 7385e).

## Subpart L—[Amended]

4. The authority citation for subpart L of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1602, 1611, 1612, 1613, 1614(f), 1621, 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j, 1383, and 1383b); sec. 211, Pub. L. 93–66, 87 Stat. 154 (42 U.S.C. 1382 note).

5. Amend § 416.1210 by adding a comma in the introductory sentence after ''(and spouse, if any)'', removing ''and'' from the end of paragraph (t), replacing the period at the end of paragraph (u) with a semicolon followed by ''and'', and adding a new paragraph (v) as follows:

### § 416.1210 Exclusions from resources; general.

* * * * *

(v) Payment of a refundable child tax credit, as provided in § 416.1235.

6. Amend § 416.1212 by:

A. Redesignating current paragraphs (d) through (g) as (e) through (h);

B. Adding a new paragraph (d) to read as set forth below;

C. Amending newly designated paragraph (e)(2)(ii), by removing the reference ''paragraph (e)'' and adding the reference ''paragraph (f)'' in its place;

D. Amending newly designated paragraph (e)(2)(iii), by removing the reference ''paragraph (f)'' and adding the reference ''paragraph (g)'' in its place; and

E. Amending newly designated paragraph (f), by removing the reference ''paragraph (d)(2)(ii) of this section'' and adding the reference, ''paragraph (e)(2)(iii) of this section'' in its place, and by removing the reference ''paragraph (f)'' and adding the reference ''paragraph (g)'' in its place.

### § 416.1212 Exclusion of the home.

* * * * *

(d) *If an individual leaves the principal place of residence due to domestic abuse.* If an individual moves out of his or her home without the intent to return, but is fleeing the home as a victim of domestic abuse, we will not count the home as a resource in determining the individual's eligibility to receive, or continue to receive, SSI payments. In that situation, we will consider the home to be the individual's principal place of residence until such time as the individual establishes a new principal place of residence or otherwise takes action rendering the home no longer excludable.

* * * * *

7. Revise § 416.1235 to read as follows:

### § 416.1235 Exclusion of certain payments related to tax credits.

(a) In determining the resources of an individual (and spouse, if any), we exclude for the 9 months following the month of receipt the following funds received on or after March 2, 2004, the unspent portion of:

(1) Any payment of a refundable credit pursuant to section 32 of the Internal Revenue Code (relating to the earned income tax credit);

(2) Any payment from an employer under section 3507 of the Internal Revenue Code (relating to advance payment of the earned income tax credit); or

(3) Any payment of a refundable credit pursuant to section 24 of the Internal Revenue Code (relating to the child tax credit).

(b) Any unspent funds described in paragraph (a) that are retained until the first moment of the tenth month following their receipt are subject to resource counting at that time.

(c) *Exception:* For any payments described in paragraph (a) received before March 2, 2004, we will exclude for the month following the month of receipt the unspent portion of any such payment.

8. Amend § 416.1236 by revising paragraph (a) (24) and adding new paragraph (a) (25) to read as follows:

### § 416.1236 Exclusions from resources; provided by other statutes.

(a) * * *

(24) Assistance provided for flood mitigation activities under section 1324 of the National Flood Insurance Act of 1968, pursuant to section 1 of Public Law 109–64 (119 Stat. 1997, 42 U.S.C. 4031).

(25) Payments made to individuals under the Energy Employees Occupational Illness Compensation Program Act of 2000, pursuant to section 1 [Div. C. Title XXXVI, section 3646] of Public Law 106–398 (114 Stat. 1654A–510, 42 U.S.C. 7385e).

* * * * *

9. Amend § 416.1240 by revising paragraph (a) to read as follows:

### § 416.1240 Disposition of resources.

(a) Where the resources of an individual (and spouse, if any) are determined to exceed the limitations prescribed in § 416.1205, such individual (and spouse, if any) shall not be eligible for payment except under the conditions provided in this section. Payment will be made to an individual (and spouse, if any) if the individual agrees in writing to:

(1) Dispose of, at current market value, the nonliquid resources (as defined in § 416.1201(c)) in excess of the limitations prescribed in § 416.1205 within the time period specified in § 416.1242; and

(2) Repay any overpayments (as defined in § 416.1244) with the proceeds of such disposition.

* * * * *

[FR Doc. E8–28618 Filed 12–8–08; 8:45 am]

BILLING CODE 4191–02–P

---

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 67

**[Docket No. FEMA–B–1022]**

## Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the

communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

**DATES:** Comments are to be submitted on or before March 9, 2009.

**ADDRESSES:** The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1022, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151, or (e-mail) *bill.blanton@dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or (e-mail) *bill.blanton@dhs.gov*.

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

*Administrative Procedure Act Statement*. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

*National Environmental Policy Act*. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

*Regulatory Flexibility Act*. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

*Executive Order 12866, Regulatory Planning and Review*. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

*Executive Order 13132, Federalism*. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform*. This proposed rule meets the applicable standards of Executive Order 12988.

### List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

## PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

### § 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| **Jefferson County, Alabama, and Incorporated Areas** | | | | |
| Dry Creek | At the confluence with Fivemile Creek; 630 feet upstream of Navajo Trail NE. | +720 | +722 | Unincorporated Areas of Jefferson County. |
| | Just upstream of Chalkville Mountain Road | None | +958 | |
| Griffin Brook | 800 feet upstream of Lakeshore Drive | +634 | +631 | Unincorporated Areas of Jefferson County. |
| | 90 feet upstream of Montgomery Highway | None | +788 | |
| Huckleberry Branch | 200 feet downstream of Tyler Rd | +516 | +514 | Unincorporated Areas of Jefferson County. |
| | 1,500 feet downstream Mountain Oaks Drive | +824 | +814 | |
| Little Shades Creek (Cahaba Basin). | 930 feet upstream of Loch Haven Drive | +431 | +432 | Unincorporated Areas of Jefferson County. |
| | At Pipe Line Road | +625 | +626 | |
| Little Shades Creek (Shades Creek). | Just downstream of Wenonah Oxmoor Rd | +515 | +514 | Unincorporated Areas of Jefferson County. |
| | 2.3 miles south of Alabama Highway 150 | +633 | +632 | |

| Flooding source(s) | Location of referenced elevation** | *Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| Patton Creek | 3,350 feet north of Alabama Highway 150 | +424 | +423 | Unincorporated Areas of Jefferson County. |
| | 310 feet south of West Ridge Dr | +534 | +533 | |
| Pinchgut Creek | 3,540 feet downstream Watterson Pkwy | +690 | +691 | Unincorporated Areas of Jefferson County. |
| | 1.96 miles upstream of Gadsden Hwy | +850 | +846 | |
| Turkey Creek | 0.7 miles downstream Old Bradford Rd | +566 | +565 | Unincorporated Areas of Jefferson County. |
| | 950 feet upstream Eagle Ridge Drive | +880 | +885 | |
| Unnamed Creek 10 | 515 feet downstream of Main St | +605 | +607 | Unincorporated Areas of Jefferson County. |
| | 90 feet downstream Houston Rd | +671 | +667 | |
| Unnamed Creek 11 | Just upstream of Center Point Rd | +627 | +626 | Unincorporated Areas of Jefferson County. |
| | 1,610 feet upstream of Green Crest Dr | +690 | +692 | |
| Unnamed Creek 9 | Just downstream of Pinson Heights Rd | +630 | +631 | Unincorporated Areas of Jefferson County. |
| | Just downstream of Alabama Highway 151 | +630 | +631 | |
| Valley Creek | 0.5 miles upstream of Power Plant Rd | None | +431 | Unincorporated Areas of Jefferson County. |
| | 0.5 miles downstream of Power Plant Rd | None | +440 | |

*National Geodetic Vertical Datum.
+North American Vertical Datum.
#Depth in feet above ground.
**BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**Unincorporated Areas of Jefferson County**

Maps are available for inspection at 716 Richard Arrington, Jr. Blvd., N. Room 260, Birmingham, AL 35203.

**Santa Cruz County, Arizona, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Agua Fria Canyon | Approx. 340 feet upstream from confluence with Santa Cruz River. | +3381 | +3384 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 21,000 feet upstream from confluence with Teruno Canyon. | None | +3700 | |
| Al Harrison Wash | Approx. 290 feet upstream from confluence with Potrero Creek. | +3650 | +3652 | City of Nogales. |
| | Approx. 125 feet downstream of I–19 | None | +3684 | |
| Ephriam Canyon Wash | At the intersection with N Bejarano St | +3815 | +3816 | City of Nogales. |
| | Approx. 130 feet upstream from SR–189 | None | +4002 | |
| Falls Wash | Approx. 150 feet upstream from E Morley Ave | +3802 | +3806 | City of Nogales. |
| | Approx. 225 feet upstream from SR–82 | +3810 | +3816 | |
| Farosa Canyon | Approx. 500 feet downstream from Sycamore Lane | None | +4846 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 110 feet upstream from Sycamore Lane | None | +4854 | |
| Harshaw Creek | Approx. 220 feet upstream from confluence with Sonoita Creek. | +4075 | +4076 | Town of Patagonia. |
| | Approx. 125 feet upstream from Harshaw Ave | None | +4116 | |
| Josephine Canyon | Approx. 270 feet upstream from confluence with Santa Cruz River. | +3281 | +3284 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 9,465 feet upstream from confluence with Josephine Canyon Tributary 5. | +3647 | +3648 | |
| Lyle Canyon | Approx 3,000 feet North along river from Hilltop Lane | None | +4798 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 1,400 feet West along river from Point Pleasant Lane. | None | +4868 | |
| Nogales Wash | At confluence with Potrero Creek | +3612 | +3604 | Unincorporated Areas of Santa Cruz County. |
| | Nogales City Limits Northern Boundary | +3612 | +3656 | |
| Nogales Wash | Intersection of Nogales Wash and the Nogales City Limits Northern Boundary. | +3656 | +3656 | City of Nogales. |
| | At International Border | +3873 | +3874 | |
| Peck Canyon | Approx. 650 feet upstream from confluence with Santa Cruz River. | +3343 | +3344 | Unincorporated Areas of Santa Cruz County. |

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| | Approx. 1,675 feet upstream from confluence with Ramanote Canyon. | None | +3598 | |
| Potrero Creek | Intersection of Portrero Creek and the Nogales City Limits Western Boundary. | +3743 | +3744 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 9,850 feet upstream from W Meadow Hills Drive. | None | +3806 | |
| Potrero Creek | Approx. 100 feet upstream from confluence with Santa Cruz River. | +3465 | +3466 | City of Nogales. |
| | Intersection of Portrero Creek and the Nogales City Limits Western Boundary. | +3743 | +3744 | |
| Puerto Canyon Wash | Approx. 350 feet downstream from Esplendito (road) | None | +3166 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 1,575 feet upstream from Puerto Canyon Road. | None | +3298 | |
| Redrock Canyon | Approx. 75 feet from confluence with Harshaw Creek | +4096 | +4094 | Town of Patagonia. |
| | Approx. 110 feet upstream from Redrock Drive | None | +4114 | |
| Santa Cruz River | Approx. 2,000 feet upstream from confluence with Sopori Wash. | +3042 | +3040 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 8,000 feet upstream from confluence with Maria Santisima del Carmen Wash. | +3730 | +3732 | |
| Sonoita Creek | At confluence with Santa Cruz River | +3431 | +3430 | Unincorporated Areas of Santa Cruz County. |
| | Approx. 4,440 feet downstream from De La Sonoita (road). | +3559 | +3558 | |
| Sonoita Creek | Approx. 1,100 feet upstream from Blue Haven Rd | +4029 | +4028 | Town of Patagonia. |
| | Approx. 1,460 feet upstream from Cross Creed Rd | None | +4130 | |
| Sonoita Tributary A | Approx. 50 feet upstream from N Second Ave | +4061 | +4066 | Town of Patagonia. |
| | Approx. 380 feet upstream from E Pennsylvania Ave | +4079 | +4080 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
^ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Nogales**

Maps are available for inspection at 2150 N. Congress Dr., No. 117, Nogales, AZ 85621.

**Town of Patagonia**

Maps are available for inspection at P.O. Box 767, 310 McKeown Ave, Patagonia, AZ 85624.

**Unincorporated Areas of Santa Cruz County**

Maps are available for inspection at 2150 N. Congress Dr., No. 117, Nogales, AZ 85621.

**Madison County, Mississippi, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Bear Creek | 9,400 feet upstream of Weiss Road | +266 | +266 | Unincorporated Areas of Madison County. |
| | 1,600 feet downstream of Reunion Parkway | +297 | +287 | |
| Beaver Creek | 400 feet upstream of U.S. HWY 51 | +317 | +316 | City of Ridgeland. |
| | 400 feet upstream of Planters Grove | +326 | +323 | |
| Brashear Creek | 1,800 feet downstream of Grandview Blvd | +332 | +328 | City of Madison, Unincorporated Areas of Madison County. |
| | 100 feet upstream of Highland Colony Parkway | +365 | +350 | |
| Panther Creek | 1,800 feet upstream of Stokes Road | +214 | +214 | Unincorporated Areas of Madison County. |
| | 5,000 feet downstream of Catlett Road | +235 | +240 | |
| Purple Creek | 2,000 feet downstream of U.S. HWY 51 | +317 | +314 | City of Ridgeland. |
| | 1,500 feet downstream of Interstate 55 | +326 | +332 | |
| Reunion Lake #1 | Entire shoreline of Reunion Lake #1 | None | +331 | Unincorporated Areas of Madison County. |
| Reunion Lake #2 | Entire shoreline of Reunion Lake #2 | None | +327 | Unincorporated Areas of Madison County. |
| School Creek | 500 feet upstream of Old Canton Road | +298 | +298 | City of Ridgeland. |
| | 1,100 feet downstream of Lake Harbour Drive | +313 | +309 | |
| School Creek Tributary 1 | 600 feet downstream of Lake Harbour Drive | None | +312 | City of Ridgeland. |

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| | 700 feet upstream of Wendover Way | None | +328 | |
| School Creek Tributary 2 | 750 feet downstream of Camellia Lane | None | +325 | City of Ridgeland. |
| | 350 feet downstream of Camellia Lane | None | +328 | |
| Stream 0 | 200 feet upstream of Interstate 55 | +268 | +270 | Unincorporated Areas of Madison County. |
| | 200 feet downstream of Gluckstadt Road | +272 | +272 | |
| Stream Q | 1,800 feet upstream of Interstate 55 | +273 | +274 | Unincorporated Areas of Madison County. |
| | 800 feet upstream of Gluckstadt Road | +299 | +295 | |
| Stream R | 4,500 feet downstream of Dewees Road | +299 | +299 | Unincorporated Areas of Madison County. |
| | 1,100 feet downstream of Dewees Road | +304 | +304 | |
| White Oak Creek Tributary 1 | 250 feet upstream of Oakhurst Trail | None | +360 | City of Ridgeland. |
| | 600 feet downstream of Bridgewater Road | None | +375 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
^ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Madison**
Maps are available for inspection at 525 Post Oak Road, Madison, MS 39110.

**City of Ridgeland**
Maps are available for inspection at 304 Highway 51, Ridgeland, MS 39157.

**Unincorporated Areas of Madison County**
Maps are available for inspection at 146 West Center Street, Canton, MS 39046.

**Valencia County, New Mexico, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Rancho Cielo Arroyo 3 | Intersection of the Belen Highline Canal and the Rancho Cielo Arroyo 3. | None | +4876 | Unincorporated Areas of Valencia County. |
| | Approximately at the Belen Highline Canal to approximately 7,900 feet upstream of Interstate 25. | None | +5018 | |
| Rancho Cielo Arroyo 3, Tributary #1. | Confluence of Rancho Cielo Arroyo 3 and Rancho Cielo Arroyo 3, Tributary #1. | None | +4840 | Unincorporated Areas of Valencia County. |
| | From the confluence with Rancho Cielo Arroyo 3 to approximately 2,260 feet upstream of the confluence with Rancho Cielo Arroyo 3. | None | +4987 | |
| Rancho Cielo Arroyo 5, Tributary #1. | Confluence of Rancho Cielo Arroyo 5 and Rancho Cielo Arroyo 5, Tributary #1. | None | +4931 | Unincorporated Areas of Valencia County. |
| | From the confluence with Rancho Cielo Arroyo 5 to approximately 5,370 feet upstream of the confluence with Rancho Cielo Arroyo 5. | None | +5056 | |
| Rancho Cielo Arroyo 6 | Intersection of Belen Highline Canal and Rancho Cielo Arroyo 6. | None | +4873 | Unincorporated Areas of Valencia County. |
| | Approximately at the Belen Highline Canal to approximately 31,900 feet upstream of Interstate 25. | None | +4873 | |
| Rancho Cielo Arroyo 8 | Intersection of Rancho Cielo Arroyo 8 and Belen Highline Canal. | None | +4880 | Unincorporated Areas of Valencia County. |
| | From a point starting at the Belen Highline Canal to a point approximately 32,700 feet upstream of Interstate 25. | None | +5274 | |
| Rancho Cielo Arroyo 9 | Intersection of Rancho Cielo Arroyo 9 and Belen Highline Canal. | None | +4877 | Unincorporated Areas of Valencia County. |
| | Approximately at the Belen Highline Canal 14,200 feet upstream of Interstate 25. | None | +5145 | |
| Rancho Cielo Arroyo 9, Tributary #1. | Confluence of Rancho Cielo Arroyo 9 and Rancho Cielo Arroyo 9, Tributary #1. | None | +5018 | Unincorporated Areas of Valencia County. |
| | From the confluence with Rancho Cielo Arroyo 9 to approximately 6,150 feet upstream of the confluence with Rancho Cielo Arroyo 9. | None | +5176 | |
| Rancho Cielo Arrroyo 5 | Intersection of Rancho Cielo Arroyo 5 and Belen Highline Canal. | None | +4870 | Unincorporated Areas of Valencia County. |

| Flooding source(s) | Location of referenced elevation** | *Elevation in feet (NGVD) +Elevation in feet (NAVD) #Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| | Approximately at the Belen Highline Canal to approximately 16,700 feet upstream of Interstate 25. | None | +5056 | |

*National Geodetic Vertical Datum.
+North American Vertical Datum.
#Depth in feet above ground.
**BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**Unincorporated Areas of Valencia County**

Maps are available for inspection at C/O Floodplain Administrator, 444 Los Luna Ave., Los Lunas, NM 87031.

**Clinton County, Ohio, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Lytle Creek | 500 feet upstream of Railroad | None | +1007 | City of Wilmington. |
| | 20 feet upstream of 4C Bicentennial Trail | None | +1020 | |
| Lytle Creek | 1,700 feet downstream of Nelson Avenue | None | +966 | Unincorporated Areas of Clinton County. |
| | 1,000 feet downstream of Nelson Avenue | None | +971 | |
| | 20 feet upstream of 4C Bicentennial Trail | None | +1020 | |
| | 800 feet upstream of 4C Bicentennial Trail | None | +1021 | |
| Mary's Fork | Starting just upstream of CSX Conrail | None | +1043 | Unincorporated Areas of Clinton County. |
| | Just downstream of Howard Street | None | +1046 | |
| Stonelick Creek | Approximately 1,600 feet downstream of State Highway 123. | None | +956 | Unincorporated Areas of Clinton County. |
| | Approximately 1,200 feet downstream of State Highway 123. | None | +957 | |
| Stonelick Creek | Approximately 3,400 feet downstream of Westboro Road. | None | +971 | Village of Blanchester. |
| | Approximately 2,000 feet downstream of Westboro Road. | None | +974 | |
| | Approximately 1,800 feet downstream of Westboro Road. | None | +974 | |
| | Approximately 1,700 feet downstream of Westboro Road. | None | +975 | |
| Wilson Creek | Approximately 1,800 feet downstream of Polk Road | None | +1036 | Unincorporated Areas of Clinton County. |
| | Approximately 1,200 feet upstream of Polk Road | None | +1039 | |

*National Geodetic Vertical Datum.
+North American Vertical Datum.
#Depth in feet above ground.
**BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Wilmington**

Maps are available for inspection at 69 N. South Street, Wilmington, OH 45177.

**Unincorporated Areas of Clinton County**

Maps are available for inspection at 1326 Fife Avenue, Wilmington, OH 45177.

**Village of Blanchester**

Maps are available for inspection at 318 E. Main Street, Blanchester, OH 45107.

**Rogers County, Oklahoma, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Elm Creek | Approximately 797 feet upstream of the confluence of Elm Creek and Tributary F. | +634 | +633 | City of Owasso, Unincorporated Areas of Rogers County. |
| | Approximately 630 feet downstream of the confluence of Elm Creek and Tributary H. | +643 | +647 | |

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| Elm Creek | Approximately 1,590 feet downstream of the confluence of Pine Valley Tributary and Elm Creek. | None | +623 | Unincorporated Areas of Rogers County, City of Owasso. |
| | Approximately 1,920 feet upstream of confluence of Lake Valley Tributary and Elm Creek. | None | +685 | |
| Pine Valley Tributary | Approximately 165 feet upstream of the confluence of Elm Creek and Pine Valley Tributary. | None | +626 | City of Owasso, Unincorporated Areas of Rogers County. |
| | Approximately 355 feet downstream of North 153rd East Avenue. | None | +645 | |
| Pine Valley Tributary | At the confluence of Elm Creek and Pine Valley Tributary. | None | +630 | Unincorporated Areas of Rogers County, City of Owasso. |
| | Approximately 83 feet upstream of East 96th Street North. | None | +679 | |
| Tributary B | At North 145 East Avenue and Tributary B | None | +630 | Unincorporated Areas of Rogers County. |
| | Approximately 2,750 feet downstream from North 193th East Avenue. | None | +750 | |
| Tributary F | At the confluence of Tributary F and Elm Creek | None | +632 | Unincorporated Areas of Rogers County. |
| | Approximately 133 feet downstream of North 161st East Avenue. | None | +667 | |
| Tributary G | At the confluence of Elm Creek and Tributary G | None | +648 | Unincorporated Areas of Rogers County. |
| | Approximately 2,581 feet downstream of North 177th East Avenue. | None | +686 | |
| Tributary G–1 | At the confluence of Tributary G and Tributary G–1 | None | +663 | Unincorporated Areas of Rogers County. |
| | Approximately 1,643 feet downstream of North 177th East Avenue. | None | +688 | |
| Tributary H | At the confluence of Tributary H and Elm Creek | None | +647 | Unincorporated Areas of Rogers County. |
| | Approximately 158 feet upstream of East 116th Street North. | None | +699 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Owasso**

Maps are available for inspection at 301 W. 2nd Ave., Owasso, OK 74055.

**Unincorporated Areas of Rogers County**

Maps are available for inspection at 219 South Missouri Street, Claremore, OK 74017.

**Wagoner County, Oklahoma, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Arkansas River | Approximately 6,809 feet from U.S. 69 up stream to limit of detailed study. | None | +516 | Unincorporated Areas of Wagoner County. |
| | Approximately 15,526 feet from U.S. 69 down stream to limit of detailed study. | None | +523 | |
| Arkansas River (Corp of Engineers). | Approximately 10,354 feet from Highway 104 down stream to limit of detailed study. | None | +551 | Unincorporated Areas of Wagoner County. |
| | Limit of detailed study at Tulsa County/Wagoner County Line. | None | +582 | |
| East Coal Creek | Approximately 386 feet up stream from River Park Avenue. | None | +561 | City of Wagoner. |
| | Approximately 213 feet upstream of Railroad Culvert | None | +570 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Wagoner**

Maps are available for inspection at Office of County Commissioner, 306 E. Cherokee St., Wagoner, OK 74107.

**Unincorporated Areas of Wagoner County**

Maps are available for inspection at Office of County Commissioner, 306 E. Cherokee St., Wagoner, OK 74107.

**Marathon County, Wyoming, and Incorporated Areas**

| | | | | |
|---|---|---|---|---|
| Bull Junior Creek | At the mouth of the Wisconsin River | +1150 | +1147 | City of Mosinee. |
| | Approximately 450 feet downstream of Old U.S. Highway 51. | +1150 | +1149 | |
| Eau Claire River | At Brooks and Ross Dam | +1167 | +1168 | City of Schofield, City of Wausau. |
| | Approximately 1.1 miles upstream of Brooks and Ross Dam. | +1171 | +1169 | |
| Wisconsin River | Just upstream of the Dam in the City of Mosinee | +1150 | +1147 | Unincorporated Areas of Marathon County, City of Mosinee, Village of Kronenwetter, Village of Rothschild. |
| | Just downstream of Rothschild Dam | +1160 | +1159 | |

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES**

**City of Mosinee**

Maps are available for inspection at City Hall, 225 Main Street, Mosinee, WI 54455.

**City of Schofield**

Maps are available for inspection at Public Works/Building Inspection Department, 200 Park Street, Schofield, WI 54476.

**City of Wausau**

Maps are available for inspection at Inspections Department, 407 Grant Street, Wausau, WI 54403.

**Unincorporated Areas of Marathon County**

Maps are available for inspection at Conservation, Planning and Zoning Office, 210 River Drive, Wausau, WI 54403.

**Village of Kronenwetter**

Maps are available for inspection at Village of Kronenwetter Municipal Center, 1582 Kronenwetter Drive, Kronenwetter, WI 54455.

**Village of Rothschild**

Maps are available for inspection at Village Hall, 211 Grand Avenue, Rothschild, WI 54470.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: November 26, 2008.

**Michael K. Buckley,**

*Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E8–29068 Filed 12–8–08; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

## 44 CFR Part 67

**[Docket No. FEMA–B–1016]**

## Proposed Flood Elevation Determinations; Correction

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule; correction.

**SUMMARY:** This document corrects the table to a proposed rule published in the **Federal Register** of November 5, 2008. This correction clarifies the table representing the flooding source(s), location of referenced elevation, the effective and modified elevation in feet and the communities affected for Marshall County, Illinois, and Incorporated Areas; specifically, for flooding source ''Sandy Creek

Tributary,'' that was previously published.

**FOR FURTHER INFORMATION CONTACT:** William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) publishes proposed determinations of Base (1-percent-annual-chance) Flood Elevations (BFEs) and modified BFEs for communities participating in the National Flood Insurance Program (NFIP), in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed BFEs are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

**Correction**

In proposed rule FR Doc. E8–26306, beginning on page 65811 in the issue of November 5, 2008, make the following corrections, in the table published under the authority of 44 CFR 67.4. On page 65813, in § 67.4, in the table with center heading Marshall County, Illinois, and Incorporated Areas, the flooding source, location of referenced elevation, the effective and modified elevation in feet and the communities affected for flooding source ''Sandy Creek Tributary'', needs to be corrected to read as follows:

| Flooding source(s) | Location of referenced elevation ** | * Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground | | Communities affected |
|---|---|---|---|---|
| | | Effective | Modified | |
| * | * | * | * | * |
| **Marshall County, Illinois and Incorporated Areas** | | | | |
| * | * | * | * | * |
| Sandy Creek Tributary ..... | From intersection of County Highway 14 ..... | None | +673 | Marshall County (Unincorporated Areas) and City of Wenona. |
| | To approximately 140 feet northwest of the intersection of Hickory Street and South 5th Street in the City of Wenona. | None | +686 | |
| * | * | * | * | * |

Dated: November 26, 2008.

**Michael K. Buckley,**

*Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E8–29069 Filed 12–8–08; 8:45 am]

BILLING CODE 9110–12–P

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[FWS–R8–ES–2008–0067; MO 9221050083–B2]**

## Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Reclassify the Delta Smelt (Hypomesus transpacificus) From Threatened to Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding; reopening of the information solicitation period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public information solicitation period on the July 10, 2008, 90-day finding on a petition to reclassify the delta smelt (*Hypomesus transpacificus*) from threatened to endangered under the Endangered Species Act of 1973, as amended (Act). This action will provide all interested parties with an additional opportunity to submit information and materials on the status of delta smelt. Information previously submitted need not be resubmitted as it will already be incorporated into the public record and will be fully considered in the 12-month finding.

**DATES:** We are reopening the public information solicitation period and request that we receive information on or before February 9, 2009.

**ADDRESSES:** You may submit information by one of the following methods:

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

• *U.S. mail or hand-delivery:* Public Comments Processing, *Attn:* FWS–R8–ES–2008–0067; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all submissions on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the ''Information Solicited'' section below for more details).

**FOR FURTHER INFORMATION CONTACT:** Susan Moore, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, CA 95825; telephone 916–414–6600; facsimile 916–414–6712. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service at 800–877–8339

**SUPPLEMENTARY INFORMATION:**

## Information Solicited

We are soliciting information during this reopened information solicitation period on the status of delta smelt (*Hypomesus transpacificus*). We published a 90-day finding on a petition to reclassify the delta smelt from threatened to endangered in the **Federal Register** on July 10, 2008 (73 FR 39639), which was made available to the public on the Federal eRulemaking Portal: *http://www.regulations.gov* on July 10, 2008. If you submitted information previously on the status of delta smelt during the previous information solicitation period, please do not resubmit it. This information has been incorporated into the public record and will be fully considered in the preparation of our 12-month finding.

You may submit your information and materials concerning the 90-day finding by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and materials we receive, as well as supporting documentation we used in preparing the 90-day finding for delta smelt, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

On July 10, 2008, we published a notice in the **Federal Register** (73 FR 39639) announcing the availability of the 90-day finding on a petition to reclassify the delta smelt (*Hypomesus transpacificus*) from threatened to endangered. Due to an unintentional error on Regulations.gov, information was not able to be submitted electronically by the public during the initial 60-day information solicitation period. Therefore, we are reopening the information solicitation period to allow all interested parties to submit information and materials on the status of delta smelt.

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a status review of the species.

It is important to note that the ''substantial information'' standard for a 90-day finding is in contrast to the Act's ''best scientific and commercial data'' standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have completed a thorough status review of the species, which is conducted following a positive 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a positive 90-day finding does not mean that the 12-month finding also will be positive.

**Authority:** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: November 24, 2008.

**Deputy Director,**

*U.S. Fish and Wildlife Service.*

[FR Doc. E8–28753 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–55–P

---

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R2–ES–2008–0055; 92210–1117–0000–B4]**

**RIN 1018–AV46**

# Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover (Charadrius melodus) in Texas

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis and draft environmental assessment, correction, and amended required determinations.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed revised designation of critical habitat for the wintering population of the piping plover (*Charadrius melodus*) in Texas under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) and a draft environmental assessment of the proposed critical habitat designation and a corrected area estimated for 19 critical habitat units vacated by the court, and amended required determinations. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, the draft environmental assessment, the corrected acreage figures, and our amended required determinations. Comments previously submitted on this rulemaking do not need to be resubmitted, as they will be

incorporated into the public record and fully considered when preparing our final determination.

**DATES:** *Written Comments:* We will accept comments received or postmarked on or before January 8, 2009. Any comments received after the closing date may not be considered in the final designation of critical habitat.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, *Attn:* RIN 1018–AV46, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Allan Strand, Field Supervisor, U.S. Fish and Wildlife Service, Corpus Christi Ecological Services Field Office, 6300 Ocean Drive TAMU–CC, Unit 5837, Corpus Christi, TX 78412; telephone 361/994–9005; facsimile 361/994–8262. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

We will accept written comments and information during this reopened comment period on our May 20, 2008, proposed revised critical habitat designation for the wintering population of the piping plover (*Charadrius melodus*) in Texas (73 FR 29294), the DEA of the proposed revised designation, the draft environmental assessment of the proposed revised designation, the corrected acreage estimates provided in this document, and our amended required determinations for the proposed revised designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) Specific information on:

- The amount and distribution of wintering piping plover habitat in the 19 court-vacated units and areas adjacent to those 19 units in Texas, and
- What areas occupied at the time of listing, but located within or adjacent to these specific units, are essential to the conservation of the species and why.

(2) Information on the effects of Hurricane Ike in 2008, if any, on the status of the wintering piping plover and its habitat in coastal Texas from Brazoria County to Cameron County and information on the impact of hurricanes in general on future development and beach cleanup following hurricanes.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(4) Information on whether the DEA identifies all State and local costs and benefits attributable to the proposed revised critical habitat designation, and information on any costs or benefits that we have overlooked.

(5) Information on whether the DEA uses appropriate methods and assumptions to estimate the impacts of future oil and gas development, including the frequency, type, location, and amount of seismic activity and drilling activity. In particular:

- Whether the conclusions of the DEA are sufficiently reliable to be useful in assessing the benefits of excluding particular areas from the final designation, and
- Information that would allow us to make a more reliable prediction of the impacts on future oil and gas development of designation of any particular area as critical habitat.

(6) Any foreseeable economic, national security, or other potential impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(7) The appropriateness of the possible exclusion of approximately 28,474 acres (ac) (11,523 hectares (ha)) of wintering piping plover habitat from the final designation based on the benefits to the conservation of the species and its habitat provided by the Comprehensive Conservation Plans (CCPs) being drafted for National Wildlife Refuge (NWR) lands (see the Areas Considered for Exclusion Under Section 4(b)(2) of the Act section for further discussion). Specifically:

(a) The benefits to the conservation of the species provided by a CCP;

(b) How the CCPs address the physical and biological features in the absence of designated critical habitat;

(c) The specific conservation benefits to the wintering piping plover that would result from designation;

(d) The certainty of implementation of the CCPs; and

(e) The benefits of excluding from the critical habitat designation the areas covered by the CCPs.

We are particularly interested in knowing how existing or future NWR partnerships may be positively or negatively affected by a designation, or through exclusion from critical habitat;

(8) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(9) Whether there are areas we previously designated, but are not proposing for revised designation here, that we should include in our critical habitat designation.

(10) The existence of any conservation or management plans being implemented by public or private land management agencies or owners on lands proposed for designation that we should consider in connection with possible exclusion of those lands from the designation under section 4(b)(2) of the Act. Please include information on any benefits (educational, regulatory, etc.) of including or excluding lands from this proposed designation. We are interested in knowing how partnerships may be positively or negatively affected by a designation, or through exclusion from critical habitat, and costs and other relevant impacts associated with the designation.

(11) Whether we should exclude any other areas from critical habitat, and why, including an analysis of the benefits of including and excluding any such area from the designation.

(12) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed revised designation and, in particular, any impacts on seismic studies for oil and gas drilling, and the benefits of including or excluding areas that exhibit these impacts.

If you submitted comments or information during the initial comment period from May 20, 2008, to July 21, 2008, on the proposed rule, they need not be resubmitted. Comments previously submitted are included in the public record, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised designation of critical habitat for the wintering population of the piping plover in Texas will take into consideration all written comments we receive and any additional information we receive during the comment period. On the basis of public comments, we may, during the development of our

final determination, find that areas proposed do not meet the definition of critical habitat, are not essential, or are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning our proposed rule, the associated DEA, the associated draft environmental assessment, the corrected area estimates, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov* your entire comment—including your personal identifying information—will be posted on the Web site. If you submit personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Corpus Christi Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the revised proposed rule, the DEA, and the draft environmental assessment on the Internet at *http://www.regulations.gov*, or by mail from the Corpus Christi Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

## Background

The piping plover was listed as endangered in the Great Lakes watershed and threatened elsewhere in its range on December 11, 1985 (50 FR 50726); critical habitat was not designated at the time of listing. On July 10, 2001, we designated 137 areas along the coasts of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas as critical habitat for the wintering population of the piping plover (66 FR 36038). On March 20, 2006, the Texas General Land Office filed suit against the Service challenging designation of 19 of 37 units of critical habitat along the Texas coast. In a July 26, 2006, stipulated settlement agreement and court order, the court vacated and remanded the designation of Units 3, 4, 7, 8, 9 ,10, 14, 15, 16, 17, 18, 19, 22, 23, 27, 28, 31, 32, and 33 for us develop a new rule. The settlement stipulated that, if prudent, a proposed rule would be submitted to the **Federal Register** for publication on or before May 8, 2008, and a final rule by May 8, 2009.

On May 20, 2008, we published a proposed rule (73 FR 29294) to revise designation for 18 of the 19 vacated units of critical habitat for wintering piping plovers in Texas; we did not re-propose Unit TX–17 for designation. (Please refer to our proposed rule for the reason why lands within this unit were not reproposed.) The proposed revised critical habitat is located along nine coastal Texas counties (Cameron, Willacy, Kenedy, Kleberg, Nueces, Aransas, Calhoun, Matagorda, and Brazoria), totaling approximately 138,881 acres (ac) (56,206 hectares (ha)). Units that were not vacated remain as described in the 2001 final designation.

In our 2008 revised proposed rule, we also stated that we intend to consider the possible exclusion of federally owned National Wildlife Refuge lands in units TX–3, TX–4, TX–16, TX–18, TX–19, and TX–31 from the final critical habitat designation under section 4(b)(2) of the Act. These lands are to be covered under Comprehensive Conservation Plans (CCPs) that are currently being drafted. We will further consider the possible exclusion of the areas covered by the CCPs being drafted once the drafts are released and if they are released within a timeframe that is reasonable for evaluation for this final designation. We will also consider exclusions of any other areas identified in the proposed rule, based on comments we receive and our assessments of the benefits of inclusion and the benefits of exclusion of those areas.

The 18 proposed revised units constitute our best assessment of those areas containing features essential to the conservation of the species. We will submit for publication in the **Federal Register** a final revised critical habitat designation for the wintering population of the piping plover on or before May 8, 2009.

Also, we acknowledge that Hurricane Ike, which struck the Texas coast on September 13, 2008, may have rearranged some critical habitat features essential to the species. We have reviewed recent information, including imagery available from the National Oceanic and Atmospheric Administration, and found little or no effect of the hurricane on the proposed designated areas. We are requesting additional information from the public on possible changes due to Hurricane Ike.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

## Corrected Area Estimates for Vacated Critical Habitat Units

By this notice, we are notifying the public of a correction in area estimates vacated by the court. In our 2008 proposed revised critical habitat designation, we published a table (Table 1) showing the number of acres (hectares) in each unit vacated by the court and the area proposed for those units. The area estimates for the vacated units were incorrect. We have revised Table 1 with the correct acres (hectares) that were published in the July 10, 2001, rule designating critical habitat for the wintering population of the piping plover in eight Southeastern states (66 FR 36038). The total acreage proposed remains unchanged.

TABLE 1—ACRES (HECTARES) OF VACATED AND PROPOSED REVISED CRITICAL HABITAT UNITS FOR THE WINTERING POPULATION OF THE PIPING PLOVER IN TEXAS

| Unit | Acres (hectares) | |
|---|---|---|
| | Vacated | Proposed |
| TX–03 | 26,983 (10,924) | 107,673 (43,574) |
| TX–04 | 12,307 (4,980) | 17,218 (6,969) |
| TX–07 | 104 (42) | 295 (120) |
| TX–08 | 239 (97) | 620 (251) |
| TX–09 | 323 (130) | 171 (69) |
| TX–10 | 216 (87) | 344 (139) |
| TX–14 | 481 (194) | 590 (239) |
| TX–15 | 1,106 (447) | 805 (325) |
| TX–16 | 463 (187) | 1,376 (557) |
| TX–17 | 14 (5) | ([1]) |
| TX–18 | 7,539 (3,051) | 2,467 (999) |
| TX–19 | 976 (395) | 2,419 (979) |
| TX–22 | 1,114 (450) | 545 (221) |
| TX–23 | 769 (311) | 1,808 (732) |
| TX–27 | 728 (295) | 906 (367) |
| TX–28 | 321 (129) | 478 (193) |
| TX–31 | 410 (166) | 399 (161) |
| TX–32 | 269 (108) | 555 (225) |
| TX–33 | 388 (157) | 212 (86) |
| Total | 54,750 (22,155) | 138,881 (56,206) |

[1] N/A.

**Draft Economic Analysis**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a DEA of the proposed revised critical habitat designation based on our May 20, 2008, proposed revised rule to designate critical habitat for the wintering piping plover in Texas.

The purpose of the DEA is describe and, if possible, quantify the baseline and incremental economic impacts of all potential conservation efforts for the wintering piping plover in Texas in the proposed revised units. Baseline impacts represent the existing state of regulation prior to the designation of critical habitat and include the potential economic impacts of all actions relating to the conservation of the wintering piping plover already accorded the species under the Federal listing (including costs associated with sections 4, 7, and 10 of the Act) and other Federal, State, and local laws that aid habitat conservation in the study area. Baseline costs will occur regardless of whether we designate critical habitat. Incremental impacts are those potential future economic impacts of conservation actions relating to the designations of critical habitat; these impacts would not be expected to occur without the designation of critical habitat for the wintering piping plover. The DEA describes economic impacts of wintering piping plover conservation efforts on the following categories of activity: (1) Oil and gas development activities, (2) residential and commercial development, (3) recreation, and (4) marine construction and other activities. In addition, analysis of the estimated baseline and incremental impacts include administrative costs of section 7 compliance for all affected activities.

The DEA estimates total pre-designation baseline impacts (1985 to 2007) for all 18 proposed revised units to be equivalent to a present value of $1.7 to $3.6 million, assuming a 3 percent discount rate, and $2.6 to $5.4 million, assuming a 7 percent discount rate. Post-designation baseline impacts (2009 to 2028) for all proposed revised units are estimated to be $0.2 to $1.2 million annually, assuming a 3 percent discount rate, and $0.2 to $1.3 million annually, assuming a 7 percent discount rate. Oil and gas industry impacts represent 40 percent of the total high-end, post-designation baseline costs.

The post-designation incremental impacts (2009 to 2028) for all proposed revised units are estimated to range from $0.6 to $4.9 million annually, assuming a 3 percent discount rate, and $0.6 to $5.1 million annually, assuming a 7 percent discount rate. The majority of incremental impacts associated with the proposed revised rule (98 percent) are anticipated to be associated with oil and gas development activities. However, no incremental impacts were associated with seismic survey efforts related to those activities. Due to the short-term nature of those impacts, the DEA assigns any costs of seismic survey efforts attributable to plover conservation to the baseline, as those costs would be incurred regardless of the designation of critical habitat.

Because oil and gas development activities make up such a large percentage of the estimated incremental impacts associated with the proposed revised rule, we are specifically seeking comment on whether the estimates in the DEA are sufficiently reliable to be useful in assessing the benefits of including or excluding particular areas from the final designation. As noted in the DEA, the level oil and gas activities generally are highly variable, in part due to fluctuations in the price of oil and gas. Even more difficult to predict is the precise location of oil and gas activities. The figures in the DEA are based on a variety of assumptions, which may turn out not to be true. In particular, the DEA assumes that the number of wells drilled in the next twenty years will be exactly correlated with the wells drilled over the last eighteen years. In addition, the DEA assumes that the distribution of new wells across the proposed critical habitat units will be identical to that of the last eighteen years. To the extent that these assumptions turn out to be incorrect, the cost figures per unit will also be incorrect. We note that it is likely that the reliability of past activity as a surrogate for future activity will

decrease over time. Thus, it may be more likely that oil and gas activity over the next five years will more closely resemble the last eighteen years than will the entire twenty-year period used in the DEA.

Due to the uncertainty of the conclusions of the DEA with respect to oil and gas activities, we also are specifically asking for information that would allow us to make a more reliable prediction of the impacts on future oil and gas development of designation of any particular area as critical habitat.

The DEA considers the potential economic effects of all actions relating to the conservation of the wintering piping plover in Texas over the next 20 years, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of critical habitat. The DEA further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the species in areas containing features essential to the conservation of the species.

The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector.

Finally, the DEA looks retrospectively at costs that have been incurred since we listed the piping plover as threatened on December 11, 1985, and considers those costs that may occur in the 20 years following the revised designation of critical habitat.

As stated earlier, we are soliciting data and comments from the public on this DEA, our draft environmental assessment, and on all aspects of the revised proposed rule and our amended determinations. A copy of the DEA is available on *http://www.regulations.gov* or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. Our supporting record will reflect any new information used in making the final designation. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

**National Environmental Policy Act (NEPA)**

It is our position that, outside the Jurisdiction of the Tenth Federal Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the ESA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995)). However, a court ruling in *Cape Hatteras Access Preservation Alliance* v. *U.S. Department of Interior* (344 F. Supp. 2d 108 (D.D.C. 2004)) ordered us to revise the critical habitat designation for wintering piping plovers in North Carolina and to prepare an environmental analysis of the proposed revised designation. To comply with that court's order, we prepared an environmental assessment for that action under NEPA as implemented by the Council on Environmental Quality regulations (40 CFR 1500–1508) and according to the Department of the Interior's NEPA procedures. As an exercise of our discretion, we have chosen to prepare an environmental assessment for the proposed revised critical habitat designation for the wintering population of the piping plover in Texas. The draft environmental assessment is based on the May 2008 proposed rule. The scope of the draft environmental assessment includes an evaluation of the impact of the proposed designation of the 18 revised critical habitat units for the wintering population of the piping plover in Texas. The draft environmental assessment presents the purpose of and need for critical habitat designation, the No Action and Preferred alternatives, and an evaluation of the direct, indirect, and cumulative effects of the alternatives.

The environmental assessment will be used by the Service to determine if critical habitat should be revised as proposed, if the Action Alternative requires refinement, or if further analyses are needed through preparation of an Environmental Impact Statement. If the Action Alternative is selected as described, or with minimal changes, and no further environmental analyses are needed, then the Service will conclude the NEPA process by issuing a Finding of No Significant Impact.

As stated earlier, we solicit data and comments from the public on this draft environmental assessment, as well as on all other aspects of the proposed revision. A copy of the draft environmental assessment is available on *http://www.regulations.gov* or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period.

**Required Determinations—Amended**

In our May 20, 2008, proposed rule, we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders was available in the DEA. We have now made use of the DEA to make our determinations. In this document we affirm the information contained in the proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on the information within the DEA, we revise our required determinations concerning E.O. 12866, the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

*Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this proposed revised rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual economic 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 rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule will raise novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2) (SBREFA)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this analysis as part of our final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised critical habitat designation for wintering piping plovers in Texas would affect a substantial number of small entities, we considered the number of affected small entities within particular types of economic activities (*e.g.*, residential and commercial development, agriculture, oil and gas production). In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant impact on a substantial number of small entities, we consider each industry or category individually. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small business entities resulting from the implementation of conservation actions related to the proposed revision to critical habitat for the wintering population of the piping plover in Texas. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in chapters 2 through 6, and evaluates the potential for economic impacts related to activity categories including oil and gas activities, residential and commercial development, recreation activities, and marine construction and other activities. The DEA concludes that small oil and gas businesses are unlikely to be involved in future oil and gas projects over the next 20 years because currently they represent only 2 percent of the oil and gas industry in that area. Few economic impacts on recreational beach use are anticipated with the majority of the impacts borne by cities carrying out beach maintenance activities. Only two of the cities in the affected area, Port Aransas and South Padre Island, are small enough to be considered small entities under SBREFA. Annually, the impacts related to beach maintenance activities for these two cities are estimated to be $5,850 to $9,290 because these maintenance activities require permits from the U.S. Army Corps of Engineers, resulting in the Service entering into section 7 consultations with that Federal agency. Thus, most of the increased impacts on beach maintenance activities will not be borne by Port Aransas and South Padre Island. Over the next 20 years, the economic impact of designating critical habitat to small residential and commercial developers is estimated to range from $10 to $337 annually. Overall, small business entities are expected to incur some costs; however, we do not expect those costs to have a significant impact on those small entities.

In summary, we have considered whether the proposed revised rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we believe that, if promulgated, this revised proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

*Executive Order 13211—Energy Supply, Distribution, or Use*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to no regulatory action. The DEA (Appendix A) finds that three of these criteria are relevant to this analysis: (1) Reductions in crude oil supply in excess of 10,000 barrels per day; (2) reductions in natural gas production in excess of 25 million Mcf per year; and (3) increases in the cost of energy production in excess of one percent. Based on conservative estimates derived from 2007 production rates, the DEA estimates the maximum amount of oil production that could be affected by the critical habitat designation is 282 barrels of oil per day and the maximum amount of natural gas production that could be affected by the critical habitat designation is 3.4 million Mcf per year. Both amounts are well below the respective thresholds in the OMB guidance. In addition, the DEA estimates that the relatively minor costs of project modifications ($0.2 million to $1.8 million per well) are unlikely to increase energy costs by more than one percent. Thus, we do not expect the

incremental impacts associated with critical habitat designation for the wintering population of the piping plover in Texas to be of sufficient magnitude to affect energy production or delivery, and the energy-related impacts are not considered a ''significant adverse effect.'' As such, we do not expect that, if made final, the proposed revised designation of critical habitat for the wintering population of the piping plover in Texas to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), we make the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

Critical habitat designation does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, permits, or that otherwise require approval or authorization from a Federal agency. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The proposed revised designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. As such, a Small Government Agency Plan is not required.

*Executive Order 12630—Takings*

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of proposing revised critical habitat for the wintering population of the piping plover in Texas in a takings implications assessment. Our takings implications assessment concludes that this proposed revision to critical habitat for the wintering populations of piping plover in Texas does not pose significant takings implications.

## References Cited

A complete list of all references we cited in the proposed revised rule and this rulemaking is available on the Internet at *http://www.regulations.gov* or by contacting the Corpus Christi Ecological Services Field Office (see **FOR FURTHER INFORMATION** section).

## Author(s)

The primary authors of this rulemaking are staff members of the Corpus Christi Ecological Services Field Office.

## Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 25, 2008.

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–28752 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–55–P

---

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 226

**RIN 0648–AV74**

## Endangered and Threatened Species; Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish

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

**ACTION:** Notice of two public hearings.

**SUMMARY:** We, NMFS, will hold two public hearings in Florida in January of 2009, to receive public comments on the proposal to designate critical habitat for the endangered U.S. distinct population segment (DPS) of smalltooth sawfish that published on November 20, 2008.

**DATES:** The hearings will be held from 7 to 9 p.m. on January 5, 2009, in Naples, FL and on January 14, 2009, in Cape Coral, FL.

**ADDRESSES:** The January 5, 2009, hearing will be held at the Port of the Islands Hotel, 25000 Tamiami Trail E, Naples, FL; and the January 14, 2009, hearing will be held at the Hampton Inn and Suites, 619 SE 47th Terrace, Cape Coral, FL.

You may also submit comments, identified by the Regulatory Information Number (RIN) 0648–AV74, by any of the following methods:

Mail: Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Facsimile (fax) to: 727–824–5309.

Electronic Submissions: Submit all electronic comments to *www.regulations.gov* by clicking on ''Search for Dockets'' at the top of the screen, then entering the RIN in the ''RIN'' field and clicking the ''Submit'' tab.

Instructions: All comments received are considered part of the public record and will generally be posted to *http://www.regulations.gov*. All Personal Identifying Information (i.e., name, address, etc.) voluntarily submitted may

be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments. Please provide electronic attachments using Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. All comments must be received by midnight EST on January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Shelley Norton, NMFS, Southeast Regional Office, at 727–824–5312; or Lisa Manning, NMFS, Office of Protected Resources, at 301–713–1401.

**SUPPLEMENTARY INFORMATION:**

## Background

On November 20, 2008, we published a proposed rule (73 FR 70290) to designate critical habitat for the endangered U.S. DPS of smalltooth sawfish. We stated that we would hold public hearings on the proposed designation. NMFS will accept oral comments on the proposed critical habitat designation at the two public hearings mentioned in the ''Dates'' section of this notice.

## Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shelley Norton at (727) 824–5312 at least 7 working days prior to the hearing date.

**Authority:** 16 U.S.C. 1531 *et seq.*

Dated: December 3, 2008.

**P. Michael Payne,**

*Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–29134 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–22–S

# Notices

Federal Register
Vol. 73, No. 237
Tuesday, December 9, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 3, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

#### Food and Nutrition Service

*Title:* Evaluation of the Birth Month Breastfeeding Changes to the WIC Food Packages Study.

*OMB Control Number:* 0584–NEW.

*Summary of Collection:* The Special Supplemental Nutrition Program for Women, Infants and Children (WIC), (42 U.S.C. 1786) provides low-income pregnant, breastfeeding, and postpartum women, infants, and children up to age five with nutritious supplemental foods. An Interim Rule was published on December 6, 2007 revising the WIC food packages to align them with the 2005 Dietary Guidelines for Americans and Infant feeding practice guidelines of the American Academy of Pediatrics. The revised food packages for infants and women were designed to strengthen WIC's breastfeeding promotion efforts and provide additional incentives to assist mothers in making the decision to start and continue breastfeeding.

*Need and Use of the Information:* FNS has designed a study to collect and analyze data to evaluate the impacts that the regulatory changes to WIC food packages have on the incidence, duration, and intensity of breastfeeding. The overarching objective is to assess the effects of the WIC food package Interim Rule to be implemented by local WIC agencies for the first month and subsequent months postpartum. The collected data will cover the following: Food package choices, breastfeeding initiation, breastfeeding duration, breastfeeding intensity, local WIC agency implementation, and WIC participation.

*Description of Respondents:* State, Local, or Tribal Government; Individuals or households.

*Number of Respondents:* 1,920.

*Frequency of Responses:* Report: Other (one-time).

*Total Burden Hours:* 1,024.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E8–29042 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–30–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 3, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

#### Cooperative State Research, Education, and Extension Service

*Title:* Children, Youth, and Families at Risk (CYFAR) Year End Report.

*OMB Control Number:* 0524–0043.

*Summary of Collection:* The Children, Youth, and Families at Risk (CYFAR)

funding program supports community-based programs serving children, youth, and families in at risk environments. CYFAR funds are intended to support the development of high quality, effective programs based on research and to document the impact of these programs on intended audiences which are children, youth, and families in at-risk environments. The CYFAR Year End Report collects demographic and impact data from each community site, which is used by the Cooperative State Research, Education, and Extension Service (CSREES). Funding for the CYFAR is authorized under section 3(d) of the Smith-Lever Act (7 U.S.C. 341 *et seq.*), as amended and other relevant authorizing legislation, which provides jurisdictional basis for the establishment and operation of extension educational work for the benefit of youth and families in communities.

*Need and Use of the Information:* The purpose of the CYFAR Year End Report is to collect the demographic and impact data from each community site in order to evaluate the impact of the programs on intended audiences. The CYFAR data is also used to respond to requests for impact information from Congress, the White House, and other Federal agencies. Data from the CYFAR annual reports is used to refine and improve program focus and effectiveness. Without the information CSREES would not be able to verify if CYFAR programs are reaching at risk, low-income audiences.

*Description of Respondents:* State, Local or Tribal Government.

*Number of Respondents:* 51.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 16,422.

**Cooperative State Research, Education, and Extension Service**

*Title:* Expanded Food and Nutrition Education Program (EFNEP).

*OMB Control Number:* 0524–0044.

*Summary of Collection:* The Department of Agriculture's Cooperative State Research, Education, and Extension Service (CSREES), Expanded Food and Nutrition Education Program (EFNEP) is a unique program that began in 1969. It is designed to reach limited resource audiences—especially youth and families with young children. EFNEP operates in all 50 states and in American Samoa, Guam, Micronesia, Northern Marianas, Puerto Rico, and the Virgin Islands. Extension professionals train and supervise paraprofessionals and volunteers who teach food and nutrition information and skills to families and youth with limited financial resources.

*Need and Use of the Information:* CSREES will collect information using Nutrition Education Evaluation and Reporting System (NEERS), which is an integrated database system that stores information on: (1) Adult program participants, their family structure and dietary practices; (2) youth group participants; and (3) staff. NEERS replaces the Evaluation and Reporting System (ERS). Without the information it would be extremely difficult for the national office to compare, assess, and analyze the effectiveness and the impact of EFNEP without the annual collection of data.

*Description of Respondents:* State, Local or Tribal Government.

*Number of Respondents:* 74.

*Frequency of Responses:* Recordkeeping; Reporting: Annually.

*Total Burden Hours:* 91,982.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E8–29043 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–09–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request; Correction

December 3, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

The following notice that published in the **Federal Register** on Monday, November 24, 2008 (Volume 73, No. 227, page 70954), contained an error in the total burden hours. The correct total is 1,020 burden hours not the 541 burden hours originally published in the notice.

**Forest Service**

*Title:* Southern Appalachian Forest Management Survey.

*OMB Control Number:* 0596–New.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E8–29046 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 4, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA;_*

*Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**Cooperative State Research, Education, and Extension Service**

*Title:* CSREES Proposal Review Process.

*OMB Control Number:* 0524–0041.

*Summary of Collection:* The Cooperative State Research, Education, and Extension Service (CSREES) is responsible for performing a review of proposals submitted to CSREES competitive awards programs in accordance with section 103(a) of the Agricultural Research, Extension, and Education Reform Act, of 1998, 7 U.S.C. 7613(a). Reviews are undertaken to ensure that projects supported by CSREES are of high quality and are consistent with the goals and requirements of the funding program. Proposals submitted to CSREES undergo a programmatic evaluation to determine worthiness of Federal support. The evaluations consist of a peer panel review and may also entail an assessment by Federal employees. CSREES will collect information using the ''Proposal Review Sheet'' or the ''Reviewer Worksheet'', and a Reviewer Questionnaire.

*Need and Use of the Information:* The collected information from the evaluations is used to support CSREES grant programs. CSREES uses the results of each proposal to determine whether a proposal should be declined or recommended for award. If this information is not collected, it would be difficult for a review panel and CSREES staff to determine which projects warrant funding, or identify appropriate qualified reviewers. In addition, Federal grants staff and auditors could not assess the quality or integrity of the review, and the writer of the application would not benefit from any feedback on why the application was funded or not.

*Description of Respondents:* Not-for-profit institutions; Business or other for-profit; Individuals or households; Federal Government; State, Local or Tribal Government; Farms.

*Number of Respondents:* 12,600.

*Frequency of Responses:* Reporting: On occasion; Annually.

*Total Burden Hours:* 78,650.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E8–29092 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–09–P

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

December 4, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**Grain Inspection, Packers and Stockyard Administration**

*Title:* Export Inspection and Weighing Waiver for High Quality Specialty Grains Transported in Containers.

*OMB Control Number:* 0580–0022.

*Summary of Collection:* The United States Grain Standards Act, as amended (7 U.S.C. 71–87) (USGSA), with few exceptions, requires that all grain shipped from the United States must be officially inspected and weighed. The Grain Inspection, Packers and Stockyards Administration (GIPSA) amended section 7 CFR 800.18 of the regulations to waive the mandatory inspection and weighing requirements of the USGSA for high quality specialty grain exported in containers. GIPSA established this waiver to facilitate the marketing of high quality specialty grain exported in containers.

*Need and Use of the Information:* To comply with the waiver of the mandatory inspection and weighing requirements, GIPSA requires exporters of high quality specialty grain to maintain records generated during the normal course of business that pertain to these shipments and make these documents available to GIPSA upon request for review or copying purposes. These records are maintained for a period of 3 years. This requirement is essential to ensure exporters of high quality specialty grain in containers comply with the waiver requirements.

*Description of Respondents:* Business or other for-profit.

*Number of Respondents:* 40.

*Frequency of Responses:* Recordkeeping.

*Total Burden Hours:* 240.

**Charlene Parker,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E8–29094 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–KD–P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Doc. No. AMS–TM–08–0092; TM–08–15]**

### Notice of Funds Availability (NOFA) Inviting Applications for the Federal-State Marketing Improvement Program (FSMIP)

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Agricultural Marketing Service (AMS) announces the

availability of approximately $1.3 million in competitive grant funds for fiscal year 2009, subject to final appropriation action by Congress, which would enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible applicants include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies. Applicants are encouraged to involve industry groups, academia, community-based organizations, and other stakeholders in developing proposals and conducting projects. In accordance with the Paperwork Reduction Act of 1995, the information collection requirements have been previously approved by OMB under 0581–0240, Federal-State Marketing Improvement Program (FSMIP).

**DATES:** Proposals will be accepted through February 11, 2009.

**ADDRESSES:** Submit proposals and other required documents to: FSMIP Staff Officer, Transportation and Marketing Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 2646 South Building, Washington, DC 20250; telephone (202) 720–8043; e-mail *janise.zygmont@usda.gov*.

**FOR FURTHER INFORMATION CONTACT:** Janise Zygmont, FSMIP Staff Officer; telephone (202) 720–8043; fax (202) 690–4948; or e-mail *janise.zygmont@usda.gov*.

**SUPPLEMENTARY INFORMATION:** FSMIP is authorized under Section 204(b) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*). FSMIP provides matching grants on a competitive basis to enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible applicants include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies. Other organizations interested in participating in this program should contact their State Department of Agriculture's Marketing Division. State agencies specifically named under the authorizing legislation should assume the lead role in FSMIP projects, and use cooperative or contractual linkages with other agencies, universities, institutions, and producer, industry or community-based organizations as appropriate. Multi-State projects are encouraged as long as one State assumes the coordinating role, using appropriate cooperative arrangements with the other States involved. Applicants other than State Departments of Agriculture and State agricultural experiment stations may wish to include with their applications an explanation of how they meet the definition of ''other appropriate State agency.''

Proposals must be accompanied by completed Standard Forms (SF) 424 and 424A. AMS will not approve the use of FSMIP funds for advertising or, with limited exceptions, for the purchase of equipment. Detailed program guidelines may be obtained from the contact listed above, and are available at the FSMIP Web site: *http://www.ams.usda.gov/FSMIP*.

## Background

FSMIP funds a wide range of applied research projects that address barriers, challenges, and opportunities in marketing, transportation, and distribution of U.S. food and agricultural products domestically and internationally.

Eligible agricultural categories include livestock, livestock products, food and feed crops, fish and shellfish, horticulture, viticulture, apiary, and forest products and processed or manufactured products derived from such commodities. Reflecting the growing diversity of U.S. agriculture, in recent years, FSMIP has funded projects dealing with nutraceuticals, bioenergy, compost, and products made from agricultural residues.

Proposals may deal with barriers, challenges, or opportunities manifesting at any stage of the marketing chain including direct, wholesale, and retail. Proposals may involve small, medium, or large scale agricultural entities but should potentially benefit multiple producers or agribusinesses. Proprietary proposals that benefit one business or individual will not be considered.

Proposals that address issues of importance at the State, regional or national level are appropriate for FSMIP. FSMIP also seeks unique proposals on a smaller scale that may serve as pilot projects or case studies useful as a model for other States. Of particular interest are proposals that reflect a collaborative approach among the States, academia, the farm sector and other appropriate entities and stakeholders. FSMIP's enabling legislation authorizes projects to:

- Determine the best methods for processing, preparing for market, packing, handling, transporting, storing, distributing, and marketing agricultural products.
- Determine the costs of marketing agricultural products in their various forms and through various channels.
- Assist in the development of more efficient marketing methods, practices, and facilities to bring about more efficient and orderly marketing, and reduce the price spread between the producer and the consumer.
- Develop and improve standards of quality, condition, quantity, grade, and packaging in order to encourage uniformity and consistency in commercial practices.
- Eliminate artificial barriers to the free movement of agricultural products in commercial channels.
- Foster new/expanded domestic/foreign markets and new/expanded uses of agricultural products.
- Collect and disseminate marketing information to anticipate and meet consumer requirements, maintain farm income, and balance production and utilization.

## Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the FSMIP information collection requirements were previously approved by the Office of Management and Budget (OMB) and were assigned OMB control number 0581–0240.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public with the option of submitted information or transacting business electronically to the maximum extent possible.

## How To Submit Proposals and Applications

Applicants have the option of submitting FSMIP applications electronically through the Federal grants Web site, *http://www.grants.gov* instead of mailing hard copy documents. Applicants considering the electronic application option are strongly urged to familiarize themselves with the Federal grants Web site well before the application deadline and to begin the application process before the deadline. Additional details about the FSMIP application process for all applicants are available at the FSMIP Web site: *http://www.ams.usda.gov/FSMIP*.

FSMIP is listed in the ''Catalog of Federal Domestic Assistance'' under number 10.156 and subject agencies must adhere to Title VI of the Civil Rights Act of 1964, which bars discrimination in all Federally assisted programs.

**Authority:** 7 U.S.C. 1621–1627.

Dated: December 3, 2008.

**James E. Link,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–29044 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–02–P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2008–0133]**

### Notice of Request for Extension of Approval of an Information Collection; PPQ Form 816; Contract Pilot and Aircraft Acceptance

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection for contract pilot and aircraft acceptance associated with Plant Protection and Quarantine domestic, emergency, and biological control programs.

**DATES:** We will consider all comments that we receive on or before February 9, 2009.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0133* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0133, Regulatory Analysis and Development, PPD, APHIS, Station3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0133.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

**FOR FURTHER INFORMATION CONTACT:** For information on contract pilot and aircraft acceptance, contact Mr. Timothy Roland, Director, Aircraft and Equipment Operations, PPQ, APHIS, 22675 N. Moorefield Road, Edinburg, TX 78541; (956) 580–7270. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* PPQ Form 816; Contract Pilot and Aircraft Acceptance.

*OMB Number:* 0579–0298.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture, either independently or in cooperation with States, to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests and noxious weeds that are new to or not widely distributed within the United States. This authority has been delegated to the Administrator, Animal and Plant Health Inspection Service (APHIS).

As part of this mission, the Plant Protection and Quarantine (PPQ) program, APHIS, responds to introductions of plant pests to eradicate, suppress, or contain them though various programs in cooperation with State departments of agriculture and other government agencies. These programs may include release through aerial application of treatments to control plant pests.

APHIS contracts for these services, and prior to any aerial applications, requests certain information from the contractor and/or contract pilots to ensure that the work will be done according to contract specifications. Among other things, APHIS asks to see aircraft registration, the aircraft's airworthiness certificate, the pilot's license, the pilot's medical certification, the pilot's proof of flight review, the pilot's pesticide applicator's license, and the aircraft logbook. APHIS transfers information from these documents to PPQ Form 816, which is then signed by the APHIS official collecting the information and the contractor or contract pilot, indicating acceptance of the pilot and aircraft for the job.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.25 hours per response.

*Respondents:* Contractors and/or pilots of aircraft.

*Estimated annual number of respondents:* 15.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 15.

*Estimated total annual burden on respondents:* 4 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 3rd day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–29084 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Emergency Food Assistance Program; Availability of Foods for Fiscal Year 2009

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice announces the surplus and purchased foods that the Department expects to make available for donation to States for use in providing nutrition assistance to the needy under the Emergency Food Assistance Program (TEFAP) in Fiscal Year (FY) 2009. The foods made available under this notice must, at the discretion of the State, be distributed to eligible recipient agencies for use in preparing meals and/or for distribution to households for home consumption.

**DATES:** *Effective Date:* October 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** Lillie Ragan, Assistant Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302–1594 or telephone (703) 305–2662.

**SUPPLEMENTARY INFORMATION:** In accordance with the provisions set forth in the Emergency Food Assistance Act of 1983 (EFAA), 7 U.S.C. 7501, *et seq.*, and the Food and Nutrition Act of 2008, 7 U.S.C. 2011, *et seq.*, the Department makes foods available to States for use in providing nutrition assistance to those in need through TEFAP. In accordance with section 214 of the EFAA, 2 U.S.C. 7515, 60 percent of each State's share of TEFAP foods is based on the number of people with incomes below the poverty level within the State and 40 percent on the number of unemployed persons within the State. State officials are responsible for establishing the network through which the foods will be used by eligible recipient agencies (ERAs) in providing nutrition assistance to those in need, and for allocating foods among those agencies. States have full discretion in determining the amount of foods that will be made available to ERAs for use in preparing meals and/or for distribution to households for home consumption.

The types of foods the Department expects to make available to States for distribution through TEFAP in FY 2009 are described below.

## Surplus Foods

Surplus foods donated for distribution under TEFAP are Commodity Credit Corporation (CCC) foods purchased under the authority of section 416 of the Agricultural Act of 1949, 7 U.S.C. 1431 (section 416) and foods purchased under the surplus removal authority of section 32 of the Act of August 24, 1935, 7 U.S.C. 612c (section 32). The types of foods typically purchased under section 416 include dairy, grains, oils, and peanut products. The types of foods purchased under section 32 include meat, poultry, fish, vegetables, dry beans, juices, and fruits.

In FY 2009, the Department anticipates that there will be sufficient quantities of fruit juices, peaches, chicken products, and cooked pork patties to support the distribution of these foods through TEFAP. Other surplus foods may be made available to TEFAP throughout the year. The Department would like to point out that food acquisitions are based on changing agricultural market conditions; therefore, the availability of foods is subject to change.

Approximately $92.6 million in surplus foods acquired in FY 2008 are being delivered to States in FY 2009. These foods include dried cherries, fruit nut mix, dates, raisins, frozen peaches, apple slices, turkey hams, peanut butter, dried beans (great northern, blackeye, and pinto), ham, lamb chops and roasts, dehydrated potatoes, pork patties, and the following canned items: Applesauce, apricots, blackeye beans, carrots, chicken, green beans, juice (apple, cherry apple, grape, orange, tomato, and grapefruit), light kidney beans, pears, peas, plums, pork, potatoes, refried beans, salmon, spaghetti sauce, sweet potatoes, tomatoes, tomato sauce, and vegetarian beans.

## Purchased Foods

In accordance with section 27 of the Food and Nutrition Act of 2008, 7 U.S.C. 2036, the Secretary is directed to purchase $250 million worth of foods in FY 2009 for distribution through TEFAP. These foods are made available to States in addition to those surplus foods which otherwise might be provided to States for distribution under TEFAP.

For FY 2009, the Department anticipates purchasing the following foods for distribution through TEFAP: Dehydrated potatoes, frozen ground beef, frozen whole chicken, frozen ham, frozen turkey roast, blackeye beans, great northern beans, light kidney beans, lima beans, pinto beans, egg mix, large eggs, lowfat bakery mix, egg noodles, white and yellow corn grits, spaghetti, macaroni, oats, peanut butter, roasted peanuts, rice, whole grain rotini, vegetable oil, UHT fluid 1% milk, bran flakes, corn flakes, oat cereal, rice cereal, corn cereal, and corn and rice cereal; and the following canned items: Green beans, blackeye beans, low sodium kidney beans, refried beans, low sodium vegetarian beans, carrots, cream corn, whole kernel corn, peas, sliced potatoes, pumpkin, low sodium spaghetti sauce, spinach, sweet potatoes, tomatoes, diced tomatoes, low sodium tomato sauce, mixed vegetables, reduced sodium tomato soup, reduced sodium vegetable soup, apple juice, cherry apple juice, grape juice, grapefruit juice, orange juice, tomato juice, apricots, applesauce, mixed fruit, freestone and cling peaches, pears, plums, beef, beef stew, chicken, pork, and tuna.

The amounts of each item purchased will depend on the prices the Department must pay, as well as the quantity of each item requested by the States. Changes in agricultural market conditions may result in the availability of additional types of foods or the non-availability of one or more types listed above.

Dated: December 2, 2008.

**E. Enrique Gomez,**

*Acting Administrator, Food and Nutrition Service.*

[FR Doc. E8–29090 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–30–P

---

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Shasta County Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Shasta County Resource Advisory Committee (RAC) will meet at the USDA Service Center in Redding, California, on January 29, 2009 from 8:30 a.m. to 12 noon. The purpose of this meeting is to discuss proposed projects under Title II of the Secure Rural Schools and Community Self-Determination Act of 2008.

**DATES:** Thursday, January 29, 2009.

**ADDRESSES:** The meeting will be held at the USDA Service Center, 3644 Avtech Parkway, Redding, California 96002.

**FOR FURTHER INFORMATION CONTACT:** Resource Advisory Committee Coordinator John Heibel at (530) 226–2524 or *jheibel@fs.fed.us*.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. Public input sessions will be provided and individuals will have the opportunity to address the Shasta County Resource Advisory Committee.

Dated: December 1, 2008.

**Scott G. Armentrout,**

*Deputy Forest Supervisor, Shasta-Trinity National Forest.*

[FR Doc. E8–28917 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF AGRICULTURE

### Forest Service

**RIN 0596–AC39**

### Travel Management Directives; Forest Service Manual 2350, 7700, and 7710 and Forest Service Handbook 7709.55

**AGENCY:** Forest Service, USDA.

**ACTION:** Final directives.

**SUMMARY:** The Forest Service is amending internal directives regarding travel management to make them consistent with and to facilitate implementation of the agency's final travel management rule. The travel management rule requires each Forest Service administrative unit or ranger district to designate those National Forest System (NFS) roads, NFS trails, and areas on NFS lands that are open to motor vehicle use.

Changes to existing travel management directives are needed to provide guidance on implementation of the travel management rule, to conform terminology to the rule, to provide consistent direction on the process of designating roads, trails, and areas for motor vehicle use, and to provide direction on travel analysis.

These final directives consolidate direction for travel planning for both NFS roads and NFS trails in Forest Service Manual (FSM) 7710 and Forest Service Handbook (FSH) 7709.55. The final directives rename roads analysis ''travel analysis'' and streamline some of its procedural requirements. In addition, for purposes of designating roads, trails, and areas for motor vehicle use, the final directives expand the scope of travel analysis to encompass trails and areas being considered for designation. Definitions and delegations of authority for the travel management directives are found in FSM 7700. Direction for trail management remains in FSM 2350.

**DATES:** *Effective Date:* The final directives are effective January 7, 2009.

**ADDRESSES:** The record for these final directives is available for inspection and copying at the office of the Director, Recreation, Heritage, and Volunteer Resources Staff, USDA, Forest Service, 4th Floor Central, Sidney R. Yates Federal Building, 1400 Independence Avenue, SW., Washington, DC, from 8:30 a.m. to 4 p.m., Monday through Friday, except holidays. Those wishing to inspect or copy these documents are encouraged to call Deidre St. Louis at (202) 205–0931 to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Deidre St. Louis, Recreation, Heritage, and Volunteer Resources Staff, (202) 205–0931.

**SUPPLEMENTARY INFORMATION:**

#### Background

On November 9, 2005, the Forest Service published the travel management rule, governing use of motor vehicles on NFS lands. The travel management rule (36 CFR part 212, subpart B) requires each administrative unit or ranger district to designate those NFS roads, NFS trails, and areas on NFS lands that are open to motor vehicle use by vehicle class and, if appropriate, by time of year. The travel management rule also requires designated roads, trails, and areas to be identified on a motor vehicle use map (MVUM). After designated roads, trails, and areas have been identified on an MVUM, motor vehicle use inconsistent with those designations is prohibited under 36 CFR 261.13.

The travel management rule combines regulations governing administration of the forest transportation system and regulations governing use of motor vehicles off NFS roads into part 212, Travel Management, covering the use of motor vehicles on NFS lands. The travel management rule implements Executive Order (E.O.) 11644 (February 8, 1972), ''Use of Off-Road Vehicles on the Public Lands,'' as amended by E.O. 11989 (May 24, 1977).

Nationally, the Forest Service manages approximately 280,000 miles of NFS roads and 47,000 miles of NFS trails that are open to motor vehicle use. Other NFS roads and NFS trails are managed for non-motorized uses or are closed to all public use. Motor vehicle routes in the forest transportation system range from paved roads designed for all vehicle types, including standard passenger cars, to single-track trails used by motorcycles. Many roads designed for high-clearance vehicles (such as logging trucks and sport utility vehicles) are also used by all-terrain vehicles (ATVs) and other off-highway vehicles (OHVs) not normally found on city streets. Almost all NFS trails serve non-motorized users such as hikers, bicyclists, and equestrians, alone or in combination with motorized users. NFS roads accept non-motorized use as well.

In addition to this managed system of NFS roads and NFS trails, many national forests contain user-created roads and trails. These routes are usually in areas where cross-country travel by motor vehicles has been allowed and sometimes include dense, braided networks of criss-crossing trail. There has been no comprehensive national inventory of user-created routes (and continuing proliferation of these routes has made a definitive inventory difficult), but they are estimated to number in the tens of thousands of miles.

Wilderness areas are closed to motor vehicles by statute, unless the applicable enabling legislation authorizes motor vehicle use. On some national forests and portions of others, motor vehicle use is restricted by order to designated routes and areas. On other national forests, motor vehicle use is not restricted to designated routes and areas.

#### Need for Final Directives

The Forest Service provides internal direction to field units through its directive system, consisting of the Forest Service manuals and Forest Service handbooks. Directives provide guidance to field units in implementing programs established by statute and regulation. Forest Service directives establish agency policy for delegations of authority, consistent definitions of terms, clear and consistent interpretation of regulatory language, and standard processes.

The travel management rule is being implemented on administrative units and ranger districts, each of which will complete the designation process and publish an MVUM identifying those NFS roads, NFS trails, and areas on NFS lands open to motor vehicle use. The Forest Service plans to complete that task on all units of the NFS within 4 years of publication of the final rule.

Current policy in the Forest Service directive system was written prior to the travel management rule and reflects previous travel management direction and terminology. For example, current directives use the terms ''classified road'' and ''unclassified road,'' which were removed by the travel management rule. Until this policy is updated, inconsistent terminology may result in confusion and inconsistent application of the travel management rule. The final directives are also needed to provide a procedural approach to implementing the travel management rule in conformance with agency policy on land management planning, environmental analysis, roads analysis, and other requirements of law and policy.

Some comments on the proposed travel management rule requested an opportunity for public input in development of Agency directives implementing the travel management rule.

**Summary of Comments on the Proposed Directives**

The Forest Service published the proposed travel management directives in the **Federal Register** for public notice and comment on March 9, 2007 (72 FR 10632). The agency received 33 comments from organizations and individuals. Most comments were submitted by organizations or their representatives.

Many comments were editorial, suggesting minor word changes, referencing errors, or identifying inconsistencies between policy statements. The Forest Service accepted many of these suggestions in developing the final directives.

The following iterates the substantive comments and the agency's *Response.*

**General Comments and Responses**

*Comment.* Some respondents suggested adding additional citations and direction related to laws, regulations, E.O.s, and directives to the authority and policy sections in the final directives. Suggested additions included references to the National Historic Preservation Act, Endangered Species Act, Clean Water Act, and the Data Quality Act, and statements addressing the protection of cultural resources and threatened and endangered species and prevention of the introduction of invasive species.

*Response.* The Forest Service does not believe that additional references in the final directives to governing laws, regulations, E.O.s, or directives are necessary. There are numerous laws, regulations, E.O.s, and directives that govern the Forest Service's programs. The purpose of FSM 2353.01, 7701, and 7710.01 and FSH 7709.55, sections 10.03, 20.03, and 30.03, is to reference those authorities that directly pertain to travel management and planning. The Forest Service believes that the final directives accomplish this purpose.

*Comment.* Some respondents commented that some of the sections in the proposed directives were redundant, making them difficult to read and understand.

*Response.* The agency agrees that there was redundancy in the proposed directives and has striven to reduce it by consolidating definitions and text in the final directives. For example, the agency has removed most redundant information on MVUMs in FSM 7711.3 and FSH 7709.55, section 15 and has consolidated direction on MVUMs in FSM 7711.3 and FSH 7709.55, section 15.1.

*Comment.* Some respondents asked the agency to provide definitions for the following terms in the directives: Sustainable, sustainable access (FSM 7702), fiscally responsible (FSM 7702), considerable adverse effects (36 CFR 212.52(b)(2)), appropriate consideration (FSH 7709.55, sec. 12.1), collaborative learning (FSH 7709.55, sec. 12.2), and use conflict (7710.2, para. 6).

Some respondents requested modification of the definitions for ''travel management atlas,'' ''forest transportation atlas,'' ''route,'' ''road decommissioning,'' ''road,'' ''trail,'' and ''unauthorized road.''

*Response.* The travel management rule provides a consistent national framework for making travel management decisions at the local level. The final directives provide national direction for implementing the travel management rule. Both the travel management rule and the travel management directives give the responsible official discretion to make appropriate decisions at the local level. Consistent with this approach, the terms ''sustainable'' and ''sustainable access'' (FSM 7702), ''fiscally responsible'' (FSM 7702), ''appropriate consideration'' (FSH 7709.55, sec. 12.1), ''collaborative learning'' (FSH 7709.55, sec. 12, para. 2), and ''use conflict'' are terms of art designed to provide a general context for implementing the final directives, while leaving discretion to the responsible official to work with the public, other Federal agencies, and State, local, and tribal governments to discern what each term means for that official's administrative unit or ranger district in light of local social and environmental issues. Accordingly, the Forest Service does not believe it is necessary or appropriate to define these terms in the final directives.

The phrase ''considerable adverse effects'' (E.O. 11644, 36 CFR 212.52(b)(2), and 36 CFR 261.51) is a requirement for establishing a temporary emergency closure of a route to motor vehicle use under 36 CFR 212.52(b)(2). The responsible official has the discretion to make this determination based on local, social, and environmental conditions. Therefore, the Forest Service does not believe it is necessary or appropriate to define ''considerable adverse effects'' in the final directives.

''Forest transportation atlas,'' ''travel management atlas,'' ''road,'' ''road decommissioning,'' ''trail,'' and ''unauthorized road'' are defined in regulations at 36 CFR 212.1, and redefining them is beyond the scope of these directives. ''Route'' is defined in FSM 7705 as ''a road or trail,'' which is a sufficient definition for purposes of these directives.

*Comment.* Some respondents believed that travel planning should be accomplished as part of land management plan revisions. Other respondents believed that the Forest Service should have separate planning processes for recreation and general access routes and suggested how the planning process for recreation routes should be structured.

*Response.* The agency has developed the travel planning process in FSM 7710 and FSH 7709.55, chapter 10, based on past experience with transportation and recreation travel planning. The Forest Service believes that it would not be appropriate to have separate planning processes for recreation and general access routes for implementing the travel management rule, which regulates motor vehicle use by vehicle class and time of year, rather than by type of use. In addition, the agency has clarified or added direction on travel planning in the final directives based on the agency's experience in implementing the travel management rule during the past 3 years.

*Comment.* Some respondents believed that the agency should not restrict motor vehicle use to a designated system of NFS roads, NFS trails, and areas on NFS lands, but if the agency created a designated system for motor vehicle use, the agency should provide broad exemptions for specific activities like big game retrieval and grazing.

One respondent expressed concern about not being able to use a motor vehicle to engage in dispersed camping or big game retrieval off a public road that is not under the jurisdiction of the Forest Service. Other respondents believed that limiting designations for dispersed camping and big game retrieval to ''within a specified distance of certain forest roads and trails'' was too restrictive, would preclude day use, and would give preference to one group over others. Some respondents commented that the directives should not limit responsible officials' ability to make designations for dispersed camping and big game retrieval. Some respondents believed that additional limitations, such as a maximum length, should be placed on designations for dispersed camping and big game retrieval.

*Response.* Unregulated cross-country motor vehicle use may have been appropriate on some national forests when these vehicles were less numerous, less powerful, and less capable of cross-country travel. Today, however, the proliferation of user-created routes is a major challenge on many national forests, and examples of significant environmental damage,

safety issues, and use conflicts are well-established. The Forest Service believes that a well-planned, well-designed system of designated roads, trails, and areas, developed in coordination with Federal, State, local, and tribal governments and with public involvement, offers better opportunities for sustainable long-term recreational motor vehicle use and better economic opportunities for local residents and communities. Consistent with these determinations, the agency promulgated the travel management rule, which requires each administrative unit or ranger district to establish a designated system of routes and areas for motor vehicle use. These final directives implement that regulation. The final rule and the final directives do not prohibit day use of NFS lands for such purposes as picnicking or fishing. Rather, the final rule and final directives regulate motor vehicle use.

The travel management rule and the final directives enumerate eight exemptions from designations for motor vehicle use, including motor vehicle use that is specifically authorized under a written authorization, such as a grazing permit (36 CFR 212.51(a)). In addition, the travel management rule provides for including in a designation the limited use of motor vehicles within a specified distance of certain designated routes, and if appropriate within specified time periods, solely for the purposes of dispersed camping or big game retrieval (36 CFR 212.51(b)).

In many places in the NFS, visitors use motor vehicles for dispersed camping or big game retrieval within a limited distance of State or county roads or trails, which are not under the jurisdiction of the Forest Service and cannot be designated for motor vehicle use (36 CFR 212.1, 212.50(a), and 212.51(a)). Consequently, the proposed directives at FSM 7710 contained language that would allow the responsible official to include in a designation the limited use of motor vehicles within a specified distance of certain forest routes, rather than designated routes, solely for the purposes of dispersed camping and big game retrieval. Forest roads and trails include State and county roads and trails in the NFS, as well as NFS roads and NFS trails (36 CFR 212.1).

The agency has retained the proposed language in FSM 7715.74 of the final directives. In addition, the agency has included the phrase, ''where motor vehicle use is allowed'' after ''certain forest roads and forest trails,'' since not all forest roads and trails are open to motor vehicle use. In a separate notice in the same issue of the **Federal Register**, the agency is revising the travel management rule at 36 CFR 212.51(b) to make it consistent with FSM 7715.74 in the final directives. Since the proposed language regarding dispersed camping and big game retrieval was subjected to full public notice and comment under the Administrative Procedure Act, further public notice and comment are unnecessary (5 U.S.C. 553(b)(B)).

The Forest Service expects responsible officials to apply 36 CFR 212.51(b) and FSM 7715.74 sparingly to avoid undermining the purposes of the travel management rule and to promote consistency in its implementation. Determination of the specified distance for limited motor vehicle use off a forest road or trail is a local decision dependent on site- and route-specific circumstances. Therefore, the travel management rule and final directives give the responsible official some discretion in making this determination.

Nothing in the travel management rule or final directives requires addressing either dispersed camping or big game retrieval in a designation or reconsideration of any decision prohibiting motor vehicle use while engaging in these activities.

*Comment.* Some respondents suggested adding provisions to the directives requiring responsible officials to coordinate with local governmental entities, including local law enforcement agencies and emergency service providers, during the travel planning process and prior to making travel management decisions.

*Response.* The travel management rule (36 CFR 212.53) and its implementing directives (FSM 7702, para. 5, and 7715.3) require the responsible official to coordinate with appropriate Federal, State, county, and other local governmental entities, which may include local law enforcement agencies and emergency service providers, as well as tribal governments in designating routes and areas for motor vehicle use.

*Comment.* Some respondents believed that the proposed directives should require a complete inventory of user-created routes and consideration of that inventory in travel planning, since many of these routes were created when cross-country travel was allowed, are well-located, and provide the type of experiences motorized recreationists are seeking. Some respondents believed that the proposed directives should provide for accepting inventories of user-created routes collected by volunteers. Other respondents believed that the proposed directives would discourage responsible officials from considering user-created routes in travel planning. Other respondents believed that a complete inventory was needed for resource protection and restoration and that the requirement to conduct a complete inventory currently in FSM 7710 should be retained.

Other respondents believed that the proposed directives should prohibit inventory of user-created routes and should direct responsible officials not to consider them in travel planning. Some of these respondents believed that the proposed directives were biased toward adding user-created routes to the forest transportation system and designating them for motor vehicle use.

*Response.* A complete inventory of user-created routes is not required to complete the designation process pursuant to the travel management rule. Therefore, the current directives do not require a complete inventory of user-created routes in conducting travel planning. In some cases, however, an administrative unit or ranger district may determine that a complete inventory of user-created routes is necessary to conduct effective travel planning. To clarify this intent, the final directives state that a complete inventory of user-created routes is not required, rather than a complete inventory is not necessary.

As a practical matter, in areas where there are no restrictions on motor vehicle use, there is no way to conduct a complete inventory of user-created routes, since users of motor vehicles can create new routes while the inventory is underway. Furthermore, to the extent a comprehensive inventory of user-created routes is feasible, conducting such an inventory would be very time-consuming and expensive, delaying completion of route and area designation. Advance planning based on public involvement, effective design, and appropriate environmental analysis provides the best hope for a system of motor vehicle routes and areas that addresses users' needs and safety with minimal environmental impacts.

User-created routes in most cases were developed without agency authorization, environmental analysis, or public involvement and do not have the same status as NFS roads and NFS trails in the forest transportation system. Nevertheless, some user-created routes are well-sited, provide excellent opportunities for outdoor recreation by motorized and non-motorized users alike, engender less environmental impact than unrestricted cross-country motor vehicle use, and would enhance the system of designated routes and areas. Other user-created routes are

poorly located and cause unacceptable environmental impacts.

The evaluation of user-created routes is best handled at the local level by officials who have first-hand knowledge of the particular circumstances, uses, and environmental impacts involved and who can work closely with local governments, users, and other members of the public.

*Comment.* Some respondents asked the agency to define ''user-created route'' in the proposed directives and to explain the difference between that term and the term ''unauthorized road.''

*Response.* FSM 7703.21, paragraph 1, addresses user-created routes. FSM 7715.78, paragraph 2, in the final directives addresses unauthorized roads and trails. '' Unauthorized road or trail,'' which is defined in the travel management rule as ''a road or trail that is not a forest road or trail or a temporary road or trail and that is not included in a forest transportation atlas'' (36 CFR 212.1), is the preferred term. Therefore, a definition for and additional direction on user-created routes is not needed in the final directives.

*Comment.* Some respondents believed that responsible officials should be required to identify the minimum trail system, as well as the minimum road system, needed for safe and efficient travel and for administration, utilization, and protection of NFS lands. Other respondents believed that the requirement to identify the minimum road system would result in reducing opportunities for motorized recreation.

*Response.* Forest Service regulations at 36 CFR 212.5(b)(1) establish the requirement to identify the minimum road system on each administrative unit of the NFS, and Forest Service directives at FSM 7703.12 implement that requirement. Agency regulations and directives do not establish a requirement to identify the minimum trail system on NFS lands.

Moreover, identification of the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of NFS lands under 36 CFR 212.5(b)(1) is separate from designation of routes and areas under 36 CFR 212.51. The requirement to identify the minimum road system was established in regulations (the roads rule) and directives (the roads policy) published on January 12, 2001 (66 FR 3216), before promulgation of the travel management rule in November 2005. Identification of the minimum road system focuses on the need for roads in the forest transportation system, rather than on appropriate motor vehicle use on routes in the forest transportation system and in areas on NFS lands. Therefore, the designation process, rather than identification of the minimum road system, determines the scope of opportunities for motorized recreation.

Although identification of the minimum road system pursuant to 36 CFR 212.5(b)(1) and designation of routes and areas pursuant to 36 CFR 212.51 are independent regulatory requirements, the Forest Service believes that travel analysis can and should be used for both. The agency has revised FSM 7712 to provide that travel analysis for purposes of 36 CFR 212.5(b)(1) and 36 CFR 212.51 may be conducted separately or simultaneously, and that any proposals resulting from travel analysis for either purpose may be addressed in the same or different environmental analyses.

*Comment.* Some respondents wanted the agency to retain all or part of the current direction in FSM 7700 and 7710 regarding roads analysis. Some respondents believed that the proposed changes to roads analysis would weaken its environmental protection.

*Response.* The agency has retained the essentials of roads analysis in the final directives and has not weakened its environmental protection. A key objective of the final directives is to describe a travel analysis process that can be used for the two separate purposes of identification of the minimum road system that incorporates a science-based roads analysis under 36 CFR 212.5(b) and designation of roads, trails, and areas under 36 CFR 212.51. The roads policy (current FSM 7700 and 7710) established Publication FS–643, *Roads Analysis: Informing Decisions About Managing the National Forest Transportation System* (August 1999), as the science-based roads analysis to be followed when identifying the minimum road system. The Forest Service has moved the six-step roads analysis described in Publication FS–643 to FSH 7709.55, chapter 20, and renamed it ''travel analysis'' to reflect its purpose of informing travel management decisions regarding motor vehicle use on NFS roads, on NFS trails, and in areas on NFS lands, as well as identification of the minimum road system. In addition, the agency has streamlined travel analysis and has given responsible officials additional discretion in determining the scope and scale of travel analysis.

By including travel analysis in the Forest Service directive system, the agency has made the process available to anyone with Internet access. Publication FS–643 was originally available only in hard copy, and while scanned versions are available on the Internet, they remain difficult to locate and, in contrast to Forest Service directives, do not meet the needs of the accessibility requirements of Section 508 of the Rehabilitation Act (29 U.S.C. 794d).

The Forest Service believes that additional clarification of the relationship between roads analysis and travel analysis is necessary and thus has modified the final directives to specify that travel analysis satisfies the requirement for use of a science-based road analysis when identifying the minimum road system per 36 CFR 212.5(b)(1) (*see* FSM 7712.4, para. 1). In addition, the final directives clarify that travel analysis is not required to inform decisions related to the designation of roads, trails, and areas for those administrative units and ranger districts that have issued a proposed action as of the effective date of the final directives (FSM 7712, para. 1).

Since the approving official for FSM 7710 and FSH 7709.55 is the Deputy Chief for the National Forest System, issuance of the final directives will negate the need for the statement currently in FSM 7710.41 regarding the authority of the Deputy Chief of the National Forest System to approve or rescind the roads analysis process for field use. Therefore, the agency has removed this statement from the final directives.

*Comment.* Some respondents suggested that the agency require a complete review of the forest transportation system as part of travel planning and establish a schedule for subsequent comprehensive review of the system in the proposed directives.

*Response.* The agency believes that it is not necessary or appropriate to require a comprehensive review of the forest transportation system when designating roads, trails, and areas for motor vehicle use per 36 CFR 212.51. Nothing in the travel management rule requires reconsideration of any previous administrative decisions that allow, restrict, or prohibit motor vehicle use on NFS roads and NFS trails or in areas on NFS lands and that were made under other authorities, including decisions made in land management plans and travel plans. To the contrary, the travel management rule provides that these decisions may be incorporated into designations for motor vehicle use (36 CFR 212.50(b)).

All national forests have a system of NFS roads open to motor vehicle use, and many also have a system of NFS trails managed for motor vehicle use. Some national forests have long restricted motor vehicles to designated

routes under E.O. 11644, 36 CFR part 295, and FSM 2355. Other national forests have issued comprehensive travel management decisions that restrict motor vehicle use to designated routes and have issued orders that prohibit cross-country motor vehicle use. In these cases, the responsible official may, with public notice but no further analysis or decision-making, establish that decision or those decisions as the designation pursuant to 36 CFR 212.51, effective upon publication of an MVUM. In that situation, the only substantive change effected by the designation would be enforcement of the restrictions pursuant to the prohibition in 36 CFR 261.13, rather than pursuant to an order issued under 36 CFR part 261, subpart B. Alternatively, responsible officials may choose to reconsider past decisions, with public involvement, as necessary to achieve the purposes of the travel management rule.

The travel management rule and final directives both recognize that designations of roads, trails, and areas for motor vehicle use are not permanent. Unforeseen environmental impacts, changes in public demand, route construction, and monitoring conducted under § 212.57 of the travel management rule may lead responsible officials to consider revising designations under § 212.54 of the rule.

Designations must be consistent with the applicable land management plan. If a responsible official proposes a designation that would be inconsistent with the applicable land management plan, a proposed amendment to the plan must be included with the proposed designation so that the designation decision will conform to the plan.

The Forest Service supports the concept of adaptive management and agrees that monitoring and, if needed, revision of motor vehicle designations will be an ongoing part of travel management. Since the system of designated routes and areas will change over time, the Forest Service anticipates that responsible officials will publish MVUMs annually to provide notice that they are current, update them as necessary, and update signs as necessary or appropriate.

Neither E.O. 11644 nor the travel management rule requires periodic review of designations. Accordingly, the Forest Service does not believe that it is necessary or appropriate to require periodic review of designations. Rather, the agency believes that responsible officials should have the discretion to conduct review of designations as needed.

*Comment.* Some respondents objected to OHV use on NFS roads, on NFS trails, and in areas on NFS lands. Other respondents advocated designating every NFS road and NFS trail for motor vehicle use. Some respondents believed that the proposed directives favored motorized recreation, while other respondents believed that the proposed directives favored resource protection and non-motorized recreation. Some respondents requested that the proposed directives require responsible officials to give preference in travel planning to resource values such as wilderness values and minimizing or preventing introduction of invasive species; social values, and existing uses such as non-motorized and motorized recreation, rock climbing, grazing, mining, and other authorized uses. Some respondents suggested that the proposed directives include language reflecting the requirements in the Multiple Use-Sustained Yield Act (MUSY) and that the proposed directives emphasize multiple use as a policy objective.

*Response.* Designation of a road, trail, or area for motor vehicle use does not establish that use as the dominant or exclusive use of that road, trail, or area. Pursuant to MUSY (16 U.S.C. 528–531), the Forest Service manages NFS lands for multiple uses, including motorized and non-motorized and recreational and non-recreational uses, without favoring one use over another. The Forest Service believes that NFS lands should provide access for both motorized and non-motorized users in a manner that is environmentally sustainable over the long term. The NFS is not reserved for any particular use, nor must every use be accommodated on every acre of NFS lands. It is not uncommon for different areas in the NFS to provide different recreation opportunities. The Forest Service believes that assessment and determination of appropriate motorized recreation opportunities are best made at the local level, in coordination with Federal, State, and local governmental entities and tribal governments and with public involvement, including input from motorized and non-motorized users, as provided for in the travel management rule and final directives.

The Forest Service does not believe that it is appropriate to cite MUSY as an authority for the final directives or to emphasize multiple use as one of their policy objectives. Like the travel management rule, the authorities for the final directives include the Bankhead-Jones Farm Tenant Act (16 U.S.C. 7 U.S.C. 1011(f)), regarding regulation of national grasslands; the agency's Organic Act (16 U.S.C. 551), regarding regulation of national forests; and E.O.s 11644 and 11989 governing use of motor vehicles off roads (42 FR 26959). In addition, the final directives cite the travel management rule as an authority. Neither the travel management rule nor the final directives need to reference all the laws and regulations governing management of the NFS.

MUSY defines ''multiple use'' in part as ''management of all the various renewable surface resources of the National Forests so that they are utilized in the combination that will best meet the needs of the American people * * *'' (16 U.S.C. 531(a)). MUSY specifically provides ''that some land will be used for less than all of the resources'' (16 U.S.C. 531(a)). MUSY does not direct that all NFS lands be open to all uses. The policy established in the final directives is consistent with MUSY.

*Comment.* Some respondents requested that the agency expand travel planning to include all recreation uses of roads and trails, both motorized and non-motorized. Specifically, these respondents wanted the agency to analyze the social and environmental effects associated with these uses and to make travel management decisions for both motorized and non-motorized uses.

*Response.* The purpose of the travel management rule and final directives is to provide better and more consistent management of motor vehicle use on NFS roads, on NFS trails, and in areas on NFS lands. Regulation of non-motorized use is beyond the scope of the travel management rule and final directives.

In designating roads, trails, and areas, responsible officials must consider conflicts among uses of NFS lands (36 CFR 212.55(a)). In designating trails and areas, local agency officials must consider compatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors (36 CFR 212.55(b)(5)).

While there is no requirement to regulate non-motorized recreation uses as part of travel planning, the final directives identify as one of the objectives of travel planning ''to provide for and manage a range of motorized and non-motorized recreational experiences, while minimizing conflicts among uses'' (FSM 7710.2). Responsible officials have the discretion to use travel analysis and planning to address non-motorized recreation (FSM 7712, para. 6).

*Comment.* Some respondents suggested that the proposed directives require consultation with counties to identify roads that could qualify as R.S. 2477 rights-of-way and that those roads

should remain open to motor vehicle use until they are adjudicated. Some respondents requested that the Forest Service establish a process outside the courts for adjudicating claims for R.S. 2477 rights-of-way. Other respondents requested that the agency limit its legal research and title searches so as not to appear to be conducting an informal adjudication of R.S. 2477 rights-of-way outside the courts. Several respondents commented that discussion of existing rights in FSM 7715.65 should be expanded to include R.S. 2477 rights-of-way.

*Response.* The Forest Service does not believe it is appropriate to include these suggestions in the final directives. Under the travel management rule, responsible officials may designate only NFS roads, NFS trails, and areas on NFS lands, that is, only roads, trails, and areas under the jurisdiction of the Forest Service (36 CFR 212.1, 212.50(a), 212.51(a)). Adjudicated R.S. 2477 rights-of-way are not under the jurisdiction of the Forest Service. The Forest Service does not have the authority to adjudicate R.S. 2477 rights-of-way.

The Forest Service may, however, make a non-binding administrative determination (NBD) as to the potential validity of an R.S. 2477 right-of-way claim for land use planning and management purposes. If the Forest Service identifies a potentially valid R.S. 2477 right-of-way claim through the NBD process, the agency will encourage the claimant to accept jurisdiction pursuant to an easement granted by the U.S. Department of Transportation (23 U.S.C. 317) or by the Forest Service under Section 2 of the National Forest Roads and Trails Act (FRTA) (16 U.S.C. 533) or to adjudicate the claim pursuant to the Quiet Title Act (28 U.S.C. 2409a).

In making designations for motor vehicle use, the responsible official must recognize valid existing rights (*see* 36 CFR 212.55(d)). FSM 7703.3 provides an administrative framework for meeting this requirement by providing guidance on documenting jurisdiction, transferring jurisdiction, and exercising jurisdiction over forest roads, based on factors such as the right of individuals and local public road authorities to own, operate, maintain, and use these roads. There is no need to repeat this guidance in FSM 7715.75 (recoded from FSM 7715.65 in the proposed directives).

*Comment.* Some respondents were concerned that the agency would rely on lack of jurisdiction over road segments crossing private lands in deciding not to designate the NFS road segments on either side of those private lands. Other respondents did not want the agency to be dissuaded from designating routes where jurisdiction was uncertain, particularly if those routes are on NFS lands.

*Response.* The Forest Service supports public access to Federal lands and supports the rights of private landowners to control access to their land. The agency generally will not consider designating an NFS road or NFS trail unless there is legal public access to that road or trail. Where access to NFS lands across private property is needed, the responsible official should seek a right-of-way from the landowner. FSM 7715.72 provides guidance regarding situations where access rights may have been acquired but are undocumented.

The Forest Service supports cooperative road development, including construction, maintenance, and reciprocal rights-of-way, where public and private lands are intermingled. When the Forest Service needs access across private land and the private landowner needs access across NFS lands, the Forest Service generally will not grant an easement to the private landowner without a reciprocal easement from the private landowner.

*Comment.* Some respondents objected to provisions in the proposed directives addressing transfer of jurisdiction over NFS roads to local public road authorities. Other respondents wanted the agency to retain some control over roads when transferring jurisdiction so as to influence environmental mitigation or prevent improvements.

*Response.* The Forest Service may transfer jurisdiction over NFS roads to local public road authorities pursuant to FSM 7703.3, for example, when more than half the use is likely to be traffic that is not generated by the Forest Service; the road is necessary for mail delivery, access to a public school, or other local governmental purposes; or the road serves year-long residents within or adjacent to the NFS. In these cases, the Forest Service would transfer jurisdiction through issuance of an easement under Section 2 of FRTA (16 U.S.C. 533). Consistent with the transfer of jurisdiction, these easements would assign full responsibility for road users' safety to the grantee.

*Comment.* Some respondents suggested that when the Forest Service is unable to obtain a permanent right-of-way for an NFS road or NFS trail, the agency accept less than full permanent public access when landowners are willing to grant limited access.

*Response.* Long-standing Forest Service policy in FSM 5460.3 provides for acquiring rights-of-way in perpetuity to accommodate all types of traffic, unless the applicable land management plan indicates that full public access is not needed, and accepting temporary agreements, road use permits, or other road use arrangements only for immediate, temporary, limited access and when future needs of the United States do not justify the expense of providing a permanent road or trail.

*Comment.* Some respondents suggested that the Forest Service improve maintenance of NFS roads and NFS trails and increase the number of NFS trails designated for motor vehicle use by leveraging all sources of funding and volunteer work, including spending State and Federal gas tax revenues generated by OHV users on road and trail maintenance. Some respondents were concerned that the agency would use the lack of funds to maintain NFS roads and NFS trails as a rationale for reducing motorized recreation opportunities, closing NFS roads, and converting NFS roads to NFS trails. Other respondents believed that the agency should not designate routes for motor vehicle use unless they could be maintained.

*Response.* Funding for road and trail maintenance is beyond the scope of the final directives. Forest Service appropriations are authorized by Congress. The Forest Service is committed to using whatever funds are available to accomplish the purposes of the travel management rule in a targeted, efficient manner. The Agency makes appropriate use of all other sources of available funding and has many successful cooperative relationships. Volunteer agreements with user groups and others have proven successful in extending agency resources for trail construction, maintenance, monitoring, and mitigation. Regardless of the level of funding available, the Forest Service believes that the travel management rule and its implementing directives provide a better framework for management of motor vehicle use on NFS roads, on NFS trails, and in areas on NFS lands.

The Forest Service maintains NFS roads and NFS trails in accordance with their road or trail management objectives, design standards, quantity and types of traffic, and availability of funds. All roads and trails require maintenance. An extended lack of maintenance can lead to deterioration of an NFS road or NFS trail to the point where it will be closed by natural events such as precipitation, wind storms, or growth of vegetation. In other cases, while a route remains passable to some traffic, the Forest Service may have to close the route to address public safety concerns or to prevent severe

environmental damage. The Forest Service actively tries to avoid closures by encouraging volunteer agreements and cooperative relationships with user groups.

The availability of resources is a consideration in designating routes for motor vehicle use. The travel management rule includes as a criterion for designation ''the need for maintenance and administration of roads, trails, and areas that would arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration'' (36 CFR 212.55(a)). The Forest Service believes, however, that these determinations involve the exercise of judgment and discretion on the part of the responsible official. The final directives clarify that the availability of resources for administration and maintenance of routes should not be the only consideration in developing travel management proposals (FSM 7715.5, para. 1c). Volunteers and cooperators can supplement agency resources for maintenance and monitoring, and their contributions should be considered in assessing the availability of resources.

To clarify that routes should not be added to the forest transportation system unless adequate resources are available to maintain them, the Forest Service has added the following to FSM 7715.03, paragraph 7: ''Administrative units and ranger districts should avoid adding routes to the forest transportation system unless there is adequate provision for their maintenance.''

In addition, in FSM 7703.27 in the final directives, the Agency has enumerated factors to consider when contemplating conversion of an NFS road to an NFS trail or when overlaying an NFS trail and an NFS road.

*Comment.* Some respondents believed that the proposed directives should require development of area management objectives, similar to road management objectives (RMOs) and trail management objectives (TMOs).

*Response.* The Forest Service agrees that areas designated for motor vehicle use should have management objectives and has added a requirement for area management objectives in FSM 7715.73 in the final directives.

*Comment.* Some respondents suggested that the proposed directives establish criteria for analysis and public comment under the National Environmental Policy Act (NEPA) and its implementing regulations. Some respondents suggested that the proposed directives establish specific factors to consider in conducting cumulative effects analysis for travel management decisions, such as the effect of road closures on communities, the effect of wilderness designation, and the effect of the roadless rule (36 CFR part 294, subpart B) on the availability of motorized recreation opportunities.

Some respondents stated that the proposed directives should modify the amount of public involvement in the travel planning process to reduce the burden on the commenting public. Other respondents wanted assurance that the public comment process would not be merely a voting process, that is, that public input would be considered, rather than merely tallied in support of or against particular proposals. Some respondents requested that the proposed directives establish the duration and time of year for public comment for specific travel management decisions, such as issuance of special use permits for motorized recreation events.

*Response.* Regulations implementing NEPA, including requirements for public involvement, are issued by the Council on Environmental Quality and are found at 40 CFR part 1500. Agency direction on NEPA compliance is found at 36 CFR part 220 and in FSH 1909.15. The scope, content, and documentation of NEPA analysis associated with designating routes and areas for motor vehicle use will depend on site-specific factors. Therefore, the Forest Service is not addressing NEPA compliance in the final directives beyond the direction found in FSM 7715.

*Comment.* Some respondents suggested that the proposed directives establish specific criteria for monitoring, including the extent and timing of monitoring, the data collected, and the storage, reporting, and use of the data collected. Some respondents believed that allowing each responsible official to develop a monitoring plan would lead to collection of inconsistent data at the local and national level.

*Response.* The travel management rule requires monitoring of the effects of motor vehicle use on designated roads, trails, and areas, consistent with the applicable land management plan and as appropriate and feasible (36 CFR 212.57). Like travel management decisions, decisions regarding what, where, how, and when to monitor are determined by local circumstances and are therefore best left to the responsible official.

Consistent with the objective of the travel management rule to establish a national framework for local decision-making, the final directives provide guidance on monitoring in FSM 7717 and FSH 7709.55, section 16.3. The Agency has strengthened this guidance in the final directives to ensure that monitoring is consistent with the applicable land management plan and to advise responsible officials to use the applicable criteria in 36 CFR 212.55 as guidance when monitoring the effects of designating roads, trails, and areas for motor vehicle use.

*Comment.* Some respondents believed that the provisions in proposed FSM 7703.14 and 7715.63 clarifying the size of designated areas narrowed their scope beyond what is authorized under the travel management rule. Other respondents believed that these provisions insufficiently narrowed the size of designated areas and suggested that their size be further narrowed by including additional considerations regarding their scope.

*Response.* As stated in the preamble to the proposed and final travel management rules, areas designated for motor vehicle use are not intended to be large or numerous. In the travel management rule, ''area'' is defined as ''a discrete, specifically delineated space that is smaller, and in most cases much smaller, than a ranger district.'' The final directives contain the same definition at FSM 7705, and the direction in FSM 7703.14 and 7715.73 is consistent with this definition and the preamble to the proposed and final travel management rules.

While areas are not intended to be large or numerous, the Forest Service believes that it is appropriate to designate some areas for motor vehicle use. These areas would have natural resource characteristics that are suitable for motor vehicle use or would be so significantly altered by past actions that motor vehicle use might be appropriate. Under the travel management rule and final directives, no administrative unit or ranger district is required to designate an area for motor vehicle use.

Routes and areas under the travel management rule are designated at the local level, based upon appropriate environmental analysis. Federal law does not require the Forest Service to demonstrate that there are no environmental impacts from designation of areas.

*Comment.* Some respondents recommended against producing multiple maps, such as a motor vehicle use map (MVUM), recreation visitor map, and opportunity maps, to display travel management data, on the grounds that multiple maps would create confusion and make it difficult to identify routes designated for motor vehicle use.

Some respondents wanted additional information displayed on MVUMs, including routes intended solely for

administrative use, routes available solely for non-motorized use, and routes available for winter use. These respondents believed that the additional information would assist with orientation and increase compliance with designations. Other respondents suggested that the proposed directives state that an MVUM's primary purpose is enforcement. Some respondents suggested that MVUMs be made available to motorized recreation groups to enhance their distribution.

*Response.* An MVUM has a single purpose: To display designated roads, trails, and areas on an administrative unit or a ranger district. An MVUM informs visitors where, and in some cases when, they may operate certain classes of motor vehicles. After NFS roads, NFS trails, and areas on NFS lands have been designated (CFR 212.51) on an administrative unit or a ranger district and identified on an MVUM, it is prohibited to possess or operate a motor vehicle on NFS lands other than in accordance with those designations (36 CFR 261.13). The Forest Service has clarified the purpose of the MVUM in FSM 7716.41.

The MVUM is the primary enforcement tool for designation decisions. Therefore, the Forest Service believes that the MVUM needs to be separate from a visitor map and any other maps produced by the Forest Service. It is the responsibility of motor vehicle users to obtain a copy of the MVUM and to operate their motor vehicles consistent with the designations shown on the MVUM.

The Forest Service anticipates that it will be necessary to continue to produce visitor maps, recreation opportunity maps, and other types of maps to meet the needs of visitors to the NFS. Which additional maps to produce and how to make them available to the public are best determined at the local level, based on local circumstances.

The travel management rule requires that MVUMs be made available at the corresponding administrative units and ranger districts and that they be made available as soon as practicable on the Web site for those units and districts (36 CFR 212.56). The Forest Service anticipates that in some cases responsible officials will obtain assistance from cooperators in publishing and distributing the MVUM. The Forest Service also anticipates that individuals will forward, print, and copy the electronic version of MVUMs.

The Forest Service believes that it is important that the MVUM be produced consistently across the NFS. Visitors to the NFS should be able to pick up an MVUM anywhere in the country and see travel management decisions displayed consistently, using the same symbols, text, and format. To ensure consistency, the final directives require responsible officials to use national protocols for each MVUM (FSM 7711.3 and 7716.41).

*Comment.* Some respondents wanted the proposed directives to require that when wheeled motor vehicle use is acceptable on a snow trail and an over-snow vehicle use map has been published, the designation for wheeled motor vehicles be shown on the over-snow vehicle use map.

*Response.* The Forest Service agrees with this suggestion. There will be times where routes are designated for motor vehicles and both wheeled and tracked motor vehicles will be operating over snow on those routes simultaneously. In these cases, the routes will be shown on the MVUM. If the over-snow vehicle use is regulated under 36 CFR 212.81 on the same route, the use by over-snow vehicles would be shown on an over-snow vehicle use map. The over-snow vehicle use map should also show the wheeled motor vehicle use. The Agency has added direction in FSM 7718 of the final directives to address this unique situation.

*Comment.* Some respondents believed that the proposed directives should require full rehabilitation of all decommissioned routes. Other respondents believed that decommissioning unauthorized routes should be mandatory. Some respondents wanted the proposed directives to include a requirement to establish a schedule for decommissioning unneeded routes. Other respondents did not want any routes decommissioned. Instead, these respondents wanted the Agency to consider including all unauthorized routes in the forest transportation system and designating them for motor vehicle use. Some respondents wanted the agency to consider designating routes that have been decommissioned. One respondent requested more explanation of how roads should be decommissioned.

*Response.* In connection with identification of the minimum road system, the 2001 roads rule requires responsible officials to review NFS roads on each national forest and national grassland and identify those that are no longer needed to meet forest resource management objectives and that therefore should be considered for decommissioning or other uses, such as trails (36 CFR 212.5(b)(2)). Decommissioning involves restoring roads to a more natural state. Decommissioning may involve reestablishing former drainage patterns, stabilizing slopes, restoring vegetation, blocking the entrance to the road, installing water bars, removing culverts, reestablishing drainage ways, removing unstable fills, pulling back road shoulders, scattering slash on the road bed, completely eliminating the road bed by restoring natural contours and slopes, or other methods designed to meet the specific conditions associated with the unneeded road. Further guidance on road decommissioning is provided in FSM 7734. Identification of the minimum road system and decisions regarding when and how to decommission roads are left to the discretion of the responsible official. The roads rule does not address identification of the minimum trail system or decommissioning of trails.

The Agency believes that evaluation of which routes, including unauthorized routes, should be designated for motor vehicle use is also best handled at the local level by officials with first-hand knowledge of the particular circumstances, uses, and environmental impacts involved, in coordination with Federal, State, and local governmental entities and tribal governments and input from motor vehicle users and other members of the public.

*Comment.* Some respondents stated that allowing motor vehicles to park within one vehicle length of a designated route should not be allowed because it is inconsistent with 36 CFR 212.51(b), which limits motor vehicle use off designated routes to dispersed camping and big game retrieval. Some respondents wanted the agency to replace ''one vehicle length'' with a specified distance and to include provisions in the proposed directives for prohibiting parking under certain circumstances.

*Response.* Users of NFS lands have always been able to park along NFS roads and NFS trails when it is safe to do so, when it would not cause damage to NFS resources or facilities, and when it is not prohibited by an order issued under 36 CFR 261.50 or by State traffic law.

The travel management rule does not regulate parking of motor vehicles along NFS roads and NFS trails. NFS roads are subject to State traffic laws, which allow parking along the shoulder of public roads when it is safe to do so. Causing resource damage to NFS lands while operating a motor vehicle is prohibited by 36 CFR 261.15(h).

The final directives provide two options for specifying how far from a designated road parking will be allowed. Accordingly, FSM 7716.1, paragraph 1, of the final directives states: ''The designation also includes

parking a motor vehicle on the side of the road, when it is safe to do so without causing damage to NFS resources or facilities, unless prohibited by state law, a traffic sign, or an order (36 CFR 261.54). Road designations must specify either that they include parking within one vehicle length of the edge of the road or within a specified distance of up to 30 feet from the centerline of the road.''

*Comment.* Other respondents suggested that the proposed directives allow OHVs to pull 8 to 10 feet off a route to let others, such as equestrians, pass.

*Response.* The Forest Service has adopted this suggestion for trails designated for motor vehicle use to promote safe, responsible, and courteous use and to reduce or eliminate use conflicts. The agency has revised FSM 7716.1 in the final directives to allow for pulling over for a safe distance on a designated trail to allow others to pass in either direction.

*Comment.* Some respondents commented that the Agency has devoted considerable time to development of strategic plans for recreation, but has not addressed recreation niches and how they relate to trail planning. These respondents suggested addressing these issues in the proposed directives.

*Response.* Recreation Facility Analysis (RFA) is an administrative process, incorporating identification of an administrative unit's recreation niche to inform facility master planning decisions for recreation sites. Development of strategic plans for recreation and facility master planning are beyond the scope of these directives, which address designation of roads, trails, and areas for motor vehicle use. However, recreation opportunities should be consistent with the applicable land management plan, and the Agency has included this clarification in FSM 2350.2, paragraph 2. In addition, FSH 2309.18, chapter 10, was recently updated (73 FR 61600; October 16, 2008) to address trail planning considerations.

*Comment.* Some respondents suggested that the authority to designate routes and areas be kept at the lowest possible level so as to maximize flexibility in the designation process. Other respondents believed that the authority to designate routes and areas should be placed at the highest possible level for consistency in the designation process.

*Response.* The travel management rule authorizes designations at either the level of an administrative unit or a ranger district (36 CFR 212.51(a)), and the agency did not propose changing these provisions in the proposed directives. Therefore, these comments are beyond the scope of the directives.

The Forest Service believes that it is appropriate to give forest supervisors the discretion to delegate designation authority to district rangers. One of the main objectives of the travel management rule and its implementing directives is to provide a national framework for local decisionmaking. The Agency believes that the decision to designate NFS roads, NFS trails, and areas on NFS lands for motor vehicle use is best made by the forest or grassland supervisor or district ranger, in coordination with Federal, State, and local governmental entities and tribal governments and with public involvement. The requirements in the travel management rule and direction and guidance in the final directives provide the consistency needed in the designation process.

**Section-Specific Comments and Responses**

**FSM 7703**

*Comment.* Some respondents suggested that FSM 7703 in the proposed directives incorporate the phrase ''minimize impacts on'' from E.O. 11644 in reference to the factors to consider in designating trails and areas for motor vehicle use.

*Response.* The phrase, ''the responsible official shall consider effects on the following, with the objective of minimizing,'' is contained in the travel management rule at 36 CFR 212.55(b) and was not proposed for revision. Therefore, this comment is beyond the scope of these directives.

The phrase in question is mandatory with respect to addressing environmental and other impacts associated with motor vehicle use of trails and areas. Moreover, the Agency believes that this phrase is consistent with E.O. 11644 and better expresses its intent. It is the intent of E.O. 11644 that motor vehicle use of trails and areas on Federal lands be managed to address environmental and other impacts, but that motor vehicle use on Federal lands continue in appropriate locations. An extreme interpretation of ''minimize'' would preclude any use at all, since impacts always can be reduced further by preventing them altogether. This interpretation would not reflect the full context of E.O. 11644 or other laws and policies related to multiple-use management of NFS lands. Neither E.O. 11644, nor these other laws and policies, establish the primacy of any particular use of trails and areas. The Agency believes that the phrase, ''shall consider * * * with the objective of minimizing * * *'' will ensure that environmental impacts are properly taken into account, without categorically precluding motor vehicle use.

**FSM 7703.11**

*Comment.* Some respondents believed that the Agency should not limit designations to vehicle class and time of year in proposed FSM 7703.11, paragraph 3.

*Response.* The travel management rule states: ''Motor vehicle use on National Forest System roads, National Forest System trails, and in areas on National Forest System lands shall be designated by vehicle class and, if appropriate, by time of year by the responsible official on administrative units or ranger districts of the National Forest System'' (36 CFR 212.51(a)). The Agency has not proposed changing this provision. Therefore, this comment is beyond the scope of these directives.

**FSM 7703.15**

*Comment.* Some respondents suggested that proposed FSM 7703.15 require responsible officials to work with municipalities to craft long-term, integrated transit and recreation plans that consider locating recreation opportunities where they can be accessed by public transportation, bicycles, or other means besides a private motor vehicle. These respondents also suggested including provisions in the proposed directives that would encourage providing public transportation to popular locations in the NFS that are far from urban areas.

*Response.* The need to provide guidance regarding alternative modes of transportation is beyond the scope of these directives, which provide direction on designation of roads, trails, and areas for motor vehicle use.

However, the Forest Service agrees as a matter of principle with this *Comment.* The agency is working with the U.S. Department of the Interior, the U.S. Department of Transportation, and many municipalities under the Alternative Transportation for Parks and Public Lands provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. No. 109–59) to provide transit and alternative transportation in the NFS when appropriate. The agency has retained the proposed policy addressing that subject in the final directives at FSM 7703.15 and 7704.2.

**FSM 7703.24**

*Comment.* Some respondents believed that proposed FSM 7703.24, paragraph

4, should be modified to allow motor vehicle use for recreation events on roads that are open only intermittently.

*Response.* The Forest Service believes that this change is not necessary. Consistent with the travel management rule at 36 CFR 212.51(a)(8), the proposed and final directives at FSM 7703.24, paragraph 4, allow for motor vehicle use that is specifically authorized under a written authorization issued under Federal law or regulation. Recreation events involving motor vehicles are subject to the conditions in FSM 2353.28h.

**FSM 7703.25**

*Comment.* Some respondents stated that responsible officials should be able to designate temporary roads for motor vehicle use under proposed FSM 7703.25, paragraph 1.

*Response.* Under the travel management rule, only NFS roads, NFS trails, and areas on NFS lands may be designated for motor vehicle use (36 CFR 212.51(a)). NFS roads and NFS trails are a subset of forest roads and trails (36 CFR 212.1). Temporary roads and trails are not forest roads and trails (36 CFR 212.1) and therefore cannot be designated for motor vehicle use. Consequently, this comment is beyond the scope of these directives.

However, emergency motor vehicle use on temporary roads is exempt from designations under 36 CFR 212.51(a)(5), and motor vehicle use on temporary roads that is specifically authorized under a written authorization is exempt from designations under 36 CFR 212.51(a)(8).

**FSM 7703.26**

*Comment.* Some respondents suggested modifying the word ''benefit'' with the adjective ''public'' or ''social'' in proposed FSM 7703.26, paragraph 1, to be consistent with the discussion of social sustainability elsewhere in the proposed directives.

*Response.* The Forest Service agrees and has modified ''benefit'' with ''social'' and ''economic'' in FSM 7703.26, paragraph 1, in the final directives.

*Comment.* Some respondents suggested modifying the 3rd and 5th sentences in proposed FSM 7703.26, paragraph 2, to clarify that changes could be positive and expanding proposed FSM 7703.26, paragraphs 2a through 2c, to include positive effects, such as improved access and enhanced recreation opportunities.

*Response.* The Forest Service agrees and in the final directives has changed the word ''impacted'' to ''affected'' in the 3rd sentence and has changed the word ''impacts'' to ''effects'' in the 5th sentence of FSM 7703.26, paragraph 2. In addition, the Agency has expanded the list of considerations to include effects on recreation opportunities and access to NFS lands.

**FSM 7705**

*Comment.* Some respondents commented that the definition of forest transportation atlas at FSM 7705 should include the environmental analysis and decision documents and the underlying electronic data that serve as the basis for the maps included in the atlas.

*Response.* The Forest Service does not believe it is appropriate to include environmental analysis and decision documents in the forest transportation atlas. However, the forest transportation atlas may be used to record decisions regarding forest transportation facilities and has added this use for the atlas to FSM 7711.2 in the proposed and final directives.

The Agency agrees that relevant electronic data need to be included in the forest transportation atlas and has therefore added to FSM 7711.2 in the proposed and final directives the requirement to use the Forest Service's national Infrastructure database and the transportation layer of the geographic information system for storage of information in a forest transportation atlas.

**FSM 7712.3**

*Comment.* Some respondents suggested that proposed FSM 7712.3, paragraph 6, require the use of travel analysis in setting maintenance priorities.

*Response.* FSM 7732.04c adequately addresses setting road maintenance priorities. This section requires forest and grassland supervisors to approve an annual road maintenance plan. The requirements for these plans include consideration of both short- and long-term needs; consideration of all sources of maintenance funds available during the fiscal year, including appropriated funds and deposits made under cooperative agreements; consideration of maintenance performed by timber purchasers, other contractors, permit holders, and cooperators; and consideration of the need for expenditures of appropriated road maintenance funds for road decommissioning (FSM 7732.11, para. 1). Responsible officials conduct maintenance planning in a variety of ways that are tailored to meet local needs and availability of resources. While travel analysis could be used for maintenance planning, the Agency does not believe it would be productive to require each responsible official to do so.

**FSM 7712.4**

*Comment.* One respondent noted that the discussion about travel analysis in proposed FSM 7712.4 should address trails, as well as roads.

*Response.* The Forest Service has modified FSM 7712 and 7712.4 to provide for the use of travel analysis to inform decisions relating to the designation of NFS roads, NFS trails, and areas on NFS lands for motor vehicle use.

**FSM 7715.63**

*Comment.* One respondent believed that the requirements in proposed FSM 7703.14 and 7715.63 (FSM 7715.73 in the final directives), governing designation of areas for motor vehicle use, were not well coordinated.

*Response.* The Forest Service disagrees with this Comment. Both sections in the proposed and final directives are consistent with the travel management rule and each other.

**FSM 7715.66**

*Comment.* Some respondents believed that proposed FSM 7715.66 unnecessarily and illegally limited the agency's discretion regarding management of wilderness and primitive areas and requested that this section be removed.

*Response.* The Wilderness Act prohibits mechanical transport and motor vehicles in wilderness areas unless they are necessary to meet minimum requirements for administration of the areas or they are expressly authorized under the applicable enabling legislation for those areas. In addition, section 3(a)(4) of E.O. 11644 prohibits designation of off-road motor vehicle use in primitive areas. Accordingly, 36 CFR 212.55(e) and FSM 7715.66 in the proposed directives (FSM 7715.76 in the final directives) prohibit designation of roads, trails, and areas for motor vehicle use in wilderness areas and primitive areas, unless, in the case of wilderness areas, motor vehicle use is authorized by the applicable enabling legislation for those areas. Primitive areas are defined as areas in the NFS that were classified as primitive on the effective date of the Wilderness Act, September 3, 1964 (36 CFR 261.2; FSM 7705).

**FSM 7715.67**

*Comment.* Some respondents believed that the restrictions in proposed FSM 7715.67 on motorized mixed use would limit the network of OHV routes.

*Response.* The Forest Service anticipates the need to mix highway-legal and non-highway-legal traffic on some NFS roads at maintenance levels 3, 4, and 5 and on a significant percentage of NFS roads at maintenance level 2. These decisions will be advised by professional engineering judgment and, when appropriate, will include design features deemed appropriate in engineering studies. The Forest Service believes that the guidance provided in FSM 7715.77 and FSH 7709.55, chapter 30, in the final directives is necessary for public safety and enjoyment.

**FSM 7715.69**

*Comment.* Some respondents believed that proposed FSM 7715.69 (FSM 7715.79 in the final directives) should preclude exemptions from designations for people with disabilities. Some respondents believed that proposed FSM 7715.69 should promote more use of OHVs by disabled hunters.

*Response.* Under section 504 of the Rehabilitation Act of 1973, no person with a disability can be denied participation in a Federal program that is available to all other people solely because of his or her disability. Consistent with section 504, FSM 2353.05, and Title V, Section 507(c), of the Americans With Disabilities Act, wheelchairs and mobility devices, including those that are battery-powered, that are designed solely for use by a mobility-impaired person for location and that are suitable for use in an indoor pedestrian area are allowed on all NFS lands that are open to foot travel.

There is no legal requirement to allow people with disabilities to use motor vehicles on roads, on trails, or in areas that are closed to motor vehicle use. Restrictions on motor vehicle use that are applied consistently to everyone are not discriminatory. Generally, granting an exemption from designations for people with disabilities would not be consistent with the resource protection and other management objectives of designation decisions and would fundamentally alter the nature of the Forest Service's travel management program (29 U.S.C. 794; 7 CFR 15e.103).

**FSM 7716.11**

*Comment.* Some respondents wanted to know how new vehicles such as utility-terrain vehicles (UTVs) would be included in designations.

*Response.* Designations are made by vehicle class (36 CFR 212.51; FSM 7716.11). The final directives establish seven categories of motor vehicle classes for use when producing a motor vehicle use map: (1) Road open only to highway-legal motor vehicles; (2) road open to all motor vehicles; (3) trail open to all motor vehicles; (4) trail open only to motor vehicles less than or equal to 50 inches in width; (5) trail open only to wheeled motor vehicles less than or equal to 50 inches in width; (6) trail open only to motorcycles; and (7) special vehicle designation (includes any classes of vehicles that are not already listed) (FSM 7711.3, para. 5a through 5g). UTVs could fall into category 2, 3, 4, 5, or 7, depending on their width.

**FSM 7716.12**

*Comment.* Some respondents suggested that proposed FSM 7716.12 require responsible officials to standardize seasonal restrictions to promote consistency and to make compliance with designations easier for the public.

*Response.* The Forest Service agrees that responsible officials should, to the extent possible, standardize seasonal restrictions for consistency. Accordingly, the Agency has revised FSM 7716.12, paragraph 2, in the final directives to emphasize consistency in designating roads, trails and areas by time of year.

**FSM 7716.4**

*Comment.* Some respondents suggested that proposed FSM 7716.4 provide direction on adequate signage to ensure the public knows which routes and areas are designated for motor vehicle use. Other respondents objected to providing direction on signage for designations so as to encourage reliance on MVUMs.

*Response.* The Forest Service will continue to use signs widely to provide information and to inform users on a variety of topics, including regulations and prohibitions. However, the Agency does not believe it is appropriate or necessary to require signing for designations. The Agency has found that posting routes as open or closed to particular uses has not always been effective in controlling use. Signs have proven difficult to maintain, are subject to vandalism, and may not be as high a priority for scarce road maintenance funds as providing for user safety and environmental protection. Therefore, the Agency believes that decisions regarding signing are best made at the local level, based on site-specific circumstances. However, the final directives suggest that each route designated for motor vehicle use have a route marker on the ground that corresponds to the route identification shown on the corresponding MVUM (FSM 7716.42, para. 2). The travel management rule makes motor vehicle users responsible for obtaining MVUMs from the headquarters or Web sites of corresponding administrative units and ranger districts (36 CFR 212.56).

**FSH 7709.55, Section 10.02**

*Comment.* Some respondents believed that paragraphs 1, 2, and 3 in section 10.02 of proposed FSH 7709.55 conflict with each other, to the extent that it is impossible simultaneously to limit gridlock, simply confirm existing travel management decisions, limit inventories of routes, and engender trust and credibility in travel management.

*Response.* The Forest Service disagrees with this *Comment.* For many years, some administrative units have limited motor vehicle use to a designated system of roads, trails, and areas. There is nothing in the travel management rule or the final directives that requires these units to reconsider these travel management decisions. To the contrary, the travel management rule provides that these decisions may be incorporated into designations for motor vehicle use (36 CFR 212.50(b)).

The Forest Service believes that it is not necessary to inventory unauthorized routes to complete travel planning. Trust and credibility in designating NFS roads, NFS trails, and areas on NFS lands are best engendered through coordination with Federal, State, and local governmental entities and tribal governments per 36 CFR 212.53 and public involvement per 36 CFR 212.52.

**FSH 7709.55, Section 21.11**

*Comment.* Some respondents stated that proposed FSH 7709.55, section 21.11, should require use in travel analysis of the data required to be collected in proposed FSH 7709.55, Section 20.03, paragraph 2.

*Response.* The Forest Service believes that FSH 7709, section 21.11, paragraphs 1a through 1m, in the final directives adequately address what should be considered in travel analysis and track the guidance in FSH 7709.55, section 20.03, paragraph 2, regarding travel analysis.

**FSH 7709.55, Section 21.4**

*Comment.* Some respondents suggested that the Agency add guidance in FSH 7709.55, section 21.4, on use of data and analysis of issues associated with social and economic sustainability.

*Response.* The Forest Service believes that FSH 7709.55 adequately addresses social and economic effects by providing a framework for conducting travel analysis in general that gives the responsible official the discretion to design the analysis to address economic

and social issues unique to that administrative unit or ranger district.

**FSM 2352**

*Comment.* Some respondents objected to elimination of the concept of recreation road management. These respondents stated that travel analysis is focused exclusively on efficient road system management and fails to consider the value of recreation, which is a critical use of NFS lands.

*Response.* The Agency agrees that driving for pleasure and other forms of recreational use of motor vehicles are legitimate uses of the forest transportation system. The agency has provided guidance on these uses in FSM 2353.28.

Travel analysis is used both to identify the minimum road system per 36 CFR 212.5(b) and to designate NFS roads, NFS trails, and areas on NFS lands for motor vehicle use per 36 CFR 212.51(a).

Recreation management in general is beyond the scope of the final directives, which implement the travel management rule.

**FSM 2353**

*Comment.* Some respondents requested that the agency remove Web page references throughout this section and instead make a cross-reference to the FSM or FSH.

*Response.* The Forest Service's accessibility guidelines reside on a Web site. Therefore, references to this Web site must remain. The Agency has removed references to the Recreation and Heritage Resources Integrated Business Management Web site because the external Web site is no longer active and the Agency has incorporated much of this information in recently issued directives at FSM 2350 and FSH 2309.18 (73 FR 61600; October 16, 2008).

**FSM 2353.05**

*Comment.* Some respondents believed that the description of difficulty levels for NFS trails in proposed FSM 2353.05 could be improved by incorporating the variation in these levels from region to region. Other respondents suggested that the Agency provide a reference guide for assigning difficulty levels for all types of trails in all parts of the country.

*Response.* Current direction is adequate to allow trail managers to assign difficulty levels, as appropriate, to all different types of NFS trails in different parts of the country. In FSM 2353 and FSH 2309.18, chapter 20, of the recently issued directives implementing the Agency's national trail classification system (TCS), the Agency clarified the definitions for and guidance on use of difficulty levels (73 FR 61600; October 16, 2008).

**FSM 2353.12**

*Comment.* Some respondents suggested that proposed FSM 2353.12 require posting of MVUMs on national forest Web sites.

*Response.* The travel management rule and the final directives require MVUMs to be made available to the public on Web sites of corresponding administrative units and ranger districts (36 CFR 212.56; FSM 7711.3).

**FSM 2353.18**

*Comment.* Some respondents suggested that the Agency provide guidance on development of TMOs in FSM 2353.18 or elsewhere in the FSM or FSH that is similar to the guidance on RMOs in FSM 7720 and 7730. These respondents also believed that there should be a clear link between TMOs and travel planning.

*Response.* The Agency has clarified direction on development of TMOs by adding a definition for ''trail management objective'' in FSM 2353.05 in the new directives implementing the TCS (73 FR 61600; October 16, 2008). In addition, the Agency has added a definition for the Trail Fundamentals and their components of Trail Class, Trail Type, Managed Use, Designed Use, and Design Parameters. The applicable Trail Type, Trail Class, Managed Use, Designed Use, and Design Parameters are reflected in the TMOs for each NFS trail. The link between TMOs and travel planning is established at FSM 2353.12 in the final directives, which requires identifying and documenting TMOs for all NFS trails. In addition, the directives governing application of the Design Parameters for motorized trails require those trails to be designated for motor vehicle use pursuant to 36 CFR 212.51 and displayed on an MVUM (FSH 2309.18, sec. 23.21, para. 1; 23.22, para. 1; and 23.23, para. 1). Management of the TCS is beyond the scope of these directives, which govern designation of routes and areas for motor vehicle use.

**FSM 2353.28**

*Comment.* Some respondents recommended including in proposed FSM 2353.28f a discussion of permits and fees for motorized use authorized under the Federal Lands Recreation Enhancement Act (REA).

*Response.* Issuance of special recreation permits and fees for those permits under REA are beyond the scope of these directives, which govern designation of NFS roads, NFS trails, and areas on NFS lands for motor vehicle use.

*Comment.* Some respondents believed that proposed FSM 2353.28h should be modified to include language from FSM 2355 regarding issuance of permits for motorized recreation events. Other respondents stated that motorized recreation events should occur only on designated routes and in designated areas.

*Response.* The final directives at FSM 2353.28h appropriately incorporate direction from current FSM 2355. The direction not to issue permits for motorized recreation events that can be conducted off NFS lands was narrowed to include only competitive events and activities that are not appropriate for a national forest or national grassland setting. Rather than prohibiting motorized recreation events off designated routes and outside designated areas, FSM 2353.28h in the final directives requires the authorized officer to consider, with the objective of minimizing, adverse effects on natural and cultural resources; to promote activities in harmony with the natural terrain; and to enhance the experience and appreciation of the national forest setting.

**FSM 2353.33**

*Comment.* Some respondents suggested that proposed FSM 2353.33a identify who should prepare the establishment report for a National Recreation Trail. One respondent suggested that proposed FSM 2353.33a identify who conducts studies for National Historic Trails and who makes recommendations regarding establishment of National Historic Trails. One respondent suggested that proposed FSM 2353.04g identify a leadership role for the regional forester in the agency's trail program.

*Response.* Forest Supervisors are responsible for preparing establishment reports for National Recreation Trails (FSM 2353.04i, para. 6). Congress authorizes studies for National Historic Trails (16 U.S.C. 1241–1251), and Regional Foresters are responsible for conducting those studies (FSM 2353.04g, para. 3c). The Agency revised FSM 2353.04g in the final directives to identify the regional forester's responsibilities for trails.

**Summary of Changes to the Current and Proposed Directives**

To ensure timely and consistent implementation of the travel management rule, the Forest Service is amending travel management directives in FSM 2350, 7700, and 7710 and FSH

7709.55. While some of the changes in the directives simply reiterate direction in the travel management rule, other changes provide clarifying instructions, delegations of authority, or other guidance on implementing the travel management rule.

The final directives consolidate Forest Service policy for travel management into FSM 7700. The Agency changed the title of this chapter from ''Transportation System'' to ''Travel Management'' to be consistent with the new title of 36 CFR part 212. The Agency added authorities and responsibilities to FSM 7700.

The Agency added direction on travel analysis and route and area designation to FSM 7710, ''Travel Planning.'' In addition, the Agency revised the Travel Planning Handbook, FSH 7709.55, to identify a process for designating roads, trails, and areas, to describe travel analysis, and to identify a process for conducting engineering analysis. Directives governing road maintenance and operations remain in FSM 7730, Operations and Maintenance, and FSH 7709.59, the Road System Operations Handbook.

The Agency consolidated management direction for motor vehicle use in FSM 2350, Trail, River, and Similar Recreation Opportunities. Directives governing trail maintenance and operations remain in FSM 2350 and the Trails Management Handbook, FSH 2309.18.

The following lists the substantive changes made to the proposed directives. These changes were based on public comment or on the Agency's 3 years of experience in implementing the travel management rule. In addition to these substantive revisions, the Agency improved organization, enhanced clarity by renaming sections, and removed duplication.

**FSM 2350**

*2350*—Added rock climbing to the list of recreational activities that involve relatively low-density use and limited infrastructure.

*2350.2*—Clarified that recreation opportunities provided must be consistent with the applicable land management plan.

*2350.2, paragraph 3*—Added the phrase, ''on the ground management, including law enforcement.''

*2350.3, paragraph 7*—Added direction not to maintain unauthorized trails.

*2353.01b, paragraph 3*—Clarified language regarding prohibitions that apply in wilderness and primitive areas.

*2353.03, paragraph 3*—Clarified that an NFS trail may not have more than one national trail classification.

*2353.03, paragraph 6*—Added that trails may be included in the forest transportation atlas even if they are under the jurisdiction of another entity.

*2353.03, paragraph 8*—Added direction to designate trails for motor vehicle use.

*2353.04d, paragraph 10*—Added direction to disseminate information to the public to enhance understanding of the proper use of motor vehicles.

*2353.04e, paragraphs 4 and 5*—Added responsibilities to issue technical specifications for signs and posters and to approve non-standard symbols and traffic control devices.

*2353.04g, paragraph 1*—Added general responsibilities for NFS trails.

*2353.04i, paragraph 11*—Clarified that the responsibility for temporary, emergency closures may not be delegated to district rangers.

*2353.04j*—Added responsibilities, including approval of TMOs.

*2353.05*—Added definitions for ''motorcycle,'' ''over-snow vehicle,'' ''route,'' and ''utility terrain vehicle.''

*2353.23, paragraph 2*—Added direction to consult with the regional sign coordinator for approval of non-standard signs.

*2353.25*—Provided direction to consider available resources and costs and decommissioning when alternative routes are available.

*2353.28, paragraphs 3 and 4*—Added direction on linking routes into a trail system and use conflicts.

*2353.28a, paragraph 2*—Added direction to use appropriate and effective communication methods to ensure understanding of motor vehicle management strategies and requirements.

*2353.28b, paragraph 3*—Added direction to review mixed use analysis when existing conditions change.

*2353.28c*—Deleted redundant direction and referred to FSM 7716.42.

*2353.28d, paragraph 5*—Added requirements regarding signing for temporary emergency closures.

*2353.28h*—Modified direction regarding when recreation event permits should not be issued.

*2353.28i*—Added a requirement to use applicable criteria in 36 CFR 212.55 as a basis for identifying effects to monitor.

*2353.28j*—Added section entitled, ''Relationship Between Motorized NFS Roads and NFS Trails.''

*2353.53*—Added additional guidance regarding the type of trail experience provided.

*2353.54*—Added examples of elements to address when describing the history of a National Recreation Trail.

**FSM 7700, Zero Code**

*7703.11*—Removed erroneous direction regarding over-snow vehicle management.

*7703.23*—Removed direction regarding management of non-motorized recreation.

*7703.26*—Added provisions regarding the positive effects of adding roads to the forest transportation system.

*7703.27*—Added section entitled, ''Converting NFS Roads to NFS Trails and Managing Coincidental Routes.''

*7705*—Added a definition for ''primitive area.''

**FSM 7710**

*7710.3*—Clarified that a science-based travel analysis will be used when identifying the minimum road system.

*7710.42*—Added a responsibility for the Washington Office Director of Engineering to produce a production guide for MVUMs.

*7710.43*—Added a responsibility for the Director of Recreation, Heritage, and Volunteer Resources to monitor implementation of the travel management rule.

*7710.44*—Added a responsibility for regional foresters to ensure that MVUMs comply with the production guide.

*7711.2, paragraph 3b*—Clarified that the forest road atlas constitutes the forest development road system plan for purposes of the National Forest Management Act (16 U.S.C. 1608).

*7711.3*—Included a seventh standard vehicle class category.

*7712, paragraph 1*—Clarified that travel analysis is not required to inform decisions related to the designation of roads, trails, and areas for those administrative units and ranger districts that have issued a proposed action as of the effective date of these directives.

*7712, paragraph 2*—Modified direction to state that travel analysis may address identification of the minimum road system and route and area designation decisions separately or simultaneously.

*7712, paragraph 3*—Added direction to state that proposals resulting from travel analysis may be addressed in the same or different environmental analyses.

*7712, paragraph 7*—Clarified that a roads analysis completed in accordance with Publication FS–643 satisfies the requirement for travel analysis relative to roads.

*7712.3*—Clarified that travel analysis is not required for decommissioning unauthorized routes.

*7712.4, paragraph 1*—Clarified that travel analysis satisfies the requirement for incorporating a science-based roads analysis at the appropriate scale when identifying the minimum road system.

*7712.4, paragraph 5*—Clarified that a report produced subsequent to a roads analysis conducted pursuant to Publication FS–643 also meets the requirement to use travel analysis relative to roads.

*7715.03*—Added a statement that administrative units and ranger districts should avoid adding routes to the forest transportation system unless there is adequate provision for their maintenance.

*7715.5, paragraph 2f*—Removed grazing allotments as specific criteria to be considered when designating trails and areas, since they are not identified as criteria to be considered when designating trails and areas in the travel management rule.

*7715.73*—Added guidance on use of signs to identify the boundaries of a designated area; added a requirement to establish and document management objectives for designated areas; and clarified that motor vehicle use in a designated area cannot be restricted by the type of activity.

*7715.74*—Added guidance on including in a designation the limited use of motor vehicles within a specified distance of certain forest routes, rather than merely designated routes, solely for the purposes of big game retrieval and dispersed camping; clarified the use of terminal facilities for dispersed camping; and suggested coordinating dates for motor vehicle use for big game retrieval with the appropriate State agency.

*7715.77*—Clarified that motor vehicles licensed under a State green sticker or other similar program do not meet the definition of a highway-legal vehicle for purposes of the agency's directives.

*7715.77*—Added a provision regarding use of engineering judgment to determine if and to what extent an engineering analysis is needed to ascertain whether over-snow vehicle use should be allowed on roads that are designated for highway-legal vehicles only.

*7716.1, paragraph 1*—Revised to require that road designations provide for parking within one vehicle length of the edge of the road or within a specified distance of up to 30 feet from the centerline of the road.

*7716.12, paragraph 2*—Added emphasis on use of standard seasonal designations.

*7716.13*—Identified limitations on designations for big game retrieval.

*7716.41*—Added direction to meet requirements for the MVUM established by the Washington Office Director of Engineering.

*7717.1, paragraph 1*—Added the requirement to establish a regular schedule for monitoring motor vehicle use; to monitor for consistency with the applicable land management plan; and use applicable criteria established in 36 CFR 212.55 as a basis for identifying effects to monitor. Stated that if over time monitoring of motor vehicle use in a designated area identifies a well-established system of routes, consider designating those routes.

*7718.1, paragraph 1*—Clarified that over-snow vehicle use may be prohibited or restricted pursuant to orders issued under 36 CFR part 261, subpart B, and that wheeled motor vehicles that are modified with tracks and/or skis meet the definition of ''over-snow vehicle.''

**FSH 7709.55, Chapter 10**

*Section 13*—Included a statement that the steps of the travel planning process overlap with the steps of the travel analysis process and that planners should avoid duplication of effort.

*Section 15.1*—To be consistent with FSM 7711.3, included direction on the contents of an MVUM and direction on how to notify the public that an MVUM is available.

*Section 15.2*—Identified a possible need to adjust RMOs and TMOs after travel management decisions are made.

*Section 16.3*—Added the requirement to use applicable criteria established in 36 CFR 212.55 as a basis for identifying effects to monitor.

**FSH 7709.55, Chapter 20**

*Section 21.1, paragraph 3*—Added the requirement to identify the scope of travel analysis.

*Section 21.12*—Deleted the example, since it did not clearly illustrate effects on the timeframe for implementing travel management decisions.

*Section 21.6*—Deleted the requirement to include a map in a travel analysis report.

**Regulatory Certifications**

*Environmental Impact*

The final directives provide policy and procedural guidance to Agency officials implementing the travel management rule. Travel management decisions implementing these directives are made with appropriate site-specific environmental analysis and public involvement. The final directives have no effect on the ground until designations of roads, trails, and areas are completed at the field level, with opportunity for public involvement, as appropriate. Section 31b of FSH 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Servicewide administrative procedures, program processes, or instructions.'' The Agency has concluded that these final directives fall within this category of actions and that no extraordinary circumstances exist that require preparation of an environmental assessment or environmental impact statement.

*Regulatory Impact*

These final directives have been reviewed under USDA procedures and E.O. 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has determined that these directives are not significant for purposes of E.O. 12866. These final directives cannot and may not reasonably be anticipated to lead to an annual effect of $100 million or more on or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; raise novel legal or policy issues; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of beneficiaries of those programs. Accordingly, these final directives are not subject to OMB review under E.O. 12866.

*Regulatory Flexibility Act Analysis*

The Agency has considered these final directives in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The final directives require identification at the field level, with public input, as appropriate, of a designated system of roads, trails, and areas for motor vehicle use. The Agency has determined that these final directives will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act because the directives will not impose recordkeeping requirements on them; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the final directives will not have any effect on small entities as

defined by the Regulatory Flexibility Act.

*No Taking Implications*

The Agency has analyzed these final directives in accordance with the principles and criteria contained in E.O. 12630. The Agency has determined that these final directives will not pose the risk of a taking of private property.

*Federalism and Consultation and Coordination With Indian Tribal Governments*

The Agency has considered these final directives under the requirements of E.O. 13132 on federalism and has determined that the final directives conform to the federalism principles set out in this E.O.; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary.

Moreover, these directives do not have Tribal implications as defined by E.O. 13175, Consultation and Coordination With Indian Tribal Governments, and therefore advance consultation with Tribes is not required.

*Energy Effects*

The Agency has reviewed these final directives under E.O. 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect the Energy Supply. The Agency has determined that these final directives do not constitute a significant energy action as defined in the E.O.

*Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Agency has assessed the effects of these final directives on State, local, and Tribal governments and the private sector. These final directives will not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

*Controlling Paperwork Burdens on the Public*

These final directives do not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

**Access to the Final Directives**

The Forest Service organizes its directive system by alphanumeric codes and subject headings. The intended audience for this direction is Forest Service employees charged with travel planning and management. The full text of FSM 2350, 7700, and 7710 and FSH 7709.55 is available electronically on the World Wide Web at *http://www.fs.fed.us/im/directives/*.

Dated: November 4, 2008.

**Abigail R. Kimbell,**

*Chief, Forest Service.*

[FR Doc. E8–29041 Filed 12–8–08; 8:45 am]

BILLING CODE 3410–11–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Applications for Duty–Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States. Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before (Insert date 20 days after publication in the FEDERAL REGISTER). Address written comments to Statutory Import Programs Staff, Room 2104, U.S. Department of Commerce, Washington, D.C. 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. at the U.S. Department of Commerce in Room 2104.

*Docket Number: 08–055.* Applicant: House Ear Institute, 2100 W. Third Street, Los Angeles, CA 90057. Instrument: Electron Microscope, Model Technai G2 20 TEM. Manufacturer: FEI Company, Czech Republic. Intended Use: The instrument will be installed in a multi–user shared imaging facility and is intended to be used in hearing research on the cochlea, the mammalian organ of hearing. Specifically, it will be used for examining the cochlear tissues, cells and cell fragments to determine how the normal cochlea functions and how hearing defects affect ultrastructural morphology and protein distribution. Application accepted by Commissioner of Customs: November 3, 2008.

Dated: December 3, 2008.

**Christopher Cassel,**

*Director, Statutory Import Programs Staff, Import Administration.*

[FR Doc. E8–29124 Filed 12–8–08; 8:45 am]

Billing Code: 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–588–804]**

### Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof from Japan

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On September 11, 2008, the Department of Commerce published in the **Federal Register** the final results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. The period of review is May 1, 2006, through April 30, 2007. Based on the correction of a ministerial error with respect to NTN's home–market packing expense, we have changed the margin for NTN Corporation (NTN) and, as a result, the margins for non–selected respondents for the final results of review with respect to the antidumping duty order on ball bearings and parts thereof from Japan.

**EFFECTIVE DATE:** September 11, 2008

**FOR FURTHER INFORMATION CONTACT:** Thomas Schauer or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–0410 and (202) 482–4477, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 11, 2008, the Department of Commerce (the Department) published in the **Federal Register** the final results of the administrative reviews of the antidumping duty orders on ball bearings and parts thereof (ball bearings) from France, Germany, Italy, Japan, and the United Kingdom. See *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping*

*Duty Administrative Reviews and Rescission of Reviews in Part*, 73 FR 52823 (September 11, 2008) (*Final Results*).

We received a timely allegation of a ministerial error pursuant to 19 CFR § 351.224(c) from The Timken Company, a petitioner, that our recalculation of NTN's home–market packing expenses reflected use of incorrect expense ratios. We agree that there is a ministerial error.

Before the Department issued amended final results reflecting correction of the ministerial error, NTN filed a summons and complaint to challenge the *Final Results*. Aisin Seiki Company, Ltd., also filed a summons and complaint with the Court of International Trade (CIT) to challenge the *Final Results*. In both cases, jurisdiction over the administrative proceeding vested with the CIT.

The Department subsequently moved for leave of court to amend the *Final Results*. On November 24, 2008, the CIT granted the Department's motion. See *NTN Corporation v. United States*, Slip Op. 08–129, Consol. Court No. 08–00329 (November 24, 2008). Therefore, we are hereby amending the *Final Results* with respect to NTN to correct the error in our calculation of NTN's home–market packing expenses in accordance with 19 CFR § 351.224(e). For details regarding the ministerial error, see the memorandum from Thomas Schauer to the File entitled ''Ball Bearings from Japan - NTN Corporation (NTN) Amended Final Results Analysis Memorandum'' dated December 3, 2008.

In addition, because the margin we calculated for respondents not selected for individual examination was based on a simple average of the rates of the two selected respondents in this review (JTEKT Corporation and NTN), we have recalculated the margin for the non–selected respondents to reflect the change in NTN's margin.

## Amended Final Results of Review

As a result of the corrections of the ministerial error, we determine that the following percentage weighted–average dumping margins on ball bearings and parts thereof exist for the period May 1, 2006, through April 30, 2007:

| Company | Margin |
|---|---|
| Aisin Seiki Company, Ltd. | 10.31 |
| Canon, Inc. | 10.31 |
| Nachi–Fujikoshi Corp. | 10.31 |
| Nippon Pillow Block Company Ltd. | 10.31 |
| NTN | 12.58 |
| Sapporo Precision, Inc | 10.31 |
| Toyota Motor Corp./Toyota Industries Corp. | 10.31 |
| Yamazaki Mazak Trading Company | 10.31 |

The Department will determine and the U.S. Bureau of Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. Except where the CIT has issued preliminary injunctions enjoining the liquidation of certain entries during the period of review, we intend to issue appropriate assessment instructions directly to CBP 15 days after publication of these amended final results of review. For a general discussion of the application of assessment rates, see *Final Results*, 73 FR at 52825–6.

We will also direct CBP to collect cash deposits of estimated antidumping duties on all appropriate entries at the rates as amended by this notice and in accordance with the procedures discussed in the *Final Results*, 73 FR at 52825–6. The amended deposit requirements are effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after September 11, 2008, the date on which we published the *Final Results* in the **Federal Register**. We will instruct CBP to collect cash deposits of estimated antidumping duties for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption as provided for by section 751(a)(2)(C) of the Act, based on these amended final results, retroactively effective to September 11, 2008, the date of publication of the *Final Results*.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i) of the Tariff Act of 1930, as amended, and 19 CFR § 351.224(e).

Dated: December 3, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E8–29127 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–583–831]**

## Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On August 5, 2008, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils (SSSSC) from Taiwan. This review covers one producer/exporter of the subject merchandise to the United States. The period of review (POR) is July 1, 2006, through June 30, 2007. We are rescinding the review with respect to two companies because these companies had no shipments of subject merchandise during the POR.

Based on our analysis of the comments received, we have made no changes in the margin calculation. Therefore, the final results do not differ from the preliminary results. The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of Review.''

**DATES:** *Effective Date:* December 9, 2008.

**FOR FURTHER INFORMATION CONTACT:** Henry Almond, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0049.

**SUPPLEMENTARY INFORMATION:**

## Background

This review covers three producers/exporters: Chia Far Industrial Factory Co., Ltd. (Chia Far), Yieh United Steel Corporation (YUSCO), and Ta Chen Stainless Pipe Co., Ltd. (Ta Chen). Chia Far is the only company participating in this review, and we are rescinding the review with respect to YUSCO and Ta Chen.

On August 5, 2008, the Department published in the **Federal Register** the preliminary results of administrative review of the antidumping duty order on SSSSC from Taiwan. *See Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Preliminary Rescission in Part of Antidumping Duty Administrative Review*, 73 FR 45393 (Aug. 5, 2008) (*Preliminary Results*).

We invited parties to comment on our preliminary results of review. In September 2008, we received a case brief from the petitioners [1] and a rebuttal brief from Chia Far.

The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

[1] The petitioners are Allegheny Ludlum Corporation, AK Steel Corporation, United Auto Workers Local 3303, United Steelworkers of America, AFL–CIO/CLC, and Zanesville Armco Independent Organization.

**Scope of the Order**

The products covered by the order are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to the order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.13.00.31, 7219.13.00.51, 7219.13.00.71, 7219.13.00.81, 7219.14.00.30, 7219.14.00.65, 7219.14.00.90, 7219.32.00.05, 7219.32.00.20, 7219.32.00.25, 7219.32.00.35, 7219.32.00.36, 7219.32.00.38, 7219.32.00.42, 7219.32.00.44, 7219.33.00.05, 7219.33.00.20, 7219.33.00.25, 7219.33.00.35, 7219.33.00.36, 7219.33.00.38, 7219.33.00.42, 7219.33.00.44, 7219.34.00.05, 7219.34.00.20, 7219.34.00.25, 7219.34.00.30, 7219.34.00.35, 7219.35.00.05, 7219.35.00.15, 7219.35.00.30, 7219.35.00.35, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.12.10.00, 7220.12.50.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.20.70.05, 7220.20.70.10, 7220.20.70.15, 7220.20.70.60, 7220.20.70.80, 7220.20.80.00, 7220.20.90.30, 7220.20.90.60, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under the order is dispositive.

Excluded from the scope of the order are the following: (1) Sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled, (2) sheet and strip that is cut to length, (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more), (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm), and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* Chapter 72 of the HTSUS, ''Additional U.S. Note'' 1(d).

Also excluded from the scope of the order are certain specialty stainless steel products described below. Flapper valve steel is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of the order. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of the order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as Arnokrome III.[2]

Certain electrical resistance alloy steel is also excluded from the scope of the order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as Gilphy 36.[3]

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of the order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This

[2] Arnokrome III is a trademark of the Arnold Engineering Company.

[3] Gilphy 36 is a trademark of Imphy, S.A.

product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as Durphynox 17.[4]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of the order. These include stainless steel strip in coils used in the production of textile cutting tools (*e.g.*, carpet knives).[5] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as GIN4 Mo. The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is GIN5 steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, GIN6.[6]

## Period of Review

The POR is July 1, 2006, through June 30, 2007.

## Partial Rescission of Review

As noted in the ''Background'' section above, we are rescinding the review with respect to two respondents, Ta Chen and YUSCO. As noted in the *Preliminary Results*, both Ta Chen and YUSCO certified to the Department that they had no shipments/entries of subject merchandise into the United States during the POR. The Department subsequently confirmed with U.S. Customs and Border Protection (CBP) the no-shipment claim made by YUSCO. *See* the August 31, 2007, Memorandum to The File from Nichole Zink, Analyst, titled, ''2006–2007 Administrative Review of Stainless Steel Sheet and Strips in Coils from Taiwan: Entry Information from U.S. Customs and Border Protection (CBP)'' (CBP Memo). Regarding Ta Chen, CBP information indicated that this company may have had shipments or entries of subject merchandise during the POR. *See* the CBP Memo. However, Ta Chen provided documentation showing these entries were not of subject merchandise. Because the evidence on the record indicates that neither Ta Chen nor YUSCO exported subject merchandise to the United States during the POR, we preliminarily determined it was appropriate to rescind the review for both companies. *See Preliminary Results*, 73 FR at 45395.

Since the preliminary results, no party to this proceeding has commented on our preliminary rescission for these two companies. As a result, we are rescinding the review with respect to Ta Chen and YUSCO, in accordance with 19 CFR 351.213(d)(3) and the Department's practice. *See, e.g., Chia Far Indus. Factory Co., Ltd.* v. *United States*, 343 F. Supp. 2d 1344, 1374 (2004); *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665, 67666 (Nov. 8, 2005); and *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 63 FR 35190, 35191 (June 29, 1998).

## Cost of Production

As discussed in the *Preliminary Results*, we conducted an investigation to determine whether Chia Far made home market sales of the foreign like product during the POR at prices below its cost of production (COP) within the meaning of section 773(b) of the Act. *See Preliminary Results*, 73 FR at 45398–99. For these final results, we performed the cost test following the same methodology as in the *Preliminary Results*.

We found that more than 20 percent of Chia Far's sales of a given product during the reporting period were at prices less than the weighted-average COP for this period. Thus, we determined that these below-cost sales were made in ''substantial quantities'' within an extended period of time and at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade. *See* sections 773(b)(2)(B)–(D) of the Act.

Therefore, for purposes of these final results, we find that Chia Far made below-cost sales not in the ordinary course of trade. Consequently, we disregarded the below-cost sales and used the remaining sales as the basis for determining normal value pursuant to section 773(b)(1) of the Act.

## Analysis of Comments Received

All issues raised in the case briefs by parties to this administrative review, and to which we have responded, are listed in the Appendix to this notice and addressed in the Issues and Decision Memorandum (Decision Memo) accompanying this notice, which is adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room 1117, of the main Department building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at *http://ia.ita.doc.gov/frn/*. The paper copy and electronic version of the Decision Memo are identical in content.

## Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made no changes in the margin calculations for Chia Far.

## Final Results of Review

We determine that the following weighted-average margin percentage exists for the period July 1, 2006, through June 30, 2007:

| Manufacturer/producer/exporter | Margin percentage |
|---|---|
| Chia Far Industrial Factory Co., Ltd. | 2.71 |

## Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific *ad valorem* duty assessment rates for Chia Far based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the

[4] Durphynox 17 is a trademark of Imphy, S.A.

[5] This list of uses is illustrated and provided for descriptive purposes only.

[6] GIN4 Mo, GIN5 and GIN6 are the proprietary grades of Hitachi Metals America, Ltd.

assessment rate is *de minimis* (*i.e.*, less than 0.50 percent).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the company included in these final results of review for which the reviewed company did not know its merchandise was destined for the United States. This clarification will also apply to POR entries of subject merchandise produced by companies for which we are rescinding the review based on certifications of no shipments, because these companies certified that they made no POR shipments of subject merchandise for which they had knowledge of U.S. destination. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate established in the less-than-fair-value (LTFV) investigation if there is no rate for the intermediate company(ies) involved in the transaction.

**Cash Deposit Requirements**

Further, the following deposit requirements will be effective for all shipments of SSSSC from Taiwan entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the reviewed company will be the rate shown above, except if the rate is less than 0.50 percent, *de minimis* within the meaning of 19 CFR 351.106(c)(1), the cash deposit will be zero; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 12.61 percent, the ''All Others'' rate made effective by the LTFV investigation. *See Notice of Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils From United Kingdom, Taiwan, and South Korea*, 64 FR 40555, 40557 (July 27, 1999). These deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice serves as a final reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

**Notification to Interested Parties**

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 3, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

**Appendix—Issues in the Decision Memorandum**

1. Affiliated Party Purchases.
2. Financial Expense Ratio.
3. Later-received Purchase Allowances.

[FR Doc. E8–29125 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–DS–P

---

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## Availability of Seats for the Cordell Bank National Marine Sanctuary Advisory Council

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

**ACTION:** Notice and request for applications.

**SUMMARY:** The Office of National Marine Sanctuaries is seeking applicants for the following vacant seats on the Cordell Bank National Marine Sanctuary Advisory Council (Council): Conservation Alternate and Primary, Maritime Activities Alternate and Primary. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve 2–3 year terms, pursuant to the Council's Charter.

**DATES:** Applications are due by January 30, 2009.

**ADDRESSES:** Application kits may be obtained on the Cordell Bank Web site at: *http://cordellbank.noaa.gov*, and from Cordell Bank National Marine Sanctuary, Rowena Forest, P.O. Box 159, Olema, CA 94950. Completed applications should be sent to the above mailing address or faxed to (415) 663–0315.

**FOR FURTHER INFORMATION CONTACT:** Rowena Forest/CBNMS, *Rowena.Forest@noaa.gov*, P.O. Box 159, Olema, CA 94950, (415) 663–0314 x105.

**SUPPLEMENTARY INFORMATION:** The Advisory Council for Cordell Bank was established in 2002 to support the joint management plan review process currently underway for the CBNMS and its neighboring sanctuaries, Gulf of the Farallones and Monterey Bay National Marine Sanctuaries. The Council has members representing education, research, conservation, maritime activity, and community-at-large. The government seats are held by representatives from the National Marine Fisheries Service, the United States Coast Guard, and the managers of the Gulf of the Farallones, Monterey Bay and Channel Islands National Marine Sanctuaries. The Council holds four regular meetings per year, and one annual retreat.

**Authority:** 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: November 24, 2008.

**Daniel J. Basta,**

*Director, Office of National Marine Sanctuaries, National Ocean Services, National Oceanic and Atmospheric Administration.*

[FR Doc. E8–29035 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–22–M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Availability of Seats for the Olympic Coast National Marine Sanctuary Advisory Council

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice and request for applications.

**SUMMARY:** The Olympic Coast National Marine Sanctuary (OCNMS or sanctuary) is seeking applicants for the following vacant seat on its Sanctuary Advisory Council (council): Commercial Fishing. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members should expect to serve the remaining year of this term, pursuant to the council's Charter. They are also eligible to apply for a full 3-year term when this term expires.

**DATES:** Applications are due by January 9, 2009.

**ADDRESSES:** Application kits may be obtained from Andrew Palmer, Olympic Coast National Marine Sanctuary, 115 E. Railroad Avenue, Suite 301, Port Angeles, WA 98362. Completed applications should be sent to the same address.

**FOR FURTHER INFORMATION CONTACT:** Andrew Palmer, Olympic Coast National Marine Sanctuary, 115 E. Railroad Avenue, Suite 301, Port Angeles, WA 98362, (360) 457–6622, ext. 15, *Andrew.palmer@noaa.ccv*.

**SUPPLEMENTARY INFORMATION:** Sanctuary Advisory Council members and alternates serve three-year terms. The Advisory Council meets bi-monthly in public sessions in communities in and around the Olympic Coast National Marine Sanctuary.

The Olympic Coast National Marine Sanctuary Advisory Council was established in December 1998 to assure continued public participation in the management of the sanctuary. Serving in a volunteer capacity, the advisory council's 15 voting members represent a variety of local user groups, as well as the general public. In addition, five Federal government agencies and one federally funded program serve as non-voting, ex officio members. Since its establishment, the advisory council has played a vital role in advising the sanctuary and NOAA on critical issues. In addition to providing advice on management issues facing the Sanctuary, the Council members serve as a communication bridge between constituents and the Sanctuary staff.

**Authority:** 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: November 24, 2008.

**Daniel J. Basta,**

*Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. E8–29034 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–22–M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XM14**

### Endangered Species; File No. 1547

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

**ACTION:** Notice; receipt of application for modification.

**SUMMARY:** Notice is hereby given that the New York State Department of Environmental Conservation (Kathryn Hattala, Principal Investigator), 21 South Putt Corners Road; New Paltz, NY 12561, has requested a modification to scientific research Permit No. 1547–01.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before January 8, 2009.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following offices:

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

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9300; fax (978)281–9394.

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular modification request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 1547.

**FOR FURTHER INFORMATION CONTACT:** Malcolm Mohead or Kate Swails, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The subject modification to Permit No. 1547–01, issued on March 22, 2007, is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The permit holder is currently authorized under Permit No. 1547–01 to conduct scientific research to evaluate seasonal movement of shortnose sturgeon (*Acipenser brevirostrum*) in the Haverstraw and Newburgh Bays of the Hudson River. Annually, a maximum of 500 adult and juvenile shortnose sturgeon are captured with gill nets, measured, weighed, genetic tissue sampled, scanned for tags, PIT and Carlin tagged (if untagged), and released. The applicant proposes to annually perform anesthesia and gastric lavage on up to 200 fish. The researcher also requests an unintentional mortality of one shortnose sturgeon annually. The goal of the additional research would be to document the diet of shortnose sturgeon occupying the same habitat as Atlantic sturgeon (Acipenser oxyrhynchus oxyrhynchus) in the lower Hudson River. This modification would be valid through the expiration date of the original permit, October 31, 2011. All other aspects of the currently permitted activity would remain the same.

Dated: December 4, 2008.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–29132 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

**Docket No. 0812021556-81558-01**

### Public Telecommunications Facilities Program: Closing Date

**AGENCY:** National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce

**ACTION:** Notice of Amended Closing Date for Solicitation of Applications; Catalog of Federal Domestic Assistance

**SUMMARY:** The National Telecommunications and Information Administration (NTIA) announces that the new closing date for certain digital television Distributed Transmission System (DTS) projects is Monday, May 18, 2009. This new Closing Date for certain DTS projects is designed to accommodate a new policy issued by the Federal Communications Commission after NTIA published the original Closing Date notice in the **Federal Register**. The Closing Date for receipt of all other Public Telecommunications Facilities Program (PTFP) applications remains Thursday, December 18, 2008.

**DATES:** Applications for certain digital television DTS projects must be received prior to 5 p.m. Eastern Daylight Time (Closing Time), Monday, May 18, 2009 (DTS Closing Date). Applications submitted by facsimile will not be accepted. If an application is received after the DTS Closing Date due to (1) carrier error, when the carrier accepted the package with a guarantee for delivery by the DTS Closing Date and Closing Time, (2) significant weather delays or natural disasters, or (3) delays due to national security issues, NTIA will, upon receipt of proper documentation, consider the application as having been received by the deadline. NTIA will not accept applications posted on the DTS Closing Date or later and received after this deadline.

**ADDRESSES:** To obtain a printed application package, submit completed applications, or send any other correspondence, write to PTFP at the following address (please note the new room number): NTIA/PTFP, Room H–4812, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, DC 20230. Application materials may be obtained electronically via the Internet at http://www.ntia.doc.gov/ptfp or http://www.grants.gov.

**FOR FURTHER INFORMATION CONTACT:** William Cooperman, Director, Public Broadcasting Division, telephone: (202) 482–5802; fax: (202) 482–2156. Information about the PTFP can also be obtained electronically via the Internet at http://www.ntia.doc.gov/ptfp.

**SUPPLEMENTARY INFORMATION:** On October 20, 2008, NTIA published a Notice of Closing Date for Solicitation of Applications for the FY 2009 PTFP grant round. The Notice established Thursday, December 18, 2008 as the Closing Date.[1]

On November 3, 2008, the Federal Communications Commission (FCC) adopted rules for the use of Distributed Transmission System (DTS) Technologies in the digital television service.[2] In paragraph 28 of the Report and Order, the FCC adopted an immediate waiver policy to use DTS to continue to provide over-the-air service to existing analog viewers after the digital transition even before its new DTS rules and forms take effect.[3] Under the timeline adopted by the FCC in the DTS Report and Order, licensees must submit DTS applications using this waiver policy to the FCC no later than August 18, 2009 (six months after the February 17, 2009 deadline for shut-down of full-power analog television service), and applicants must commit to build the DTS facility as quickly as possible.[4] Consistent with PTFP's purposes, NTIA is extending the Closing Date for DTS applications so stations may apply for the financial assistance necessary to build DTS facilities as allowed by the new FCC rules and waiver policy.[5]

For DTS projects that require an FCC waiver under the aforementioned waiver policy, NTIA will accept applications for DTS projects until May 18, 2009 (DTS Closing Date). Such applications will be placed in Subpriority A. While applicants may file requests for FCC authorizations with the FCC after the DTS Closing Date, applicants are reminded that no grant will be awarded until confirmation has been received from the FCC that any necessary authorization will be issued. As noted in the Federal Funding Opportunity Notice of October 20, 2008, ''[t]ransmission equipment required by public television stations to complete their digital broadcast facilities will be considered in Broadcast Other, Subpriority A'' and that facilities ''should replicate the station's comparable analog Grade B coverage.''[6]

Applications for DTS projects will utilize the same forms, and undergo the same review and evaluation process contained in the PTFP Closing Date Notice. The Closing Date for receipt of all other PTFP applications, including applications for those DTS projects that do not require a FCC waiver as discussed above, remains Thursday, December 18, 2008.[7]

Dated: December 4, 2008.

**Dr. Bernadette McGuire-Rivera,**

*Associate Administrator, Office of Telecommunications and Information Applications.*

[FR Doc. E8–29096 Filed 12–8–08; 8:45 am]

BILLING CODE 3510–60–S

[1] Public Telecommunications Facilities Program: Closing Date, 73 Fed. Reg. 62,258 (NTIA Oct. 20, 2008)(PTFP Closing Date Notice).

[2] Digital Television Distributed Transmission Services Technologies, MB Docket No. 05-312, Report and Order, 2008 FCC LEXIS 7698, FCC 08-256 (2008)(DTS Report and Order).

[3] *Id.* at ¶28.

[4] *Id.*

[5] *See* 47 U.S.C. § 390.

[6] Announcement of Federal Funding Opportunity, National Telecommunications and Information Administration, FY 2009, U.S. Department of Commerce (Oct. 20, 2008) available at http://www.ntia.doc.gov/otiahome/ptfp/attachments/FFO1Notice109.html.

[7] *See* PTFP Closing Date Notice, *supra* note 1.

## CONSUMER PRODUCT SAFETY COMMISSION

**[CPSC Docket No. 09–C0002]**

### Nordstrom, Inc., Provisional Acceptance of a Settlement Agreement and Order

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** It is the policy of the Commission to publish settlements which it provisionally accepts under the Federal Hazardous Substances Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Nordstrom, Inc., containing a civil penalty of $60,000.00.

**DATES:** Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by December 24, 2008.

**ADDRESSES:** Persons wishing to comment on this Settlement Agreement should send written comments to Comment 09–C0002, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 502, Bethesda, Maryland 20814–4408.

**FOR FURTHER INFORMATION CONTACT:** Dennis C. Kacoyanis, Trial Attorney, Office of Compliance and Field

Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7587.

**SUPPLEMENTARY INFORMATION:** The text of the Agreement and Order appears below.

Dated: December 2, 2008.

**Todd A. Stevenson,**

*Secretary.*

**United States of America**

**Consumer Product Safety Commission**

In the Matter of Nordstrom, Inc.; CPSC Docket No. 09–C0002

**Settlement Agreement**

1. In accordance with 16 CFR 1118.20, Nordstrom, Inc. (''Nordstrom'') and the staff (''Staff'') of the United States Consumer Product Safety Commission (''Commission'') enter into this Settlement Agreement (''Agreement''). The Agreement and the incorporated attached Order (''Order'') settle the Staff's allegations set forth below.

**Parties**

2. The Commission is an independent federal regulatory agency established pursuant to, and responsible for the enforcement of, the Consumer Product Safety Act, 15 U.S.C. 2051–2089 (''CPSA'').

3. Nordstrom is a corporation organized and existing under the laws of the State of Washington, with its principal offices located in Seattle, WA. Nordstrom is a fashion specialty retailer selling a wide selection of apparel, shoes, and accessories for women, men, and children.

**Staff Allegations**

4. From November 2007 to December 2007, Nordstrom held for sale and/or sold 2,418 Micros boy's hooded jackets and Hearts & Stars and Robot reversible zip hooded sweaters with drawstrings (''Drawstring Jackets and Sweaters'').

5. Nordstrom sold the Drawstring Jackets and Sweaters to consumers nationwide.

6. The Drawstring Jackets and Sweaters are ''consumer product[s],'' and, at all times relevant hereto, Nordstrom was a ''retailer'' of those consumer products, which were ''distributed in commerce,'' as those terms are defined in CPSA sections 3(a), (5), (8), and (13), 15 U.S.C. § 2052(a), (5), (8), and (13).

7. In February 1996, the Staff issued the Guidelines for Drawstrings on Children's Upper Outerwear (''Guidelines'') to help prevent children from strangling or entangling on neck and waist drawstrings. The Guidelines state that drawstrings can cause, and have caused, injuries and deaths when they catch on items such as playground equipment, bus doors, or cribs. In the Guidelines, the Staff recommends that there be no hood and neck drawstrings in children's upper outerwear sized 2T to 12.

8. In June 1997, ASTM adopted a voluntary standard, ASTM F1816–97, that incorporated the Guidelines. The Guidelines state that firms should be aware of the hazards and should be sure garments they sell conform to the voluntary standard.

9. On May 19, 2006, the Commission posted on its Web site a letter from the Commission's Director of the Office of Compliance to manufacturers, importers, and retailers of children's upper outerwear. The letter urges them to make certain that all children's upper outerwear sold in the United States complies with ASTM F1816–97. The letter states that the Staff considers children's upper outerwear with drawstrings at the hood or neck area to be defective and to present a substantial risk of injury to young children under Federal Hazardous Substances Act (''FHSA'') section 15(c), 15 U.S.C. 1274(c). The letter also notes the CPSA's section 15(b) reporting requirements.

10. Nordstrom reported to the Commission there had been no incidents or injuries from the Drawstring Jackets and Sweaters.

11. Nordstrom's distribution in commerce of the Drawstring Jackets and Sweaters did not meet the Guidelines or ASTM F1816–97, failed to comport with the Staff's May 2006 defect notice, and posed a strangulation hazard to children.

12. By December 10, 2007, Nordstrom had removed the Drawstring Jackets and Sweaters from sale and had removed the drawstrings from those garments.

13. On February 6, 2008 and March 11, 2008, the Drawstring Jackets and Sweaters were recalled. The recall informed consumers that they should immediately remove the drawstrings to eliminate the hazard.

14. Nordstrom had presumed and actual knowledge that the Drawstring Jackets and Sweaters distributed in commerce posed a strangulation hazard and presented a substantial risk of injury to children under FHSA section 15(c)(l), 15 U.S.C. 1274(c)(l). Nordstrom had obtained information that reasonably supported the conclusion that the Drawstring Jackets and Sweaters contained a defect that could create a substantial product hazard or that they created an unreasonable risk of serious injury or death. CPSA sections 15(b)(3) and (4), 15 U.S.C. 2064(b)(3) and (4), required Nordstrom to immediately inform the Commission of the defect and risk.

15. Nordstrom knowingly failed to immediately inform the Commission about the Drawstring Jackets and Sweaters as required by CPSA sections 15(b)(3) and (4), 15 U.S.C. 2064(b)(3) and (4), and as the term ''knowingly'' is defined in CPSA section 20(d), 15 U.S.C. 2069(d). This failure violated CPSA section 19(a)(4), 15 U.S.C. 2068(a)(4). Pursuant to CPSA section 20, 15 U.S.C. 2069, this failure subjected Nordstrom to civil penalties.

**Nordstrom Response**

16. Nordstrom denies the Staff's allegations that Nordstrom violated the CPSA.

**Agreement of the Parties**

17. Under the CPSA, the Commission has jurisdiction over this matter and over Nordstrom.

18. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Nordstrom, or a determination by the Commission, that Nordstrom has knowingly violated the CPSA.

19. In settlement of the Staff's allegations, Nordstrom shall pay a civil penalty in the amount of sixty-thousand dollars ($60,000.00) within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement. The payment shall be by check payable to the order of the United States Treasury.

20. Upon provisional acceptance of the Agreement, the Agreement shall be placed on the public record and published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 1118.20(e). In accordance with 16 CFR 1118.20(f), if the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the sixteenth (16th) calendar day after the date it is published in the **Federal Register**.

21. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, Nordstrom knowingly, voluntarily, and completely waives any rights it may have regarding the Staff's allegations to the following: (1) An administrative or judicial hearing; (2) judicial review or other challenge or contest of the validity of the Order or of the Commission's actions; (3) a determination by the Commission of whether Nordstrom failed to comply with the CPSA and its underlying regulations; (4) a statement

of findings of fact and conclusions of law; and (5) any claims under the Equal Access to Justice Act.

22. The Commission may publicize the terms of the Agreement and the Order.

23. The Agreement and the Order shall apply to, and be binding upon, Nordstrom and each of its successors and assigns.

24. The Commission issues the Order under the provisions of the CPSA, and violation of the Order may subject Nordstrom to appropriate legal action.

25. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

26. If any provision of the Agreement and the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Nordstrom agree that severing the provision materially affects the purpose of the Agreement and the Order.

NORDSTROM, INC.

Dated: Oct. 30, 2008.

By:

Cherie Williams,
*General Liability and Business Claims Manager, Nordstrom, Inc., 1700 7th Avenue, Seattle, WA 98101.*

U.S. CONSUMER PRODUCT SAFETY COMMISSION

Cheryl A. Falvey,
*General Counsel.*

Ronald G. Yelenik,
*Assistant General Counsel, Division of Compliance, Office of the General Counsel.*

Dated: 10/31/08.

By:

Dennis C. Kacoyanis,
*Trial Attorney, Division of Compliance, Office of the General Counsel.*

**United States of America**

**Consumer Product Safety Commission**

In the Matter of Nordstrom, Inc., CPSC Docket No. 09–C0002

**Order**

Upon consideration of the Settlement Agreement entered into between Nordstrom, Inc. (''Nordstrom'') and the U.S. Consumer Product Safety Commission (''Commission'') staff, and the Commission having jurisdiction over the subject matter and over Nordstrom, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

*Ordered*, that the Settlement Agreement be, and hereby is, accepted; and it is

*Further ordered*, that Nordstrom shall pay a civil penalty in the amount of sixty thousand dollars ($60,000.00) within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement. The payment shall be made by check payable to the order of the United States Treasury. Upon the failure of Nordstrom to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by Nordstrom at the federal legal rate of interest set forth at 28 U.S.C. 196 1(a) and (b).

Provisionally accepted and provisional Order issued on the 2nd day of December, 2008.

By Order of the Commission:

Todd A. Stevenson,
*Secretary, U.S. Consumer Product Safety Commission.*

[FR Doc. E8–28892 Filed 12–8–08; 8:45 am]

BILLING CODE 6355–01–M

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0055]**

## Federal Acquisition Regulation; Information Collection; Freight Classification Description

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning freight classification description. The clearance currently expires on December 31, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before February 9, 2009

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Jeritta Parnell, Procurement Analyst, Contract Policy Division, at (202) 501–4082.

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

When the Government purchases supplies that are new to the supply system, nonstandard, or modifications of previously shipped items, and different freight classifications may apply, offerors are requested to indicate the full Uniform Freight Classification or National Motor Freight Classification. The information is used to determine the proper freight rate for the supplies.

### B. Annual Reporting Burden

*Respondents*: 2,640.
*Responses Per Respondent*: 3.
*Annual Responses*: 7,920.
*Hours Per Response*: .167.
*Total Burden Hours*: 1,323.
*Obtaining copies of proposals*: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0055, Freight Classification Description, in all correspondence.

Dated: November 20, 2008

**Al Matera**

*Director, Contract Policy Division.*

[FR Doc. E8–29048 Filed 12–8–08; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0067]**

## Federal Acquisition Regulation; Information Collection; Incentive Contracts

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning incentive contracts. The clearance currently expires on December 31, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before February 9, 2009.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Warren Blankenship, Contract Policy Division, GSA (202) 501–1900.

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

Incentive contracts are normally used when a firm fixed-price contract is not appropriate and the required supplies or services can be acquired at lower costs, and sometimes with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor's performance.

The information required periodically from the contractor, such as cost of work already performed, estimated costs of further performance necessary to complete all work, total contract price for supplies or services accepted by the Government for which final prices have been established, and estimated costs allocable to supplies or services accepted by the Government and for which final prices have not been established, is needed to negotiate the final prices of incentive-related items and services.

The contracting officer evaluates the information received to determine the contractor's performance in meeting the incentive target and the appropriate price revision, if any, for the items or services.

### B. Annual Reporting Burden

*Respondents:* 3,000.
*Responses per Respondent:* 1.
*Annual Responses:* 3,000.
*Hours per Response:* 1.
*Total Burden Hours:* 3,000.
*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4041, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0067, Incentive Contracts, in all correspondence.

Dated: November 26, 2008.

**Rhonda Cundiff,**

*Acting Director, Office of Acquisition Policy.*

[FR Doc. E8–29049 Filed 12–8–08; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF ENERGY

## Request for Information: Geothermal Workforce Education Development and Retention

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

**ACTION:** Notice of Request for Information (DE–PS36–09GO39004).

**SUMMARY:** The Department of Energy (DOE) gives notice of a Request for Information (RFI), seeking innovative ways for industry and educators to work together in addressing important challenges in the geothermal program; under authorities such as 42 U.S.C. Section 7381(b) of the Department of Energy Education Enhancement Act, and the Energy Policy Act of 2005, Section 931(a)(2)(C). The Federal government and industry must address the growing inadequacy of workforce competencies due to the small size of the existing geothermal industry and the competition for human resources, as the geothermal industry competes with the oil and gas industry for qualified personnel. The limited capability for meeting a critical need in qualified personnel is compounded by the current lack of formal university degree programs. This RFI seeks input regarding future GTP funding, potential initiatives within the industry and in the classroom, and with DOE administrative efforts.

**DATES:** Written comments must be received by January 30, 2009.

**ADDRESSES:** Send all responses to this RFI to *RFI-09GO39004@go.doe.gov* in Microsoft Word format.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the content of the RFI must be submitted to the following e-mail address: *RFI-09GO39004@go.doe.gov*.

**SUPPLEMENTARY INFORMATION:** The U.S. Department of Energy's Geothermal Technology Program (GTP) is working with industry and educators to address important challenges in the geothermal program under authorities such as 42 U.S.C. Section 7381(b) of the Department of Energy Education Enhancement Act, and the Energy Policy Act of 2005, Section 931(a)(2)(C). Glitnir Geothermal Research's 2008 United States Geothermal Energy Market Report asserts that human capital will be a bottleneck to advancing geothermal energy technology and could delay development of Enhanced Geothermal Systems (EGS) technology.

The limited capability for meeting this need is further illustrated by the current lack of formal university degree programs. The Federal government and industry, together, must address the growing inadequacy of workforce competencies due to the small size of the existing geothermal industry and the competition for human resources, as the geothermal industry competes with the oil and gas industry for qualified personnel.

Future GTP funding and administrative efforts may focus on the following goals:

- Institute program activities affiliated with the development and retention of the geothermal-specific competencies.

- Develop teaming opportunities with universities and industry to invest in geothermal education programs.
- Co-sponsor student design competitions with industry focused on critical technology challenges for EGS.

Potential initiatives may include, but are not limited to:

- EGS curriculum—Competitively fund institutions of higher education to develop geothermal educational curricula and degree programs/minors/specializations.
- Educational scholarship program—Support student enrollment in programs with geothermal development and curricula for education, research and/or internships. These programs may apply to undergraduates, graduate students, and post-docs.
- Vocational training—Develop the next generation of skilled workers for widespread geothermal facility construction and operation.
- University cooperative education and professional internship program.
- University student competition.
- Allow students to solve real-life problems and implement solutions in the field.
- Co-sponsor with industry student design competitions focused on critical technology challenges.
- Co-sponsor student paper challenges to showcase student research in a public forum and make connections to industry.
- K–12 education modules—Provide early exposure to and curricula for geothermal energy and technology. This may include supplementing the Energy Efficiency & Renewable Energy (EERE) Education Web site.
- Pilot education program.
- Day programs/workshops at universities.
- Innovative education models for post-undergraduate education.

Issued in Golden, CO on November 26, 2008.

**James P. Damm,**

*Acting Assistant Manager, Office of Acquisition and Financial Assistance, Golden Field Office, U.S. Department of Energy.*

[FR Doc. E8–29087 Filed 12–8–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Energy Information Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Energy Information Administration (EIA), Department of Energy (DOE).

**ACTION:** Agency Information Collection Activities: Proposed Collection Update; Informational.

**SUMMARY:** The EIA issued a Proposed Collection Comment Request on ''Report of Refinery Outages,'' 73 FR 10745, Thursday, February 28, 2008. EIA is postponing a decision on pursuing this survey until spring 2009. This notice is an informational update on the reason for EIA's postponement of decision and EIA's activities in this area.

**FOR FURTHER INFORMATION CONTACT:** Joanne Shore by e-mail at *joanne.shore@eia.doe.gov* or by telephone at 202–586–4677.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

EIA recognizes the importance of understanding and anticipating supply changes that could add to already high prices being paid by consumers for petroleum products. Refinery availability is an important element of this issue, and was highlighted in Section 804 of the Energy Independence and Security Act of 2007 (Pub. L. 110–140), requiring EIA to assess the impact of planned outages using commercially available data. Before EIA could implement Section 804, Congressional interest increased in having EIA collect such data, partially as a result of unusually high refinery outages in 2007. In response, EIA put out a **Federal Register** notice on February 2008 (Proposed Collection Comment Request on ''Report of Refinery Outages,'' 73 FR 10745, Thursday, February 28, 2008) to solicit comments on collecting such data. The EIA data collection would be an enhancement to the monthly refinery survey (Form EIA–810). In addition, the Department of Energy's Office of Electricity Delivery and Energy Reliability (OE) put out a **Federal Register** notice in July 2008 (Notice and Request for Comments on Proposal for a Refinery Disruption and Incident Report, 73–FR 37451, July 1, 2008, *http://www.oe.netl.doe.gov/docs/FRN_RefDisrupt070108.pdf*) to collect complementary after-the-fact outage information on a short-term, real-time basis in order to monitor ongoing issues as part of its role in monitoring potential supply emergencies. A second **Federal Register** notice on this proposed emergency report was published on November 5, 2008, taking into consideration comments received after the first notice. Public comments are being solicited through December 5, 2008, on the proposed emergency form and instructions (Proposed Agency Information Collection, 73–FR 65841, November 5, 2008, *http://www.oe.netl.doe.gov/docs/FRN_RefDisrupt110508.pdf*). EIA's data collection on planned outages would necessarily be prospective, but any historical outage information in an EIA survey would ultimately reflect those reported in the proposed DOE Refinery Emergency Disruption and Incident Report.

Prior to the February 2008 EIA **Federal Register** Notice, EIA had looked at potentially collecting outage data or alternatively using commercial data. EIA's review of commercial outage data indicated that such data is relatively comprehensive. It captures most significant outages; contains unit-by-unit outages for individual refineries (thereby serving many State-specific informational needs as well as Federal needs for estimating supply impacts); and may be able to be shared in a useable form with State energy officials more economically than a government survey. However, the commercial data does not contain production impacts.

A government data collection would more likely capture all refinery outage plans, but differences from commercial data may be small. Government-collected data could potentially have greater credibility and could add information on potential impacts on product output. However, government collection would cost the Federal government more than using commercial data and would take several years of data to accumulate adequate history to be useful.

In addition to cost considerations, data quality differences between commercial data and an EIA collection must be considered. EIA does not currently collect planned refinery unit outages. Rather, outages are reflected retrospectively in EIA's historical inputs to major refinery units, although there is no distinction between planned and unplanned outages, or between outages as a whole and economically-driven utilization decisions in the refinery input data. However, commercial data is available that reflects planned unit outages, as well as unplanned and planned historical outages.

Reporting planning information is not the same as reporting historical data. While an EIA data collection could be somewhat more accurate than a commercial data source, EIA's experience with collecting ''planned'' activities is that such data inherently have an element of uncertainty because plans shift and actual maintenance may take more or less time than planned.

Commercial data does not contain impacts of outages on production, although some private firms estimate aggregate impacts from outages. EIA

already collects data on historical inputs to major refinery processing units. As outages occur, unit inputs decline. EIA has used these data to estimate outage impacts on production. If EIA were to collect refinery estimates of planned unit outage impacts on production, results still would be uncertain, would involve different methods of estimation by different refiners, and would only provide an indicator of supply changes. Having EIA specify estimation methods for determining planned outage impacts on production would not necessarily improve the accuracy, as different methods may be appropriate for different refinery situations. Whether using commercial data or government-collected data, EIA will have to do extensive analyses to make a supply-adequacy determination. That is, one data option will not provide savings in analytical effort over the other option.

The responses to the EIA **Federal Register** notice did not shed further light on EIA's earlier assessment. The comments opposing government data collection questioned the usefulness of the data in affecting the market, difficulties in obtaining consistent information, and the large burden needed to respond. Comments supporting the collection felt the information would be helpful in preparing States or regions for potential supply problems and noted commercial data is not readily available to States or the public. Comments on both sides noted that if a survey is proposed, more clarification on information to be collected is needed.

## II. Current Actions

EIA could not begin a refinery outage data collection before 2010. The approval process and time needed for both industry and the government to make appropriate systems changes preclude a 2009 collection. Furthermore, EIA's resources are fully engaged in changing forms to meet EPACT 2005 requirements and other changes.

The retrospective real-time survey of refinery outages, first proposed by DOE in its July **Federal Register** notice, could meet some of the needs listed in the comments made by the National Association of State Energy Officials (NASEO) in response to EIA's comment request. However, the revised form in DOE's subsequent (November) **Federal Register** notice no longer seeks to collect information on actions taken, units or processes affected, and estimated production impacts. Also, NASEO was not familiar with the extent of commercially available data. It may be more cost-effective for the Federal government to pay for State access to commercial information than to collect it itself.

Since EIA is moving ahead to produce reports on planned outages using commercial data, and since it is not possible to begin a new collection immediately, EIA proposes to postpone a decision on this data collection until spring 2009. This will allow some additional time to assess the adequacy of the commercial data and EIA's analysis using that data to meet State and Congressional concerns. It also will provide the time for DOE to finalize its emergency report survey, providing EIA with the information to determine which State and Congressional concerns the DOE survey may ultimately address. Last, a spring decision date will give EIA more time to revisit potential government survey costs and industry burden associated with a government collection. In the interim, EIA will work with the Congress and the States (the latter through the NASEO) to determine if existing information and associated analyses can be used to meet their needs.

Should the EIA determine a survey is necessary, a **Federal Register** notice will be issued with the proposed survey form and another opportunity for comments will be provided. A survey proposal would fall under the Federal Energy Administration Act of 1974 (Pub. L. 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*), which require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near- and longer-term domestic demands.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Any comments received following a survey proposal help the EIA prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. Also, the EIA would later seek approval for this collection by the Office of Management and Budget (OMB) under Section 3507(a) of the Paperwork Reduction Act of 1995.

Issued in Washington, DC, December 2, 2008.

**Patricia Breed,**

*Executive Assistant, Energy Information Administration.*

[FR Doc. E8–29086 Filed 12–8–08; 8:45 am]

BILLING CODE 6450–01–P

---

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OW–2008–0437; FRL–8749–3]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Public Water System Supervision Program (Renewal); EPA ICR No. 0270.43, OMB Control No. 2040–0090

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before January 8, 2009.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OW–2008–0437 to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *OW-Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, MC: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Richard Naylor, Drinking Water Protection Division, Office of Ground Water and Drinking Water, (4606M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202.564.3847; fax number: 202.564.3755; e-mail address: *naylor.richard@epa.gov*.

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for

review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 6, 2008 (73 *FR* 32325), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2008–0437, which is available for online viewing at *www.regulations.gov*, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use EPA's electronic docket and comment system at *www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov*.

*Title:* Public Water System Supervision Program (Renewal).

*ICR numbers:* EPA ICR No. 0270.43, OMB Control No. 2040–0090.

*ICR Status:* This ICR is scheduled to expire on December 31, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* The Public Water System Supervision (PWSS) Program ICR examines Public Water System (PWS), primacy agency, EPA, laboratories, and tribal operator certification provider burden and costs for ''cross-cutting'' recordkeeping and reporting requirements (i.e., the burden and costs for complying with drinking water information requirements that are not associated with contaminant-specific rulemakings). These activities which have recordkeeping and reporting requirements that are mandatory for compliance with 40 CFR parts 141 and 142 include the following: Consumer Confidence Reports, Variance and Exemption Rule, Capacity Development, General State Primacy Activities, Public Notification, Operator Certification/Expense Reimbursement Program, Tribal Operator Certification Program, Constructed Conveyances, and Proficiency Testing Studies for Drinking Water Laboratories. The information collection activities for both the Operator Certification/Expense Reimbursement Program and the Capacity Development Program are driven by the grant withholding and reporting provisions under Sections 1419 and 1420, respectively, of the Safe Drinking Water Act. Although the Tribal Operator Certification Program is voluntary, the information collection is driven by grant eligibility requirements outlined in the Drinking Water Infrastructure Grant Tribal Set-Aside Program Final Guidelines and the Tribal Drinking Water Operator Certification Program Guidelines.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3.2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* New and existing public water systems (PWS), primacy agencies, and laboratories.

*Estimated Number of Respondents:* 158,113.

*Frequency of Response:* varies by requirement (i.e., on occasion, monthly, quarterly, semi-annually, annually).

*Estimated Total Annual Hour Burden:* 3,913,544.

*Estimated Total Annual Cost:* $165.9 million includes $25.2 million annualized capital or O&M costs.

*Changes in the Estimates:* There is an increase of 687,517 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is primarily due to adjustments to burden based on consultations with drinking water associations, updated compliance information, and restructuring adjustments from the incorporation of the burden hours for Laboratory Proficiency Testing.

Dated: December 3, 2008.

**John Moses,**

*Acting Director, Collection Strategies Division.*

[FR Doc. E8–29111 Filed 12–8–08; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OECA–2008–0809; FRL–8749–4]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; Notice of Arrival of Pesticides and Devices (EPA Form 3540–1); EPA ICR No. 0152.09, OMB Control No. 2070–0020

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on March 31, 2009. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before February 9, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–

OECA–2008–0809, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: docket.oeca@epa.gov.*
- *Fax:* (202) 566–1511.
- *Mail:* Enforcement and Compliance Docket and Information Center (ECDIC), Environmental Protection Agency, *Mail Code:* 2201T, 1200 Pennsylvania Ave., NW., Washington, DC.
- *Hand Delivery:* Enforcement and Compliance Docket and Information Center (EDIC), Environmental Protection Agency, EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OECA–2008–0809. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

**FOR FURTHER INFORMATION CONTACT:** Robin Nogle, Office of Compliance, Agriculture Division (2225A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–4154; fax number: (202) 564–0085; e-mail address: *nogle.robin@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OECA–2008–0809, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center is 202–566–1752.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

## What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

## What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under DATES.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## What Information Collection Activity or ICR Does This Apply to?

*Affected entities:* Entities potentially affected by this action are those which import pesticides and devices.

*Title:* Notice of Arrival of Pesticides and Devices (EPA Form 3540–1).

*ICR numbers:* EPA ICR No. 0152.09 OMB Control No. 2070–0020.

*ICR status:* This ICR is currently scheduled to expire March 31, 2009. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* The U. S. Customs and Border Protection regulations at 19 CFR 12.112 require that an importer desiring to import pesticides into the United

States shall, prior to the shipment's arrival, submit a Notice of Arrival of Pesticides and Devices (EPA Form 3540–1) to EPA who will determine the disposition of the shipment. The form requires identification and address information of the importer or his agent and information on the identity and location of the imported pesticide or device shipment. After completing the form, EPA returns the form to the importer, or his agent, who must present the form to U.S. Customs and Border Protection upon arrival of the shipment at the port of entry. This is necessary to ensure that EPA is notified of the arrival of pesticides and devices as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 17(c), so that EPA has the ability to examine such shipments to determine if they are in compliance with FIFRA.

When the form is submitted to EPA regional personnel for review, it is examined to determine whether the shipment should be released for entry upon arrival or whether it should be detained for examination. The responsible EPA official returns the form to the respondent with EPA instructions to the U.S. Customs and Border Protection Service as to the disposition of the shipment.

Upon arrival of the shipment, the importer presents the completed Notice of Arrival form to the District Director of U.S. Customs and Border Protection at the port of entry. U.S. Customs and Border Protection compares the entry documents for the shipment with the Notice of Arrival form and notifies the EPA Regional Office of any discrepancies, which EPA will resolve with the importer or broker. At this point the shipment may be retained for examination. If there are no discrepancies, U.S. Customs and Border Protection follows instructions regarding release or detention. If EPA inspects the shipment and it appears from examination of a sample that it is adulterated, misbranded, or in any other manner violates the provisions of FIFRA, or is otherwise injurious to health or the environment, the pesticide or device may be refused admission into the United States.

This reporting requirement is needed to inform the Agency of pesticides arriving in the customs territory of the United States and to ensure compliance with FIFRA by the responsible party importing pesticides or devices. This reporting requirement is needed to meet direct statutory requirements of FIFRA regarding notification of EPA of such arrivals.

The information collected is used by EPA Regional pesticide enforcement and compliance staff and the Headquarters Office of Enforcement and Compliance Assurance and Office of Pesticide Programs. The U.S. Department of Homeland Security (Customs and Border Protection), the Department of Agriculture, the Food and Drug Administration, and other Federal agencies may also make use of this information.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.3 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/affected entities:* 25,000.

*Estimated number of respondents:* 25,000.

*Frequency of responses:* 1.

*Estimated total annual burden hours:* 7,500.

There are no capital/startup costs or operating and maintenance costs associated with this ICR since all equipment associated with the ICR is present as part of ordinary business practices.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing, and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 1, 2008.

**Richard Colbert,**

*Director, Agriculture Division, Office of Compliance, Office of Enforcement and Compliance Assurance.*

[FR Doc. E8–29118 Filed 12–8–08; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–R09–OAR–2008–0128; FRL–8749–2]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; Survey of 56 California County Agricultural Commissioners for Readiness To Implement the Enforcement Component of the U.S. EPA Endangered Species Protection Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44

U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request for a new Information Collection Request (ICR) to the Office of Management and Budget (OMB). Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before February 9, 2009.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2008–0128, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: estrada.fabiola@epa.gov.*

3. *Mail or deliver:* Fabiola Estrada (CED–5), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

*Docket:* The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Fabiola Estrada, EPA Region IX, (415) 972–3493, *estrada.fabiola@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

## What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

## What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under **DATES**.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## What Information Collection Activity or ICR Does This Apply to?

*Affected entities:* Entities potentially affected by this action are the County Agricultural Commissioners in the state of California.

*Title:* Survey of 56 California County Agricultural Commissioners for Readiness to Implement the Enforcement component of the U.S. EPA Endangered Species Protection Program.

*ICR numbers:* EPA ICR No. 2287.01, OMB Control No. 20XX–NEW.

*ICR status:* This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* For nearly twenty years, the California Department of Pesticide Regulation (DPR) has worked with county agricultural commissioners on behalf of U.S. EPA to refine measures that would protect federally listed species while minimizing impacts on agriculture and other beneficial uses of pesticides. DPR vetted these measures in local advisory groups consisting of farmers, pest control advisors, pesticide applicators, representatives of the California Department of Fish and Game, California Department of Food and Agriculture, U.S. Fish and Wildlife Service and other species experts and they were ultimately adopted by the County Agricultural Commissioners and Sealers Association (CACASA). DPR developed the Pesticide Regulation's Endangered Species Custom Real-time Internet Bulletin Engine (PRESCRIBE), an Internet database, to simplify distribution of endangered species protection measures (California's county bulletins) and has trained county agricultural commissioner staff and pesticide professionals in its use. So far, these measures have been voluntary. While many counties have incorporated endangered species protection as a routine part of their regulatory programs, DPR does not know the full extent of implementation in all counties. All (56) California county agricultural commissioners will be surveyed through a written

questionnaire to determine their readiness to implement the U.S. EPA Endangered Species Protection Program as it transitions from voluntary to mandatory status. Responses are voluntary. The collected information will guide further work needed by DPR to prepare for the new stage in the protection of endangered species. A summary report will be provided to the respondents to inform them of the survey results.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average less than one hour per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 56.

*Frequency of response:* Once.

*Estimated total average number of responses for each respondent:* 12—based on the # of questions on the questionnaire.

*Estimated total annual burden hours:* 56.

*Estimated total annual costs:* $6,000 for collection of information and an estimated cost of $3,000 for capital investment or maintenance and operational costs.

**What is the Next Step in the Process for this ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: November 25, 2008.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*

[FR Doc. E8–29121 Filed 12–8–08; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

### Notice of Release of Exposure Draft, the Hierarchy of Generally Accepted Accounting Principles for Federal Entities, Including the Application of Standards Issued by the Financial Accounting Standards Board

*Board Action:* Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. No. 92–463), as amended, and the FASAB Rules of Procedure, as amended in April 2004, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has released the Exposure Draft, The Hierarchy of Generally Accepted Accounting Principles for Federal Entities, Including the Application of Standards Issued by the Financial Accounting Standards Board.

The Generally Accepted Accounting Principles Exposure Draft is available on the FASAB home page *http://www.fasab.gov/exposure.html*. Copies can be obtained by contacting FASAB at (202) 512–7350.

Respondents are encouraged to comment on any part of the exposure draft. Written comments are requested by February 2, 2009, and should be sent to: Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street, NW., Suite 6814, Mail Stop 6K17V, Washington, DC 20548.

Any interested person may attend the meetings as an observer. Board discussion and reviews are open to the public. GAO Building Security requires advance notice of your attendance. Please notify FASAB of your planned attendance by calling 202–512–7350 at least one day prior to the respective meeting.

**FOR FURTHER INFORMATION, CONTACT:** Wendy Payne, Executive Director, 441 G Street, NW., Washington, DC 20548, or call (202) 512–7350.

**Authority:** Federal Advisory Committee Act, Public Law No. 92–463.

Dated: December 2, 2008.

**Charles Jackson,**

*Federal Register Liaison Officer.*

[FR Doc. E8–28899 Filed 12–8–08; 8:45 am]

BILLING CODE 1610–01–M

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 24, 2008.

**A. Federal Reserve Bank of Minneapolis** (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

*1. Kirk Sandquist*, individually, and acting in concert with Amy Uribe IRA, and Robert Uribe IRA, all of Deer Lodge, Montana, to acquire voting shares of Sandquist Corporation, and thereby indirectly acquire voting shares of Peoples Bank of Deer Lodge, both of Deer Lodge, Montana.

Board of Governors of the Federal Reserve System, December 4, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–29104 Filed 12–8–08; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. E8-28715) published on pages 73933 and 73934 of the issue for Thursday, December 4, 2008.

Under the Federal Reserve Bank of San Francisco heading, the entry for 1st Security Bancorp, Inc., Mountlake Terrace, Washington, is revised to read as follows:

**A. Federal Reserve Bank of San Francisco** (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

*1. 1st Security Bancorp, Inc.*, to become a bank holding company by acquiring 100 percent of the voting shares of 1st Security Bank of Washington, both of Mountlake Terrace, Washington, upon the conversion from a mutual savings bank to a stock savings bank.

Comments regarding this application must be received by December 29, 2008.

Board of Governors of the Federal Reserve System, December 4, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–29103 Filed 12–8–08 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**TIME AND DATE:** 10:00 a.m., Monday, December 15, 2008.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

**FOR FURTHER INFORMATION CONTACT:** Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

**SUPPLEMENTARY INFORMATION:** You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, December 5, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–29259 Filed 12–5–08; 4:15 pm]

BILLING CODE 6210–01–S

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### Sunshine Act; Notice of Meeting

**TIME AND DATE:** 10 a.m. (Eastern Time) December 15, 2008.

**PLACE:** 4th Floor Conference Room, 1250 H Street, NW., Washington, DC 20005.

**STATUS:** Parts will be open to the public and parts closed to the public.

**Matters To Be Considered**

*Parts Open to the Public*

1. Approval of the minutes of the November 24, 2008 Board member meeting.

2. Thrift Savings Plan activity report by the Executive Director:

a. Monthly Participant Activity Report

b. Legislative Report

c. Investment Performance Review

*Parts Closed to the Public*

3. Personnel.

**FOR MORE INFORMATION CONTACT:** Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: December 4, 2008.

**Thomas K. Emswiler,**

*Secretary, Federal Retirement Thrift Investment Board.*

[FR Doc. E8–29209 Filed 12–5–08; 4:15 pm]

BILLING CODE 6760–01–P

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0221]**

### Civilian Board of Contract Appeals; Information Collection; Civilian Board of Contract Appeals Rules of Procedure

**AGENCY:** Civilian Board of Contract Appeals, GSA.

**ACTION:** Notice of request for comments regarding a renewal to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement regarding the Civilian Board of Contract Appeals (CBCA) Rules of Procedure. A request for public comments was published at 72 FR 65341, November 20, 2007. No comments were received. The clearance currently expires on October 31, 2008.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

**DATES:** Submit comments on or before: January 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** Margaret S. Pfunder, Chief Counsel, Civilian Board of Contract Appeals, 1800 F Street, NW., Washington, DC 20405, telephone (202) 606–8800 or via e-mail to *Margaret.Pfunder@gsa.gov*.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Ms. Jasmeet Seehra, GSA Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the Regulatory Secretariat (VPR), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0221, Civilian Board of Contract Appeals Rules Procedure, in all correspondence.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

The CBCA requires the information collected in order to conduct proceedings in contract appeals and petitions, and cost applications. Parties include those persons or entities filing appeals, petitions, cost applications, and Government agencies.

**B. Annual Reporting Burden**

*Respondents:* 85.

*Responses per Respondent:* 1.

*Hours per Response:* .108.

*Total Burden Hours:* 9.2.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–0221, Civilian Board of Contract Appeals Rules of Procedure, in all correspondence

Dated: November 25, 2008.

**Casey Coleman,**

*Chief Information Officer.*

[FR Doc. E8–29051 Filed 12–8–08; 8:45 am]

BILLING CODE 6820–AL–P

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0262]**

### General Services Administration Acquisition Regulation; Information Collection; Identification of Products With Environmental Attributes

**AGENCY:** Office of the Chief Acquisition Officer, GSA.

**ACTION:** Notice of request for comments regarding a revision to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to revise and approve an extension of a currently approved information collection requirement regarding identification of products with environmental attributes. The clearance currently expires on April 30, 2009.

*Public comments are particularly invited on:* Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

**DATES:** Submit comments on or before: February 9, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Warren Blankenship, Procurement Analyst, Contract Policy Division, at telephone (202) 501–1900 or via e-mail to *warren.blankenship@gsa.gov*.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, Room 4041, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0262, Identification of Products with Environmental Attributes, in all correspondence.

**SUPPLEMENTARY INFORMATION:**

#### A. Purpose

General Services Administration (GSA) requires contractors submitting Multiple Award Schedule Contracts to identify in their GSA price lists those products that they market commercially that have environmental attributes. The identification of these products will enable Federal agencies to maximize the use of these products to meet the responsibilities expressed in statutes and executive orders.

#### B. Annual Reporting Burden

*Respondents 18,000.:*
*Responses per Respondent: 1.*
*Annual Responses: 18,000.*
*Hours per Response: 5.*
*Total Burden Hours: 90,000.*
*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–0262, Identification of Products with Environmental Attributes, in all correspondence.

Dated: November 19, 2008.

**Rhonda Cundiff,**

*Acting Director, Office of Acquisition Policy.*

[FR Doc. E8–29050 Filed 12–8–08; 8:45 am]

BILLING CODE 6820–61–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Health Care Research and Quality

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Agency for Health Care Research and Quality, HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request the Office of Management and Budget (OMB) to allow the proposed information collection project: ''Overcoming Barriers to Expanded Health Information Exchange (HIE) Participation in Indiana.'' In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on June 10th, 2008 and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

**DATES:** Comments on this notice must be received by January 8, 2009.

**ADDRESSES:** Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (Attention: AHRQ's desk officer) or by e-mail at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

**FOR FURTHER INFORMATION CONTACT:** Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

#### Proposed Project

''Overcoming Barriers to Expanded Health Information Exchange (HIE) Participation in Indiana.''

AHRQ, through its contractor, the Regenstrief Institute at Indiana University, proposes to assess the barriers to participation in health information exchange (HIE) in Indiana. The Regenstrief Institute will use its experience to date working with a variety of organizations to establish specific barriers to engagement in HIE cited by stakeholders, define the barriers and evaluate them.

The Regenstrief Institute will develop and implement a questionnaire and survey process to identify barriers that may exist throughout the State of Indiana to participation in the Indiana Network of Patient Care (INPC). The INPC is a local health information infrastructure that includes information from five major hospital systems (fifteen separate hospitals), the county and State public health departments, and Indiana Medicaid and RxHub. The INPC began operation seven years ago and is one of the first examples of a local health information infrastructure.

This research will elicit and aggregate feedback from large and small physician groups, as well as hospitals, throughout the State of Indiana. The goal is to identify the gaps in understanding, barriers and disconnects that may exist with providers' adoption of, and membership in, the INPC. The relationship between the stakeholders involved in the Indiana HIE is governed by a contract between the participants. The Regenstrief Institute, acting on behalf of the participants, created and operates the exchange, including serving as the custodian of the data.

The Regenstrief Institute will survey three key stakeholder groups in the State of Indiana: Small hospitals, small physician practices (less than 5 providers) and large physician practices (greater than 20 providers) to identify barriers for each of these groups to participate in a HIE in general, and specifically the INPC. It is difficult to predict the barriers that will be identified, but based on their experience to date, anecdotal evidence suggests that

the cost of interfaces and the management attention needed to participate will be the two major barriers. The findings will be used to create approaches to engage specific entities to participate in their statewide HIE.

This project is being conducted pursuant to AHRQ's statutory mandates to conduct and support research, evaluations and initiatives to advance information systems for health care improvement (42 U.S.C. 299b–3) and to promote innovations in evidence-based health care practices and technologies by conducting and supporting research on the development, diffusion, and use of health care technology (42 U.S.C. 299b–5(a)(1)). This project is also being conducted pursuant to a modification to an earlier AHRQ request for proposals entitled ''State and Regional Demonstrations in Health Information Technology'' (issued under contract 290–04–0015).

**Method of Collection**

To ease the burden on the participating health care providers a Web-based questionnaire will be used. An initial screener interview will be conducted by telephone to describe the purpose of the survey and the survey process and to request the hospital's or physician practice's participation in the survey. After a hospital or practice agrees to participate, a communication packet will be sent by e-mail to the contact person identified during the telephone screening. The communication packet includes: (a) An HIE description and definition; (b) description of the INPC, its mission, overall direction, and other relevant background information; and (c) purpose for the contact, estimated time required to complete the Web-based questionnaire and a link to the questionnaire.

Responses to the survey are expected from about 20 hospitals and 40 physician practices of each size. Two to three individuals from each hospital will be asked to respond to the questionnaire. For physician practices, one person from each practice will be asked to respond: A practice manager, director of technology, or person occupying a similar role.

Following the completion of the Web-based questionnaire, respondents will be re-contacted by telephone for a follow-up interview. The purpose of the follow-up interview is to determine the steps necessary to overcome the barriers to HIE identified in the Web-based questionnaire. A structured interview guide has been developed with standard questions for the telephone follow-up.

The data will be aggregated, analyzed and a final report will be prepared that focuses on the following major topic areas:

a. General perceptions on electronic sharing of health information;

b. The extent to which electronic health information sharing exists in the contact's current environment;

c. Barriers to the adoption and implementation of electronic health information sharing and, specifically, INPC; and

d. Recommendations for addressing and resolving issues preventing the adoption of HIE (general as well as entity-specific recommendations).

This information will assist AHRQ's mission to advance ''the creation of effective linkages between various sources of health information, including the development of information networks.'' 42 U.S.C. 299b–3(a)(3). A seventy-five percent (75%) response rate is anticipated.

**Estimated Annual Respondent Burden**

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in this research. A screener interview will be completed once by each of the 20 hospitals and 80 physician practices and is expected to require about 5 minutes to complete. The Web-based questionnaire will be completed by an average of 3 persons from each of the 20 hospitals and by one person from each of the 80 physician practices and will take about 10 minutes to complete. The telephone follow-up interview will be conducted with each person that completed the Web-based questionnaire and is expected to last about 15 minutes. The total burden hours for the participating health care providers is estimated to be 66 hours.

Exhibit 2 shows the estimated annualized cost burden to the responding health care providers based on their time to participate in this research. The total cost burden is estimated to be $3,074.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

| Form name | Number of respondents | Number of responses per respondent | Hours per response | Total burden hours |
|---|---|---|---|---|
| Screener | 100 | 1 | 5/60 | 8 |
| Web-based Questionnaire | 100 | 1.4 | 10/60 | 23 |
| Telephone Follow-up Interview | 100 | 1.4 | 15/60 | 35 |
| Total | 300 | na | na | 66 |

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

| Form name | Number of respondents | Total burden hours | Average hourly wage rate * | Total cost burden |
|---|---|---|---|---|
| Screener | 100 | 8 | $46.58 | $373 |
| Web-based Questionnaire | 100 | 23 | 46.58 | 1,071 |
| Telephone Follow-up Interview | 100 | 35 | 46.58 | 1,630 |
| Total | 300 | 66 | na | 3,074 |

* Based upon the average of the ''Wage estimates, mean hourly'' for the following occupation codes and titles: 11–101/Chief executives; 13–0000/Business and financial operations occupations; 15–1071/Network and computer systems administrators; 29–1062/Family and general practitioners; 11–9111/Medical and health services managers, from the ''May 2007 State Occupational Employment and Wage Estimates, Indiana; Occupational Employment Statistics, U.S. Department of Labor, Bureau of Labor Statistics, *http://www.bls.gov/oes/current/oes_in.htm*.''

**Estimated Annual Costs to the Federal Government**

This project will last for one year and is estimated to cost the government $120,000. The scope of work includes the development of the survey instruments and data collection ($90,000), and data analysis ($10,000) to establish specific barriers to HIE participation cited by stakeholders and to define and evaluate them ($20,000).

**Request for Comments**

In accordance with the above cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of functions of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility, and clarity on the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: December 1, 2008.

**Carolyn M. Clancy,**

*Director.*

[FR Doc. E8–28901 Filed 12–8–08; 8:45 am]

BILLING CODE 4160–90–M

---

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Agency for Healthcare Research and Quality

## Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Agency for Healthcare Research and Quality, Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) allow the proposed information collection project: ''Establishing Benchmarks for the Medical Office Survey on Patient Safety.'' In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)), AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on September 19th, 2008 and allowed 60 days for public comment. One comment was received. This notice differs from the previous notice in that the number of respondents was increased by 150 respondents and the burden hours were reduced by 1,488 hours. The purpose of this notice is to allow an additional 30 days for public comment.

**DATES:** Comments on this notice must be received by January 8, 2009.

**ADDRESSES:** Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQs desk officer) or by e-mail at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

**FOR FURTHER INFORMATION CONTACT:** Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

**Proposed Project**

*''Establishing Benchmarks for the Medical Office Survey on Patient Safety''*

The ambulatory Medical Office Survey on Patient Safety (SOPS), an adapted version of AHRQ's Hospital Survey on Patient Safety Culture (HSOPSC), was developed in 2005 to measure specific components of patient safety culture in the ambulatory setting. A pilot study (OMB #0935–0131) assessed and refined the psychometric properties of specific survey items, and a final version of SOPS is now ready for public dissemination. However, in order for the survey to be most useful to ambulatory medical offices in identifying areas of relative strength and weakness in patient safety culture, reliable benchmarks to which a practice's responses can be compared need to be established.

AHRQ has determined, through discussions with potential end-users of SOPS, including leaders of physician and other provider groups, that an ambulatory practice is unlikely to have confidence in SOPS benchmarks unless the benchmarking data are based on responses derived from offices with similar characteristics. Office characteristics thought to have a potential effect on SOPS responses include practice size, provider specialty mix, and use of electronic information technology. A separate survey to collect information about these practice characteristics has been developed and was tested and refined as part of the pilot study.

In order to establish SOPS benchmarks that can be tailored with respect to specific practice-related characteristics, survey responses from a large sample of practices stratified by these characteristics are required. AHRQ therefore intends to recruit and administer SOPS to ambulatory medical offices that have been selected on the basis of practice characteristics. In addition, AHRQ intends to collect from these practices evaluative information about administrative barriers and facilitators to survey participation as well as a description of how the office used (or plans to use) the survey results to enhance patient safety culture. These data will inform future efforts by AHRQ to maximize the use of SOPS and the utility/value of survey results to ambulatory practices across the country.

This project is being conducted pursuant to AHRQ's statutory mandates to (1) promote health care quality improvement by conducting and supporting research that develops and presents scientific evidence regarding all aspects of health care, including methods for measuring quality and strategies for improving quality (42 U.S.C. 299(b)(1)(F)) and (2) conduct and support research on health care and on systems for the delivery of such care, including activities with respect to quality measurement and improvement (42 U.S.C. 299a(a)(2)).

**Methods of Collection**

A purposive sample of 400 outpatient medical offices will be identified and recruited. The goal is for the sample to be proportionately distributed with regard to three practice characteristics: Office size (number of physicians and employed staff); provider specialty mix (single- vs multi-specialty); and extent to which electronic health information tools are used. All physicians and employed staff in the practices will be asked to complete the SOPS. Additionally, one office manager for the practice will be asked to complete the Office Characteristics Survey. Since higher response rates have been demonstrated when paper-based

(compared to electronic) surveys are administered to busy ambulatory clinicians, SOPS will be administered in paper form. Standard non-response follow-up techniques such as reminder postcards and distribution of a second survey will be used. Additionally, all respondents will subsequently be asked to complete a Web-based evaluation assessing barriers and facilitators to survey completion, and the intended use(s) of survey data. Individuals and organizations contacted will be assured of the confidentiality of their replies under 42 U.S.C. 924(c).

**Estimated Annual Respondent Burden**

Exhibit 1 shows the estimated burden hours for the medical offices' time to participate in this one-time data collection. It is anticipated than an average of 10 persons (about 3 physicians and 7 staff) in each of the approximately 400 medical offices will respond to the survey, resulting in a maximum of 4000 responses (approximately 1,200 physicians and 2,800 staff). The Medical Office Survey on Patient Safety (MO–SOPS) and post survey evaluation will be completed by both physicians and staff, while the Office Characteristics Survey will be completed by the office manager at each of the participating medical offices. Standard techniques such as using a cover letter of support from the medical office, reminder postcards, and distribution of a second survey will be used to achieve the target response rate.

The MO–SOPS survey and Office Characteristics survey each require approximately 15 minutes to complete. All staff will be asked to complete the MO–SOPS, however only the office manager will need to complete the Office Characteristics Survey. Additionally, the Post-Survey Evaluation, which will take an estimated 15 minutes to complete, will be distributed to all respondents electronically. It is estimated that the total annualized respondent burden for completing the surveys will be 2,100 hours.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

| Survey name | Number of respondents | Number of responses per respondent | Hours per response | Total burden hours |
|---|---|---|---|---|
| MO–SOPS Survey | 400 | 10 | 15/60 | 1,000 |
| Office Characteristics Survey | 400 | 1 | 15/60 | 100 |
| Post-Survey Evaluation | 400 | 10 | 15/60 | 1,000 |
| Total | 1,200 | na | na | 2,100 |

Exhibit 2 shows the estimated annualized cost burden based on the respondent's time to participate in this project. Based on the burden hours and hourly rates of physicians and staff, the total annualized cost burden is estimated at $58,662.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

| Survey name | Number of respondents | Total burden hours | Average hourly wage rate * | Total cost burden |
|---|---|---|---|---|
| MO–SOPS Survey | 400 | 1,000 | $27.44 | $27,440 |
| Office Characteristics Survey | 400 | 100 | 37.82 | 3,782 |
| Post-Survey Evaluation | 400 | 1,000 | 27.44 | 27,440 |
| Total | 1,200 | 2,100 | n/a | 58,662 |

* For the SOPS and Post-Survey Evaluation the wage rate is the national average wage for ''healthcare practitioner and technical occupations.'' For the Office Characteristics Survey the hourly wage is the national average wage for ''medical and health services managers.'' National Compensation Survey: Occupational wages in the United States 2006, U.S. Department of Labor, Bureau of Labor Statistics.

**Estimated Annual Costs to the Federal Government**

The total cost to the Government for conducting this research will be approximately $340,000. This estimate includes the costs of medical office identification and recruitment; data collection and aggregation; shipping, inputting and cleaning of data; analysis and report writing.

**Request for Comments**

In accordance with the above-cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: December 1, 2008.

**Carolyn M. Clancy,**

*Director.*

[FR Doc. E8–28902 Filed 12–8–08; 8:45 am]

BILLING CODE 4160–90–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0038]**

### Blood Products Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee*: Blood Products Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on FDA's regulatory issues.

*Date and Time*: The meeting will be held on January 9, 2009, from 8 a.m. to 6 p.m.

*Location*: Hilton Hotel, Washington, D.C./Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person*: William Freas or Pearline K. Muckelvene, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014519516. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda*: On the morning of January 9, 2009, the Committee will discuss CSL Behring's Biologics License Application for plasma-derived fibrinogen concentrate for treatment of bleeding in congenital fibrinogen deficiency. In the afternoon, the Committee will hear an update on the ''Food and Drug Administration Draft Guidance for Industry on Regulation of Genetically Engineered Animals Containing Heritable Recombinant Deoxynucleic Acid Constructs.'' Following this update, the Committee will discuss GTC Biotherapeutics' Biologics License Application for recombinant Antithrombin III derived from genetically engineered goats for treatment of patients with hereditary Antithrombin III deficiency to prevent thrombosis during high risk situations like surgery and obstetrical procedures.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

*Procedure*: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before December 30, 2008. Oral presentations from the public will be scheduled between approximately 10:30 a.m. and 11 a.m. and between approximately 4 p.m. and 5 p.m. on January 9, 2009. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before December 19, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by December 22, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact William Freas or Pearline K. Muckelvene at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 1, 2008.

**Randall W. Lutter,**

*Deputy Commissioner for Policy.*

[FR Doc. E8–29105 Filed 12–8–08; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Request for Public Comment: 30-Day Proposed Information Collection: Indian Health Service Health Promotion/Disease Prevention Grantee Survey

**AGENCY:** Indian Health Service, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which requires 30 days for public comment on proposed information collection projects, the Indian Health Service (IHS) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection project was previously published in the **Federal Register** (73 FR 23254) on August 25, 2008 and allowed 60 days for public comment. No public comment was received in response to the notice. The purpose of this notice is to allow 30 days for public comment to be submitted directly to OMB.

*Proposed Collection: Title:* 0917–NEW, ''Indian Health Service Health Promotion/Disease Prevention Grantee Survey.''

*Type of Information Collection Request:* This is a one-time survey to fulfill an OMB request for an independent external evaluation collection, 0917–NEW, ''Indian Health Service Health Promotional Disease Prevention (HP/DP) Grantee Survey.''

*Form Number(s):* None.

*Need and Use of Information Collection:* The IHS goal is to raise the health status of the American Indian and Alaska Native (AI/AN) people to the highest possible level by providing comprehensive health care and preventive health services. HP/DP is one of the three IHS Director's initiatives to reduce health disparities among AI/AN populations through a coordinated and systematic approach to enhance health

promotion and chronic disease prevention approaches at the local, regional, and national levels.

The HP/DP competitive grant was established in 2005 to encourage Tribal and urban Indian programs to fully engage their local schools, communities, health care providers, health centers, faith-based/spiritual communities, senior centers, youth programs, local governments, academia, non-profit organizations, and many other community sectors to work together to enhance and promote health and prevent chronic disease in their communities. Thirty-three Tribal/urban Indian organizations and programs were awarded competitive grants to expand and enhance health promotion and disease prevention to address health disparities among AI/AN populations.

To conduct a thorough evaluation of the grant program, 29 telephone and four face-to-face interviews will be conducted to collect information to complete a quantitative and qualitative evaluation of the HP/DP grant program. The teleconference interviews may include one staff member per site. Each of the Tribal/urban organization/programs will determine the number of their staff members that will participate in the interview. The evaluation will include an assessment of whether HP/DP grantees achieve measurable health outcomes, synthesize the evaluation findings, and include a written report with recommendations to enhance program effectiveness. The information gathered will be used to prepare a final report for OMB.

*Affected Public:* Individuals.

*Type of Respondents:* Tribal/urban organizations program staff.

The table below provides: Types of data collection instruments, estimated number of respondents, number of responses per respondent, average burden hour per response, and total annual burden hour(s).

ESTIMATED BURDEN HOURS

| Data collection instrument | Estimated number of respondents | Responses per respondent | Average burden hour per response | Total annual burden hours |
|---|---|---|---|---|
| HP/DP Grantees Telephone and Face-to-Face Interview Survey | 231 | 1 | 1 | 231 |
| Total | 231 | | | 231 |

There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

*Request for Comments:* Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimates are logical; (e) ways to enhance the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Direct Comments to OMB:* Send your written comments and suggestions regarding the proposed information collection contained in this notice, especially regarding the estimated public burden and associated response time to: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for IHS.

To request more information on the proposed collection or to obtain a copy of the data collection instrument(s) and/or instruction(s) contact: Ms. Janet Ingersoll, Freedom of Information Act Coordinator, 801 Thompson Avenue, TMP Suite 450, Rockville, MD 20852–1601; call non-toll free (301) 443–1116; send via facsimile to (301) 443–9879; or send your e-mail requests, comments, and return address to: *Janet.Ingersoll@ihs.gov*.

*Comment Due Date:* Comments regarding this information collection are best assured of having full effect if received within 30 days of the date of this publication.

Dated: December 2, 2008.

**Robert G. McSwain,**

*Director, Indian Health Service.*

[FR Doc. E8–28922 Filed 12–8–08; 8:45 am]

BILLING CODE 4160–16–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; MOSS Continuous Receipt.

*Date:* December 18, 2008.

*Time:* 2 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Daniel F. McDonald, PhD, Scientific Review Officer, Chief, MOSS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814,Bethesda, MD 20892, (301) 435–1215, *mcdonald@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Oncological Sciences Integrated Review Group; Cancer Molecular Pathobiology Study Section.

*Date:* January 15–16, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Sheraton Delfina, 530 West Pico Boulevard, Santa Monica, CA 90405.

*Contact Person:* Elaine Sierra-Rivera, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health,6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, 301–435–1779, *riverase@csr.nih.gov*.

*Name of Committee:* Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Risk and Disease Prevention Study Section.

*Date:* January 26–27, 2009.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Serrano Hotel, 405 Taylor Street, San Francisco, CA 94102.
*Contact Person:* Martha Faraday, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, MSC 7808, Bethesda, MD 20892, 301–435–3575, *faradaym@csr.nih.gov*.

*Name of Committee:* Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Surgery, Anesthesiology and Trauma Study Section.
*Date:* January 28–29, 2009.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.
*Contact Person:* Weihua Luo, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, (301) 435–1170, *luow@csr.nih.gov*.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group; Developmental Brain Disorders Study Section.
*Date:* January 29–30, 2009.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.
*Contact Person:* Pat Manos, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301–435–1785, *manospa@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 2, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29031 Filed 12–8–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(cX4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflicts: Prevention and Behavioral Intervention.
*Date:* January 15, 2009.
*Time:* 3 p.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
*Contact Person:* Karen Lechter, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3128, MSC 7759, Bethesda, MD 20892, 301–496–0726, *lechterk@csr.nih.gov*.

*Name of Committee:* Oncological Sciences Integrated Review Group, Cancer Immunopathology and Immunotherapy Study Section.
*Date:* January 26–27, 2009.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.
*Contact Person:* Denise R. Shaw, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804,Bethesda, MD 20892, 301–435–0198, *shawdeni@csr.nih.gov*.

*Name of Committee:* Oncological Sciences Integrated Review Group, Radiation Therapeutics and Biology Study Section.
*Date:* January 26–27, 2009.
*Time:* 8 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
*Contact Person:* Bo Hong, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–435–5879, *hongb@csr.nihgov*.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated, Review Group Clinical Neuroimmunology and Brain Tumors Study Section.
*Date:* January 29–30, 2009.
*Time:* 8:30 a.m. to 5 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.
*Contact Person:* Jay Joshi, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5196, MSC 7846, Bethesda, MD 20892, (301) 435–1184, *joshij@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 2, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29033 Filed 12–8–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Complementary and Alternative Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the National Advisory Council for Complementary and Alternative Medicine (NACCAM) meeting.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

A portion of the meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussion could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council for Complementary and Alternative Medicine.
*Date:* February 6, 2009.
*Closed:* 8:30 a.m. to 10:30 a.m.
*Agenda:* To review and evaluate grant applications and/or proposals.
*Open:* 11 a.m. to 4 p.m.
*Agenda:* Opening remarks by the Director of the National Center for Complementary and Alternative Medicine, presentation of a new research initiative, and other business of the Council.
*Place:* National Institutes of Health, Neuroscience Building, 6001 Executive Boulevard, Conference Rooms C & D, Bethesda, MD 20892.

*Contact Person:* Martin H. Goldrosen, PhD., Executive Secretary. Director, Division of Extramural Activities. National Center for Complementary and Alternative Medicine. National Institutes of Health, 6707 Democracy Blvd., Suite 401, Bethesda, MD 20892, (301) 594–2014.

The public comments session is scheduled from 3:30–4 p.m., but could change depending on the actual time spent on each agenda item. Each speaker will be permitted 5 minutes for their presentation. Interested individuals and representatives of organizations are requested to notify Dr. Martin H. Goldrosen, National Center for Complementary and Alternative Medicine, NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, Maryland 20892, 301–594–2014, Fax: 301–480–9970. Letters of intent to present comments, along with a brief description of the organization represented, should be received no later than 5 p.m. on February 2, 2009. Only one representative of an organization may present oral comments. Any person attending the meeting who does not request an opportunity to speak in advance of the meeting may be considered for oral presentation, if time permits, and at the discretion of the Chairperson. In addition, written comments may be submitted to Dr. Martin H. Goldrosen at the address listed above up to ten calendar days (February 16, 2009) following the meeting. Copies of the meeting agenda and the roster of members will be furnished upon request by contacting Dr. Martin H. Goldrosen, Executive Secretary, NACCAM, National Center for Complementary and Alternative Medicine, National Institutes of Health, 6707 Democracy Boulevard, Suite 401, Bethesda, Maryland 20892, 301–594–2014, Fax 301–480–9970, or via e-mail at *naccames@mail.nih.gov*.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show a photo I.D. and sign in at the security desk upon entering the building.

Dated: December 2, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29030 Filed 12–8–08; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**Proposed Project: SAMHSA Fetal Alcohol Spectrum Disorders Center for Excellence Project CHOICES Evaluation—New**

Since 2001, SAMHSA's Center for Substance Abuse Prevention has been operating the SAMHSA Fetal Alcohol Spectrum Disorders (FASD) Center for Excellence. The purpose of the FASD Center for Excellence is to prevent and improve the treatment of FASD. Some of the activities of the FASD Center include providing training, technical assistance, and subcontracts to increase the use of effective evidence-based interventions.

The FASD Center will be integrating the Project CHOICES program through service delivery organizations and will be evaluating the results. Six sites will implement Project CHOICES with nonpregnant women 18–44 years who are sexually active and who are participating in alcohol treatment (residential or outpatient) or in drug treatment (if the women also use alcohol). Women in substance abuse treatment will be screened and those women that meet the above description will be provided four Motivational Interviewing (MI) sessions (related to alcohol use), plus one contraceptive counseling session. The goal is to help these women prevent an alcohol-exposed pregnancy by abstaining from alcohol and using contraceptive methods of their choice consistently and correctly.

At baseline, an assessment tool will be administered by the counselor to assess drinking, sexual activity, contraceptive use, and demographic information. At the end of the program, women are assessed on their alcohol consumption and contraceptive use in the past 30 days. At 6 months and 12 months after the end of the program, women are assessed on alcohol consumption and contraceptive use using the same core assessment tool used at baseline. All participating sites will maintain personal identification on their clients for service delivery purposes but no such information will be transmitted to SAMHSA.

The data collection is designed to evaluate the implementation of Project CHOICES by measuring whether abstinence from alcohol is achieved and effective birth control practices are performed. Furthermore, the project will include process measures to assess whether and how the intervention was provided.

ESTIMATED ANNUALIZED BURDEN HOURS

| Screening tool/activity | Number of respondents (6 Sites) | Number of responses per respondent | Average burden per response | Total burden hours per collection |
|---|---|---|---|---|
| Alcohol Use and Contraceptive Methods Assessment | 913 | 1 | 0.25 | 228 |
| Project CHOICES process evaluation assessing whether sessions were delivered and their duration (75% of baseline) | 684 | 5 | 0.08 | 274 |

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

| Screening tool/activity | Number of respondents (6 Sites) | Number of responses per respondent | Average burden per response | Total burden hours per collection |
|---|---|---|---|---|
| Alcohol Use and Contraceptive Methods Assessment: End of program, 6- and 12-month followup (50% of baseline) | 456 | 3 | 0.25 | 342 |
| Total | 2,053 | 9 | | 844 |

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 71–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: November 25, 2008.

**Elaine Parry,**

*Acting Director, Office of Program Services.*

[FR Doc. E8–28648 Filed 12–8–08; 8:45 am]

BILLING CODE 4162–20–P

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0129]**

### Privacy Act of 1974; United States Immigration and Customs Enforcement—010 Confidential and Other Sources of Information System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate three legacy record systems: Treasury/CS.053 Confidential Source Identification File, Treasury/CS.058 Cooperating Individual Files, and Treasury/CS.122 Information Received File into a new Immigration and Customs Enforcement (ICE) system of records notice titled Confidential and Other Sources of Information (COSI). Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect ICE COSI record systems. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 8, 2009. This new system will be effective January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0129 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Lyn Rahilly, Privacy Officer, (202–732–3300), Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20024, e-mail: *ICEPrivacy@dhs.gov*. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the DHS and its component agency ICE have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to information received from confidential and other sources. As a law enforcement investigatory agency, ICE collects and maintains information regarding possible violations of law from a number of sources, including confidential sources, State, local, tribal and Federal law enforcement agencies, and members of the public. As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for ICE to cover these records. This new system of records will allow ICE to collect and maintain records concerning the identities of and information received from documented confidential sources and other sources who supply information to ICE regarding possible violations of law or otherwise in support of law enforcement investigations and activities.

In accordance with the Privacy Act of 1974, DHS is giving notice that it proposes to consolidate three legacy record systems: Treasury/CS.053 Confidential Source Identification File (66 FR 52984 October 18, 2001), Treasury/CS.058 Cooperating Individual Files (66 FR 52984 October 18, 2001), and Treasury/CS.122 Information Received File (66 FR 52984 October 18, 2001), into a DHS/ICE system of records notice titled, United States Immigration and Customs Enforcement Information, and Confidential Sources. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the DHS/ICE Information, and Confidential Sources record systems. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in the Department's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The

Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the ICE Confidential and Other Sources of Information (COSI) System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

**System of Records: DHS/ICE–010.**

**SYSTEM NAME:**

Immigration and Customs Enforcement Confidential and Other Sources of Information (COSI).

**SECURITY CLASSIFICATION:**

Unclassified. Law Enforcement Sensitive (LES).

**SYSTEM LOCATION:**

Records are maintained at the ICE Headquarters in Washington, DC, and in field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include:

(1) Confidential Sources: Individuals who report information to ICE regarding possible violations of law or other information in support of law enforcement investigations and activities who have been documented as a confidential source. These individuals include confidential informants; Federal, State, local, tribal, territorial, or foreign government personnel or law enforcement officers; and members of the public acting in either their personal or professional capacities;

(2) Non-Confidential Sources: Individuals other than those described in (1) above, who report information to ICE regarding possible violations of law or other information in support of law enforcement investigations and activities. These individuals include Federal, State, local, tribal, territorial, or foreign government personnel or law enforcement officers; and members of the public acting in either their personal or professional capacities.

(3) Individuals reported by Confidential and Non-Confidential Sources: Individuals whose information is provided to ICE by the individuals described in (1) and (2) above. These individuals are typically persons who are alleged to have engaged in, witnessed, or otherwise been associated with suspected illegal activity.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system may include:

*For Confidential Sources:*

- Individual's name (actual or assumed).
- ICE Confidential Source (identifying) number.
- Date ICE Source number assigned.
- Addresses.
- Nationality.
- Occupational information.
- Date and place of birth.
- Physical description of identifying features.
- Photograph of Source.
- Identifying numbers such as Social Security Number, driver's license number, FBI number, and passport number.
- Criminal history record.
- Copy of driver's license.
- Copy of alien registration card.
- Documentation of information received and the amount and date of any monetary payment made to the source.

*For other non-confidential sources of information:*

- Individual's name (actual or assumed).
- Addresses.
- Nationality.
- Occupational information.

*For individuals about whom confidential and non-confidential information is provided:*

- Individual's name (alleged violator, witness, interested parties, those connected with the investigation);
- Fingerprints;
- Handwriting sample;
- Aliases;
- Social Security Number;
- Nationality;
- Date of birth;
- Place of birth;
- Addresses;
- Telephone numbers;
- Emergency contact information;
- Occupation;
- Association/Organization memberships;
- Physical description of the individual;
- Photograph of the individual;
- Alien registration number;
- Copy of Alien registration card;
- Copy of Driver's license;
- Driver's license number;
- Registration number of vehicle, vessel, or aircraft;
- FBI/National Crime Information Center (NCIC) number;
- Passport number;
- ICE Investigative case number;
- Internal DHS/ICE memoranda and related materials regarding possible violations of law;
- Criminal record information;
- Financial record information;
- Documentation of information received from confidential sources, agencies and other individuals;
- The ICE office receiving the information; and
- ICE Duty Agent Log of information received, which contains some or all of the specific data listed above.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 18 U.S.C. Chapter 27; and 19 U.S.C. 1619.

**PURPOSE(S):**

The purpose of this system is to document and manage the identities of and information received from a number of sources, including confidential sources, regarding possible violations of law or other information in support of law enforcement investigations and activities conducted by ICE.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or

administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

J. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To Federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

L. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD-ROM.

**RETRIEVABILITY:**

Records for confidential sources are retrieved by ICE their numerical identifier or the associated ICE investigative case number. Other source records are retrieved by ICE investigative case number, individual's name or alias (source, subject or other person connected with the investigation), the ICE field office which received the information, and the date the information was received.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are maintained until the end of the fiscal year in which the related investigative file is closed. The records are then transferred to the Federal Records Center five (5) years after the end of that fiscal year. The records are then destroyed 50 years after the end of the fiscal year in which the related investigative file is closed. Disposal of paper files occurs by burning or shredding; electronic data is disposed of using methods approved by the DHS Chief Information Security Officer.

**SYSTEM MANAGER AND ADDRESS:**

Deputy Assistant Director, Investigative Services Division, Office of Investigations, ICE Headquarters, Potomac Center North, 500 12th St., SW., Washington, DC 20024.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Other Federal, State, local, and tribal law enforcement agencies, confidential sources, any other sources of information including members of the public.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). In addition, to the extent a record contains information from other exempt systems of records, ICE will rely on the exemptions claimed for those systems.

Dated: November 28, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29054 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0130]**

### Privacy Act of 1974; United States Immigration and Customs Enforcement—008 Search, Arrest, and Seizure Records System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate two legacy record systems: Treasury/CS.212 Search/Arrest/Seizure Report and Treasury/CS.214 Seizure File into a Immigration and Customs Enforcement system of records notice titled Search, Arrest, and Seizure Records. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect Immigration and Custom Enforcement's search, arrest, and seizure records. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 8, 2009. This new system will be effective January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0130 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general issues please contact Lyn Rahilly, Privacy Officer, (202) 732–3300), Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20024, *e-mail: ICEPrivacy@dhs.gov*. For privacy issues please contact Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its component agency Immigration and Customs Enforcement (ICE) have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records pertaining to ICE's arrests of individuals, and searches, detentions, and seizures of property pursuant to ICE's law enforcement authorities. As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C.

552a) for ICE to cover these records. The collection and maintenance of this information will assist ICE in meeting its obligation to record its actions regarding searches of individuals and property, arrests of individuals, and detentions and seizures of property and goods pursuant to ICE's law enforcement authorities.

In accordance with the Privacy Act of 1974, DHS is giving notice that it proposes to consolidate two legacy record systems: Treasury/CS.212 Search/Arrest/Seizure Report (66 FR 52984 October 18, 2001) and Treasury/CS.214 Seizure File (66 FR 52984 October 18, 2001) into an ICE system of records notice titled Search, Arrest, and Seizure Records. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect ICE's search, arrest, and seizure records. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in the Department's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/ICE Search, Arrest, and Seizure Records system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

### System of Records DHS/ICE–008

#### SYSTEM NAME:

Immigration and Customs Enforcement Search, Arrest, and Seizure Records.

#### SECURITY CLASSIFICATION:

Unclassified. Law Enforcement Sensitive (LES).

#### SYSTEM LOCATION:

Records are maintained at the U.S. Immigration and Customs Enforcement (ICE) Headquarters in Washington, DC and in field offices.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include persons who violated, or are believed to have violated, the laws and regulations enforced by ICE, including those who have been administratively or criminally charged with violations of such laws and regulations. Also included in this system are owners, claimants, and other interested parties of the detained, seized and/or forfeited property.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system may include: Information about individuals:

- Name;
- Nationality;
- Aliases;
- Social Security Number;
- Fingerprints;
- Date of birth;
- Physical description of individual;
- Addresses;
- Telephone numbers;
- Occupation;
- Place of business;
- Driver's license number;

Information about the search, seizure, or detention of goods or property, or the search or arrest of individuals:

- Search/arrest/seizure/detention date;
- License and registration number of vehicle, vessel and/or aircraft;
- Individual and/or contraband's mode of entry;
- Photographs related to searches, detentions, seizures, or arrests;
- Declaration forms submitted to U.S. Customs and Border Protection;
- Receipts of cash, goods, or other property seized, detained, or forfeited;
- Description of goods or other property seized, detained, searched, or forfeited;
- Estimated foreign value of seized goods or other property;
- Duty paid and owed;
- Domestic value of seized goods or other property;
- Notices provided to owners, claimants, or other interested parties pertaining to seized goods or other property;
- Reports of arrests, searches, detentions and seizures by ICE including the circumstances of the seizure, including reports from other law enforcement agencies;
- Section of law violated; and
- Seized or detained records in both paper and electronic form, including computers, computer records, disks, hard drives, flash drives and other electronic media and storage devices.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 19 U.S.C. 66, 1618, 1625; 19 U.S.C. 8; 19 CFR Parts 171 and 172; the Federal Records Act, 44 U.S.C. 3101; Executive Order 9373.

#### PURPOSE(S):

The purpose of this system is to document all information and activity related to ICE searches of individuals and property, arrests of individuals, and seizures of goods, as well as related information about the individuals or entities suspected of violations of laws and regulations enforced by ICE. The system is also intended to facilitate communication between ICE and foreign and domestic law enforcement agencies for the purpose of enforcement and administration of laws, including immigration and customs laws.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney

Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

J. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To international and foreign governmental authorities in accordance with the law and formal or informal international arrangements.

L. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are also stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records are retrieved by individual's name, Social Security Number, ICE case number, vehicle, vessel, or aircraft number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are maintained for 5 years after final disposition, and then are transferred to the Federal Records Center. Records are destroyed 20 years after final disposition. Disposal of paper files occurs by burning or shredding; electronic data is disposed of using methods approved by the DHS Chief Information Security Officer.

**SYSTEM MANAGER AND ADDRESS:**

Unit Chief, Executive Information Unit/Program Management Oversight (EIU/PMO), Office of Investigations, Mission Support Division, U.S. Immigration and Customs Enforcement, Potomac Center North, 500 12th St., SW., Washington, DC 20024.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to

contest its content, may submit a request in writing to the component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individuals who have been subject to search or arrest; owners, claimants, and other interested parties of detained, seized and/or forfeited property; other Federal agencies, and State, tribal and local law enforcement agencies; confidential sources; and members of the public.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), and (e)(4)(H), (e)(5) and (e)(8); (f); and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). In addition, to the extent a record contains information from other exempt systems of records, ICE will rely on the exemptions claimed for those systems.

Dated: November 28, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29055 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0186]**

### Privacy Act of 1974; U.S. Immigration and Customs Enforcement-006 Intelligence Records System (IIRS) System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new system of records titled the U.S. Immigration and Customs Enforcement (ICE) Intelligence Records System (IIRS). IIRS contains information generated or received by the ICE Office of Intelligence, or other offices within ICE that support the law enforcement intelligence mission, that is analyzed and disseminated to ICE executive management and operational units for law enforcement, intelligence, counterterrorism, and other homeland security purposes. IIRS also contains data maintained in the Office of Intelligence's Intelligence Fusion System (IFS), a software application and data repository that facilitates research and analysis of information from a variety of sources within and outside of DHS to support law enforcement activities and investigations of violations of U.S. laws, administration of immigration laws and other laws administered or enforced by DHS, and production of DHS law enforcement intelligence products. Additionally, a Privacy Impact Assessment for IFS will be posted on the Department's privacy Web site. (See *www.dhs.gov/privacy* and follow the link to ''Privacy Impact Assessments.'') Due to urgent homeland security and law enforcement mission needs, IFS is currently in operation. Recognizing that ICE is publishing a notice of system of records for an existing system, ICE will carefully consider public comments, apply appropriate revisions, and republish the IIRS notice of system of records within 180 days of receipt of comments. A proposed rulemaking is also published in this issue of the **Federal Register** in which the Department proposes to exempt portions of this system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** The established system of records will be effective January 8, 2009. Written comments must be submitted on or before January 8, 2009. A revised IIRS notice of system of records that addresses public comments, responds to OMB direction, and includes other ICE changes will be published not later than July 7, 2009 and will supersede this notice of system of records.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0186 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Lyn M. Rahilly (202–514–1900), Privacy Officer, U.S. Immigration and Customs Enforcement, 425 I Street, NW., Washington, DC 20001, or Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The ICE Intelligence Records System (IIRS) system of records is owned by the ICE Office of Intelligence. It consists of information generated or received by the Office of Intelligence, or other offices within ICE that support the law enforcement intelligence mission, that is analyzed and disseminated to ICE executive management and operational units for law enforcement, intelligence, counterterrorism, and other homeland security purposes. Using various databases and tools, the Office of Intelligence produces formal law-enforcement intelligence reports that are the end-result of the intelligence process. These reports, the underlying data on which they are based, and the work papers used or created by the analysts and agents, are all included within the IIRS system of records.

As part of the intelligence process, ICE investigators and analysts must review large amounts of data to identify and understand relationships between individuals, entities, threats, and events to generate law-enforcement intelligence products that provide ICE operational units with actionable information for law enforcement purposes. If performed manually, this process can involve hours of analysis of voluminous data. To automate and expedite this process, the former Immigration and Naturalization Service created a software application and data repository that allowed for the efficient research and analysis of data from a variety of sources. That application is now called the Intelligence Fusion System (IFS) and is currently owned by the ICE Office of Intelligence.

IFS is specifically designed to make the intelligence research and analysis process more efficient by allowing searches of a broad range of data through a single interface. IFS can also identify links (relationships) between individuals or entities based on commonalities, such as identification numbers, addresses, or other information. These commonalities in and of themselves are not suspicious, but in the context of additional information they sometimes help DHS agents and analysts to identify potentially criminal activity and identify other suspicious activities. These commonalities can also form the basis for a DHS-generated intelligence product that may lead to further investigation or other appropriate follow-up action by ICE, DHS, or other Federal, State, or local agencies.

DHS personnel may access IFS only if they hold positions that involve the execution of law enforcement responsibilities, the administration of immigration and naturalization laws, or the production of DHS intelligence products. While IFS does increase the efficiency of data research and analysis, it does not allow DHS personnel to obtain any data they could not otherwise access in the course of their job responsibilities. IFS does not seek to predict future behavior or ''profile'' individuals, *i.e.*, look for individuals who meet a certain pattern of behavior that has been pre-determined to be suspect.

Individuals may request information about records pertaining to them stored in IIRS as outlined in the ''Notification Procedure'' section below. ICE reserves the right to exempt various records from release pursuant to exemptions 5 U.S.C. 552a(j)(2) and (k)(2) of the Privacy Act.

Consistent with DHS's information sharing mission, information stored in IIRS may be shared with other DHS components, as well as appropriate Federal, State, local, tribal, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals to more easily find such files within the agency. Below is the description of the IIRS system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**SYSTEM OF RECORDS:**

**DHS/ICE–006**

**SYSTEM NAME:**

ICE Intelligence Records System (IIRS).

**SECURITY CLASSIFICATION:**

Sensitive But Unclassified, Classified.

**SYSTEM LOCATION:**

Records are maintained at ICE Headquarters in Washington, DC, and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include the following: (1) Individuals (*e.g.*, subjects, witnesses, associates) associated with immigration enforcement activities or law enforcement investigations/activities conducted by ICE, the former Immigration and Naturalization Service, or the former U.S. Customs Service; (2) individuals associated with law enforcement investigations or activities conducted by other Federal, State, tribal, territorial, local or foreign agencies where there is a potential nexus to ICE's law enforcement and immigration enforcement responsibilities or homeland security in general; (3) individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism; (4) individuals involved in, associated with, or who have reported suspicious activities, threats, or other incidents reported by domestic and foreign government agencies, multinational or non-governmental organizations, critical infrastructure owners and operators, private sector entities and organizations, and individuals; and (5) individuals who are the subjects of or otherwise identified in classified or unclassified intelligence reporting received or reviewed by ICE.

IIRS includes an information technology system known as the Intelligence Fusion System (IFS). In addition to the categories of individuals listed above, IFS also includes the following: (1) Individuals identified in law enforcement, intelligence, crime, and incident reports (including financial reports under the Bank Secrecy Act and law enforcement bulletins) produced by DHS and other government agencies; (2) individuals identified in U.S. visa, border, immigration and naturalization benefit data, including arrival and departure data; (3) individuals identified in DHS law enforcement and immigration records; (4) individuals not authorized to work in the United States; (5) individuals whose passports have been lost or stolen; and (6) individuals identified in public news reports.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include: (1) Biographic information (name, date of birth, social security number, alien registration number, citizenship/immigration status, passport information, addresses, phone numbers, etc.); (2) Records of immigration enforcement activities or law enforcement investigations/activities conducted by ICE, the former Immigration and Naturalization Service, or the former U.S. Customs Service; (3) Information (including documents and electronic data) collected by DHS from or about individuals during investigative activities and border searches; (4) Records of immigration enforcement activities and law enforcement investigations/activities that have a possible nexus to ICE's law enforcement and immigration enforcement responsibilities or homeland security in general; (5) Law enforcement, intelligence, crime, and incident reports (including financial reports under the Bank Secrecy Act and law enforcement bulletins) produced by DHS and other government agencies; (6) U.S. visa, border immigration and naturalization benefit data, including arrival and departure data; (7) Terrorist watchlist information and other terrorism related information regarding threats, activities, and incidents; (8) Lost and stolen passport data; (9) Records pertaining to known or suspected terrorists, terrorist incidents, activities, groups, and threats; (10) ICE-generated intelligence requirements, analysis, reporting, and briefings; (11) Third party intelligence reporting; (12) Articles, public-source data, and other published information on individuals and events of interest to ICE; (13) Records and information from government data systems or retrieved from commercial data providers in the course of intelligence research, analysis and reporting; and (14) Reports of suspicious activities, threats, or other incidents generated by ICE and third parties.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 8 U.S.C. 1103, 1105, 1225(d)(3), 1324(b)(3), 1357(a), and 1360(b); 19 U.S.C. 1 and 1509.

**PURPOSE(S):**

(a) To maintain records that reflect and generally support ICE's collection, analysis, reporting, and distribution of law enforcement, immigration administration, terrorism, intelligence, and homeland security information in support of ICE's law enforcement and immigration administration mission.

(b) To produce law-enforcement intelligence reporting that provides actionable information to ICE's law enforcement and immigration administration personnel and to other appropriate government agencies.

(c) To enhance the efficiency and effectiveness of the research and analysis process for DHS law enforcement, immigration, and intelligence personnel through information technology tools that provide for advanced search and analysis of various datasets; and

(d) To identify potential criminal activity, immigration violations, and threats to homeland security; to uphold and enforce the law; and to ensure public safety.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when (1) DHS or any component thereof; (2) any employee of DHS in his/her official capacity; (3) any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or (4) the United States or any agency thereof, is a party to the litigation or has an interest in such litigation; and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To the Department of Justice (DOJ), Civil Rights Division, for the purpose of responding to matters within the DOJ's jurisdiction to include allegations of fraud and/or nationality discrimination.

C. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

D. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

E. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

F. To appropriate agencies, entities, and persons when: (1) DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information, or harm to an individual; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

G. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

H. To a Federal, State, territorial, tribal, local, international, or foreign government agency or entity for the purpose of consulting with that agency or entity: (1) To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program; (2) for the purpose of verifying the identity of an individual seeking redress in connection with the

operations of a DHS component or program; or (3) for the purpose of verifying the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

I. To a former employee of DHS, in accordance with applicable regulations, for purposes of responding to an official inquiry by a Federal, State or local government entity or professional licensing authority; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

J. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to the agency's decision concerning the hiring or retention of an individual or the issuance, grant, renewal, suspension or revocation of a security clearance, license, contract, grant, or other benefit; or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person receiving the information.

K. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats; appropriate notice will be provided of any identified health risk.

L. To a public or professional licensing organization when such information indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of an individual who is licensed or who is seeking to become licensed.

M. To a Federal, State, tribal, local or foreign government agency or organization, or international organization, lawfully engaged in collecting law enforcement intelligence information, whether civil or criminal, or charged with investigating, prosecuting, enforcing or implementing civil or criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities, including the collection of law enforcement intelligence.

N. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil, criminal, or regulatory laws.

O. To third parties during the course of an investigation by DHS, a proceeding within the purview of the immigration and nationality laws, or a matter under DHS's jurisdiction, to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

P. To a Federal, State, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

Q. To Federal and foreign government intelligence or counterterrorism agencies when DHS reasonably believes there to be a threat or potential threat to national or international security for which the information may be useful in countering the threat or potential threat, when DHS reasonably believes such use is to assist in anti-terrorism efforts, and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

R. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life or property and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

S. To international and foreign governmental authorities in accordance with law and formal or informal international agreements.

T. To the Department of State in the processing of petitions or applications for benefits under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements.

U. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations where DHS is aware of a need to utilize relevant data for purposes of testing new technology and systems designed to enhance national security or identify other violations of law.

V. To appropriate Federal, State, local, tribal, or foreign government agencies or multinational government organizations where DHS desires to exchange relevant data for the purpose of developing new software or implementing new technologies for the purposes of data sharing to enhance homeland security, national security or law enforcement.

W. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by personal identifiers such as but not limited to name, alien registration number, phone number, address, social security number, or passport number. Records may also be retrieved by non-personal information such as transaction date, entity/institution name, description of goods, value of transactions, and other information.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

**RETENTION AND DISPOSAL:**

ICE is in the process of drafting a proposed record retention schedule for the information maintained in IIRS, including system information stored in IFS. ICE anticipates retaining the records from other databases in IFS for 20 years, records for which IFS is the repository of record for 75 years, and ICE-generated intelligence reports for 75 years. The original electronic data containing the inputs to IFS will be destroyed after upload and verification or returned to the source.

**SYSTEM MANAGER AND ADDRESS:**

Director, ICE Office of Intelligence, 425 I Street NW., Washington DC 20536.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty or perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

*See* ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Federal, State, local, territorial, tribal or other domestic agencies, foreign agencies, multinational or non-governmental organizations, critical infrastructure owners and operators, private sector entities and organizations, individuals, commercial data providers, and public sources such as news media outlets and the Internet.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f); and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f).

Dated: December 1, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29056 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0132]**

## Privacy Act of 1974; Immigration and Customs Enforcement (ICE)–007 Law Enforcement Support Center (LESC) Alien Criminal Response Information Management (ACRIMe) System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security (DHS) is giving notice that it proposes to update and reissue the following legacy record system Justice/INS. 023 Law Enforcement Support Center Database as an Immigration and Customs Enforcement (ICE) system of records titled Law Enforcement Support Center (LESC) Alien Criminal Response Information Management System (ACRIMe). The information in this system of records includes data collected and maintained by the ICE LESC to carry out its mission to respond to inquiries from law enforcement agencies concerning immigration status of an individual, and whether the individual is under investigation and/or wanted by ICE or other law enforcement agencies. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been updated. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in the DHS inventory of record systems.

**DATES:** Written comments must be submitted on or before January 8, 2009. This new system will be effective January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0132 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of

Homeland Security, Washington, DC 20528.

- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact Lyn Rahilly, Privacy Officer, (202–732–3300), Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20024, e-mail: *ICEPrivacy@dhs.gov*. For privacy issues please contact Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records concerning the operation of the ICE Law Enforcement Support Center (LESC). The LESC is ICE's 24-hour national enforcement operations facility. Although Title 8 U.S. Code immigration violations were the original focus of the LESC and ACRIMe under the Immigration and Naturalization Service (INS), the mission of the LESC now supports the full range of ICE's law enforcement operations. Specifically, the LESC provides assistance including, but not limited to, immigration status information to local, State and Federal law enforcement agencies on aliens suspected, arrested, or convicted of criminal activity, Customs violations, and violations of other laws within ICE's jurisdiction. This notice updates the preexisting system of records notice for the LESC Database published by the legacy INS, which owned the LESC prior to the creation of DHS. The LESC transferred to ICE with the creation of DHS and the LESC database is now known as the Alien Criminal Response Information Management System (ACRIMe).

The ACRIMe Database facilitates the response of LESC personnel to specific inquiries from law enforcement agencies that seek to determine the immigration status of an individual and whether the individual is under investigation and/or wanted by ICE or other law enforcement agencies. ACRIMe also supports ICE's efforts to identify aliens with prior criminal convictions that may qualify them for removal from the U.S. as aggravated felons. In addition, this system of records helps to facilitate the processing of aliens for deportation or removal proceedings.

The ACRIMe Database also facilitates the collection, tracking, and distribution of information about possible violations of customs and immigration law reported by the general public to the toll-free DHS/ICE Tip-line. ACRIMe logs requests for assistance from criminal justice personnel who contact the LESC on the full range of ICE law enforcement missions. ACRIMe supports the entry of both administrative (immigration) and criminal arrest warrants into the Federal Bureau of Investigation's National Crime Information Center (NCIC) system. Finally, ACRIMe also enables ICE to collect and analyze data to evaluate the effectiveness and quality of LESC services and ICE's immigration law enforcement efforts.

Consistent with DHS's information sharing mission, information stored in ACRIMe may be shared with other DHS components, as well as appropriate Federal, State, local, tribal, foreign, or international government agencies. This sharing will only take place after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system Justice/INS. 023 Law Enforcement Support Center Database as an ICE system of records titled Law Enforcement Support Center (LESC) Alien Criminal Response Information Management System (ACRIMe). The information in this system of records includes data collected and maintained both in paper form and electronically by ICE's Law Enforcement Support Center to carry out its mission to respond to inquiries from law enforcement agencies concerning immigration status of an individual, and whether the individual is under investigation and/or wanted by ICE or other law enforcement agencies. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been updated. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the LESC/ACRIMe system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to Congress.

**SYSTEM OF RECORDS:**

**DHS/ICE–007**

**SYSTEM NAME:**

Immigration and Customs Enforcement Law Enforcement Support Center Alien Criminal Response

Information Management System (LESC/ACRIMe).

**SECURITY CLASSIFICATION:**

Unclassified. Law Enforcement Sensitive (LES).

**SYSTEM LOCATION:**

Records are maintained at the ICE LESC in Burlington, Vermont.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include:

(1) Individuals covered by the Immigration and Nationality Act of 1952 (8 U.S.C. 1101 *et seq.* ) and who are either the subject of an investigation, or have been arrested, charged with, and/or convicted of criminal or civil offenses that could render them removable or excludable from the U.S. under the provisions of U.S. immigration and nationality laws.

(2) Individuals who make reports to the DHS/ICE Tip-line and individuals about whom those reports were made.

(3) Individuals who are the subject of administrative (immigration) and criminal arrest warrants that the LESC has entered into the FBI's National Crime Information Center System.

(4) Individuals who are the subject of an investigation by Federal, State, local, and tribal law enforcement agencies and who have been identified through searches of shared DHS law enforcement information.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Biographic identifiers (e.g. name, date and place of birth);
- Alien registration number (''A-number'');
- Social Security Number;
- Passport number;
- Federal Bureau of Investigation (FBI) criminal history number;
- Federal, State, and local law enforcement agency booking number;
- Correctional facility inmate numbers; and

Records may also include other information, such as operator's license number, State identification number, Fingerprint Section number, and other personal identification numbers provided by law enforcement agencies, that may assist in the identification process, that would enable ICE special agents and analysts to gather additional evidence, respond to law enforcement queries, and/or to determine the status, removability, or excludability of an individual.

In addition, the system also contains information about the inquiries submitted by Federal, State, local, and tribal law enforcement agencies and the LESC responses to those queries. Query information retained in the ACRIMe database includes mandatory and optional data. Mandatory information includes: Originating Agency Identifier (ORI) number, purpose for query, attention field, phone number for requestor, name of subject of query, date of birth, sex, place of birth, custody status, and offense code. Optional information includes: alien registration number, FBI number, State system identification number, operator license number, height, weight, eye color, mother's maiden name, mother's first name, father's last name, father's first name, Social Security Number, passport number, booking number, and narrative comments entered in a remarks section.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

8 U.S.C. Sec. 1103; 8 U.S.C. Sec. 1324(b)(3); 8 U.S.C. Sec. 1360(b); 5 U.S.C. Sec. 552a(b); 5 U.S.C. Sec. 301; Section 504 of the Immigration and Nationality Act of 1990 (Pub. L. 101–649); the Federal Records Act, 44 U.S.C. 3101, Executive Order 9373..

**PURPOSE(S):**

The purpose of this system is to:

(1) Facilitate the response of LESC personnel to specific inquiries from law enforcement agencies that seek to determine the immigration status of an individual and whether the individual is under investigation and/or wanted by ICE or other law enforcement agencies;

(2) support ICE's efforts to identify aliens with prior criminal convictions that may qualify them for removal from the U.S. as aggravated felons;

(3) facilitate the processing of aliens for deportation or removal proceedings;

(4) support ICE's collection and distribution of possible violator information collected during telephone calls from the general public to DHS/ICE;

(5) support ICE's efforts to assist Federal, State, local, and tribal criminal justice personnel who contact the LESC on the full range of ICE law enforcement missions, including both customs and immigration violations; and

(6) enable ICE to collect and analyze data to evaluate the effectiveness and quality of LESC services and ICE's immigration law enforcement efforts.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

J. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To Federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

L. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities behind locked doors. Electronic records are stored on magnetic disc and digital optical media. Hardcopy records are stored in locked file cabinets.

**RETRIEVABILITY:**

Records are retrieved by name, alien registration number(s), booking number(s), FBI criminal history number(s), State criminal history number(s), Social Security Number, passport number, inmate number and other personal identifiers, and by biographic information, including place of birth, date of birth, and residential address.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

DHS will be working with NARA to develop the appropriate retention schedule based on the information below. The information, as collected and maintained in ACRIMe, pertains to immigration and other law enforcement investigations and national security related matters. Therefore, DHS proposes to maintain the records for seventy-five (75) years from the date of final action or case closure, after which the records will be deleted from the ACRIMe system.

**SYSTEM MANAGER AND ADDRESS:**

Unit Chief, Law Enforcement Support Center, U.S. Immigration and Customs Enforcement, 188 Harvest Lane, Williston, VT 05495.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that

individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Records are obtained from Federal, State and local law enforcement and criminal justice agencies (e.g., investigators, prosecutors, correctional institutions, police departments, and inspectors general).

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from subsections (c)(3) and (4); (d); (e)(1), (2), (3), (4)(G), (4)(H), (5) and (8); (f); and (g) of the Privacy Act. In addition, the system has been exempted from subsections (c)(3), (d), and (e)(1), (4)(G), (4)(H), and (f) pursuant to 5 U.S.C. 552a(k)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register** as additions to Title 28, Code of Federal Regulations (28 CFR 16.99). In addition, to the extent a record contains information from other exempt systems of records, ICE will rely on the exemptions claimed for those systems.

Dated: November 28, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29057 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

---

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0160]**

### Privacy Act of 1974; Science & Technology Directorate–001 Research, Development, Test, and Evaluation Records System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** Pursuant to the Privacy Act of 1974, the Department of Homeland Security proposes to add a new system of records titled Research, Development, Test, and Evaluation Records. This system maintains records collected in support of, or during the conduct of, Science & Technology-funded research, development, test, and evaluation activities. This new system will be added to the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 8, 2009. This new system will be effective January 8, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0160 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For system related questions please contact the Science & Technology Directorate's Regulatory Compliance Office at *regulatorycompliance@dhs.gov.* For privacy issues, please contact: Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

### I. Background

An integral part of the Department of Homeland Security (DHS) Science & Technology Directorate's (S&T) mission is to conduct research, development, testing, and evaluation (RDT&E activities) on topics and technologies related to improving homeland security and combating terrorism. Some RDT&E activities involve the collection of personally identifiable information. This system of records notice covers records collected in support of, or during the conduct of, DHS/S&T-funded RDT&E activities, where those records are retrieved by personal identifier.

As a general rule, the information collected will be used by DHS/S&T solely for the purposes of RDT&E activities. The information collected will not be used for law enforcement, intelligence, or any purpose other than RDT&E. The information collected will never be used in operations and no operational decision will be based in any part on the information collected. These limitations on the use of the information collected will apply even in DHS/S&T-funded RDT&E activities in which law enforcement and/or intelligence personnel are directly involved in the activity. A different SORN, a SORN other than this SORN, is required to address any DHS/S&T-funded RDT&E activities from which information collected would be used for any purpose other than RDT&E activities.

The only exception to the above general rule limiting the use of collected information to RTD&E activities is if, during a human subject testing activity, the individual provides information that indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations. Only in that limited situation, the information collected may be referred to Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, pursuant to Routine Use G, below.

Pursuant to the Privacy Act of 1974, the Department of Homeland Security proposes to add a new system of records titled Research, Development, Test, and Evaluation Records. This system maintains records collected in support of, or during the conduct, of Science & Technology-funded research, development, test, and evaluation activities. This new system will be added to the Department's inventory of record systems.

### II. The Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other particular assigned to an individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents (LPRs). As a matter of policy, DHS extends administrative Privacy Act protections

to all individuals, including aliens who are not LPRs, on whom a system of records maintain information. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system to make agency recordkeeping practices transparent, to notify individuals regarding the uses of their records, and to assist the individual to more easily find such files within the agency. Below is a description of the Research, Development, Test, and Evaluation Records System of records.

In accordance with 5 U.S.C. 552a(r), a report on this system has been sent to Congress and to the Office of Management and Budget.

**SYSTEM OF RECORDS:**

**DHS/S&T–001**

**SYSTEM NAME:**

Science & Technology Directorate Research, Development, Test, and Evaluation Records.

**SYSTEM LOCATION:**

Records are maintained at the S&T Headquarters in Washington, D.C., in S&T field offices, and at public or private institutions, including the National Labs, conducting research funded by S&T.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this notice include voluntary participants in S&T-funded human subjects research (all S&T-funded human subjects research is conducted in accordance with 45 CFR 46 and is reviewed by a certified Institutional Review Board); individuals whose names may appear in publicly available documents (e.g., newspapers and academic articles) about terrorism, terrorist events, violent groups, or other topics related to terrorism research; individuals whose image, biometrics, physiological features, or other information may be intentionally (with notice to and consent by the individual) or incidentally captured during testing of S&T technologies; and subject matter experts who publish articles related to terrorism or biomedical and life sciences research; and subject matter experts who voluntarily consent to be included in a database of experts.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

S&T RDT&E Records will vary according to the specific project. The information may include an individual's:

- Individual's name;
- Age;
- Gender;
- Contact information;
- Birthplace;
- Ethnicity;
- Level of education;
- Occupation;
- Institutional or organizational affiliation;
- Publication record, such as article and publication titles, dates and sources;
- Medical history;
- Lifestyle information (e.g., caffeine or tobacco use);
- Publicly available reports of criminal history;
- Video or still images;
- Other images (e.g., infrared thermography, terahertz, millimeter wave);
- Audio recordings;
- Fingerprints or other biometric information; and
- Physiological measurements collected using sensors (e.g., heart rate, breathing pattern, and electrodermal activity).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; The Homeland Security Act of 2002 [Pub. L. 1007–296, § 302(4)] as codified in Section 182(b) Title 6 Chapter I Subchapter III of the United States Code (6 U.S.C. 182(b)), authorizes the Science and Technology Directorate to conduct ''basic and applied research, development, demonstration, testing, and evaluation activities that are relevant to any or all elements of the Department, through both intramural and extramural programs.'' In exercising its responsibility under the Homeland Security Act, S&T is authorized to collect information, as appropriate, to support research and development related to improving the security of the homeland. Where research includes human subjects, S&T complies with the provisions of DHS Management Directive 026–04, ''Protection of Human Subjects'', which adopts the regulations set forth in 45 Code of Federal Regulations 46 and establishes Departmental policy for the protection of human subjects in research.

**PURPOSE(S):**

The purposes of S&T's RDT&E records are to:

- Understand the motivations and behaviors of terrorists, individuals that engage in violent or criminal activities, terrorist groups, and groups that engage in violent or criminal activities.
- Understand terrorist incidents and the phenomenon of terrorist and identify trends and patterns in terrorist activities.
- Collect and maintain searchable records of individuals (such as subject matter experts on chemical weapons) and/or their characteristics and professional accomplishments, organized according to categories useful for the conduct of research, including research to determine the efficacy and utility of new or enhanced technologies intended for eventual transition to and use by S&T's customers.
- Evaluate the performance and utility to the future customer of an experimental homeland security technology or product in a laboratory or ''real-world'' setting.
- Test the accuracy of a research hypothesis. (For example, S&T might hypothesize that an individual's behavior changes in a detectable manner when he or she is being deceitful, and then design a research experiment to test that hypothesis.)
- Answer a research question. (For example, ''Can an experimental screening technology distinguish between threat objects and non-threat objects?'').
- Conduct testing and evaluation of an experimental technology at the request of or on behalf of a customer.
- Conduct research and development to solve a technical problem for a customer.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3):

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;
2. Any employee of DHS in his/her official capacity;
3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or
4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS

determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal Government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

RDT&E records maintained in hard copy are stored in a locked file cabinet or safe. Electronic records are stored in computer files that require a password for access and are protected by a firewall.

**RETRIEVABILITY:**

In most cases, S&T RDT&E is focused on evaluating the performance of a given experimental technology or system. Thus, only the aggregated performance data (e.g., the technology has a 5 percent false positive rate, or the technology is accurate 92 percent of the time) is important and relevant to S&T. For this reason, S&T RDT&E records are not as a matter of course retrieved by name or other identifier assigned to the individual. However, S&T may need to access RDT&E records by name or other identifier in order to make corrections to an individual's record, resolve an anomaly related to a specific individual's record, and/or link disparate pieces of information related to an individual. For example, if an individual informed a researcher that he or she had inadvertently provided incorrect information regarding his or her medical history, the researcher would retrieve that individual's record using the research identifier in order to correct the erroneous data.

**SAFEGUARDS:**

All RDT&E records are protected by employing a multi-layer security approach to prevent unauthorized access to sensitive data through appropriate administrative, physical, and technical safeguards. Protective strategies such as implementing physical access controls at DHS facilities; ensuring confidentiality of communications using tools such as encryption, authentication of sending parties, and compartmentalizing databases; and employing auditing software and personnel screening to ensure that all personnel with access to data are screened through background investigations commensurate with the level of access required to perform their duties.

S&T RDT&E records are also monitored for changes to the source data. The system manager has the capability to maintain system back-ups for the purpose of supporting continuity of operations and the discrete need to isolate and copy specific data transactions for the purpose of conducting privacy or security incident investigations. S&T RDT&E records are secured in full compliance with the requirements of DHS IT Security Program Handbook. This handbook establishes a comprehensive information security program.

**RETENTION AND DISPOSAL:**

All records will be maintained in accordance with the NARA-approved retention schedule. All existing S&T RDT&E records fall under General Records System 20, which covers the disposition of Electronic files or records created solely to test system performance, as well as hard-copy printouts and related documentation for the electronic files/records. According to General Records System 20, records should be ''delete[d]/destroy[ed] when the agency determines that they are no longer needed for administrative, legal, audit, or other operational purposes.'' Electronic records will be deleted from all computers, storage devices, and networks, and paper records will be shredded.

**SYSTEM MANAGER(S) AND ADDRESS:**

S&T Regulatory Compliance Office, Mail Stop: 2100, Department of Homeland Security, 245 Murray Lane, SW., Washington, DC 20528.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to S&T FOIA Coordinator, Mail Stop: 2100, Department of Homeland Security, 245 Murray Lane, SW., Washington, DC 20528, Specific FOIA contact information can be found at *http://www.dhs.gov/foia* under ''contacts.''

When seeking records about yourself from this system of records or any other S&T system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from

the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the S&T may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

S&T RDT&E records include: (1) Records collected directly from the individual; (2) publicly available documents (e.g., articles from newspapers and academic journals); (3) records collected from the individual using sensors (e.g., a heart rate monitor) or technologies (e.g., cameras, audio recorders, infrared thermography or other images, or biometric devices).

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 1, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29059 Filed 12–8–08; 8:45 am]

BILLING CODE 4410–10–P

## INTER-AMERICAN FOUNDATION BOARD MEETING

### Sunshine Act Meetings

**TIME AND DATE:** December 15, 2008, 9 a.m.–2 p.m.

**PLACE:** 901 N. Stuart Street, Tenth Floor, Arlington, Virginia 22203.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

- Approval of the Minutes of the July 28, 2008, Meeting of the Board of Directors
- President's Report
- Program Presentation: Regional Challenges
- Congressional Affairs
- Board Trip for 2009
- Advisory Council

**PORTIONS TO BE OPEN TO THE PUBLIC:**

- Approval of the Minutes of the July 28, 2008, Meeting of the Board of Directors
- President's Report
- Program Presentation: Regional Challenges
- Congressional Affairs
- Board Trip for 2009
- Advisory Council

**CONTACT PERSON FOR MORE INFORMATION:** Jennifer Hodges Reynolds, General Counsel, (703) 306–4301.

Dated: December 2, 2008.

**Jennifer Hodges Reynolds,**

*General Counsel.*

[FR Doc. E8–29199 Filed 12–5–08; 4:15 pm]

BILLING CODE 7025–01–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–R–2008–N0244; 40136–1265–0000–S3]**

### Archie Carr National Wildlife Refuge, Brevard and Indian River Counties, FL

**AGENCY:** Fish and Wildlife Service, Department of the Interior.

**ACTION:** Notice of availability: final comprehensive conservation plan and finding of no significant impact.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Archie Carr National Wildlife Refuge (NWR). In the CCP, we describe how we will manage Archie Carr NWR for the next 15 years.

**ADDRESSES:** A copy of the CCP may be obtained by writing to the refuge at: P.O. Box 2683, Titusville, FL 32781–2683. The CCP may also be accessed and downloaded from the Service's Internet Site: *http://southeast.fws.gov/planning.*

**FOR FURTHER INFORMATION CONTACT:** Cheri Ehrhardt; Telephone: 321/861–2368.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

With this notice, we finalize the CCP process for Archie Carr NWR. We started this process through a notice of intent in the **Federal Register** on April 24, 2000 (65 FR 21784). For additional information regarding the process, see that notice. We released the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) to the public, announcing and requesting comments in a notice of availability in the **Federal Register** on June 26, 2008 (73 FR 36347).

Established in 1991, Archie Carr NWR is located approximately 15 miles northeast of Vero Beach, Florida, in Brevard and Indian River Counties. The 258-acre refuge includes a diversity of habitats consisting of beaches, dunes, coastal strand, maritime hammock, and mangroves. Refuge and partner beaches support the highest nesting concentrations of federally protected loggerhead and green sea turtles in the United States. Furthermore, several other state- and federal-listed species are found in the coastal and other barrier island habitats supported by the refuge. The refuge protects several historical and archaeological sites and, through working with the partners, provides a range of visitor services.

We announce our decision and the availability of the CCP and FONSI for Archie Carr NWR in accordance with National Environmental Policy Act (NEPA) [40 CFR 1506.6(b)] requirements. We completed a thorough analysis of impacts on the human environment, which we included in the Draft CCP/EA.

The CCP will guide us in managing and administering Archie Carr NWR for the next 15 years. Alternative B, as we described in the CCP, is the foundation for the CCP.

#### Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

#### Comments

We solicited comments on the Draft CCP/EA for Archie Carr NWR from June

26 to July 28, 2008. The comments were thoroughly evaluated, and changes were incorporated into the CCP, where warranted. Some of the changes include adding the impacts of climate change to the list of priority issues facing the refuge and updating the land cover maps with regard to the location of key non-native plant species.

### Selected Alternative

After considering the comments received, we have selected Alternative B for implementation. Under this alternative, refuge management will focus on improving conditions for sea turtles and other threatened and endangered species, maintaining and restoring habitat, and improving biodiversity on the refuge, while focusing public use activities on partner properties within the larger Archie Carr NWR partnership.

**Authority:** This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: September 19, 2008.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E8–29082 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–55–P

---

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

**[FWS–R4–R–2008–N0249; 40136–1265–0000–S3]**

## Mackay Island National Wildlife Refuge, Currituck County, NC

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability: final comprehensive conservation plan and finding of no significant impact.

**SUMMARY:** We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Mackay Island National Wildlife Refuge (NWR).

**ADDRESSES:** A copy of the CCP may be obtained by writing to: Mike Hoff, Refuge Manager, Mackay Island NWR, P.O. Box 39, Knotts Island, NC 27950. The CCP may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning.*

**FOR FURTHER INFORMATION CONTACT:** Mike Hoff; Telephone: 252/429–3100; Fax: 252/429–3185.

**SUPPLEMENTARY INFORMATION:**

### Introduction

With this notice, we finalize the CCP process for Mackay Island NWR. We started this process through a notice in the **Federal Register** on November 3, 2000 (65 FR 66256). Mackay Island NWR, in northeastern North Carolina, consists of 8,219 acres, of which 4,251 acres are brackish marsh, 1,515 acres are coastal fringe evergreen forest, 995 acres are managed wetlands (impoundments), and 298 acres are cropland. These habitats support a variety of wildlife species, including waterfowl, shorebirds, wading birds, marsh birds, neotropical migratory songbirds, and deer.

We announce our decision and the availability of the final CCP and FONSI for Mackay Island NWR in accordance with the National Environmental Policy Act (NEPA) [40 CFR 1506.6(b)] requirements. We completed a thorough analysis of impacts on the human environment, which we included in the Draft CCP/EA. The CCP will guide us in managing and administering Mackay Island NWR for the next 15 years. Alternative 2 is the foundation for the CCP.

The compatibility determinations for recreational hunting, fishing, wildlife observation, wildlife photography, environmental education and interpretation, trapping of selected furbearers for nuisance animal management, forest management, and refuge resource research studies are also available in the CCP.

### Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

### Comments

Approximately 100 copies of the Draft CCP/EA were made available for a 30-day review period as announced in the **Federal Register** on January 17, 2006 (71 FR 2560). Twenty-one comments on the Draft CCP/EA were received. The Draft CCP/EA identified and evaluated three alternatives for managing the refuge over a 15-year period.

### Selected Alternative

After considering the comments we received and based on the professional judgment of the planning team, we selected Alternative 2 for implementation. The refuge will develop a habitat management plan and manage all habitats on the refuge. It will survey a wide range of wildlife. The refuge will continue to allow the priority public uses (*e.g.*, hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation) and will have the capacity to increase the number of opportunities for public use.

**Authority:** This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: September 29, 2008.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E8–29071 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–55–P

---

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

**[FWS–R9–MB–2008–N0307; 91400–5110–0000–7B; 91400–9410–0000–7B]**

## Multistate Conservation Grant Program; Priority List for Conservation Projects

**AGENCY:** Fish and Wildlife Service, Department of the Interior.

**ACTION:** Notice of receipt of priority list.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (FWS), announce the FY 2009 priority list of wildlife and sport fish conservation projects from the Association of Fish and Wildlife Agencies (AFWA). As required by the Wildlife and Sport Fish Restoration Programs Improvement Act of 2000, AFWA submits a list of projects to us each year to consider for funding under the Multistate Conservation Grant program. We then review and award grants from this list.

**ADDRESSES:** John C. Stremple, Multistate Conservation Grants Program Coordinator, Division of Federal

Assistance, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop MBSP–4020, Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** John C. Stremple, (703) 358–2156 (phone) or *John_Stremple@fws.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:** The Wildlife and Sport Fish Restoration Programs Improvement Act of 2000 (Improvement Act, Pub. L. 106–408) amended the Pittman-Robertson Wildlife Restoration Act (16 U.S.C. 669 *et seq.*) and the Dingell-Johnson Sport Fish Restoration Act (16 U.S.C. 777 *et seq.*) and established the Multistate Conservation Grant Program. The Improvement Act authorizes us to award grants of up to $3 million annually from funds available under each of the Restoration Acts, for a total of up to $6 million annually. We may award grants from a list of priority projects recommended to us by AFWA. The FWS Director, exercising the authority of the Secretary of the Interior, need not fund all projects on the list, but all projects funded must be on the list.

Grantees under this program may use funds for sport fisheries and wildlife management and research projects, boating access development, hunter safety and education, aquatic education, fish and wildlife habitat improvements, and other purposes consistent with the enabling legislation.

To be eligible for funding, a project must benefit fish and/or wildlife conservation in at least 26 States, or in a majority of the States in any one FWS Region, or it must benefit a regional association of State fish and wildlife agencies. We may award grants to a State, a group of States, or one or more nongovernmental organizations. For the purpose of carrying out the National Survey of Fishing, Hunting and Wildlife-Associated Recreation, we may award grants to the FWS, if requested by AFWA, or to a State or a group of States. Also, AFWA requires all project proposals to address its National Conservation Needs, which are announced annually by AFWA at the same time as its request for proposals. Further, applicants must provide certification that no activities conducted under a Multistate Conservation grant will promote or encourage opposition to regulated hunting or trapping of wildlife or to regulated angling or taking of fish.

Eligible project proposals are reviewed and ranked by AFWA Committees and interested nongovernmental organizations that represent conservation organizations, sportsmen's organizations, and industries that support or promote fishing, hunting, trapping, recreational shooting, bowhunting, or archery. AFWA's Committee on National Grants recommends a final list of priority projects to the directors of State fish and wildlife agencies for their approval by majority vote. By statute, AFWA then must transmit the final approved list to the FWS for funding under the Multistate Conservation Grant program by October 1.

This year, we received a list of fourteen recommended projects. We recommend them for funding in 2009, contingent on the Multistate Conservation Grant Program receiving additional funds as specified in the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005 (Pub. L. 109–059) passed in August 2005. AFWA's recommended list follows.

MSCGP 2009 CYCLE RECOMMENDED PROJECTS

| ID | Title | Submitter | WR request | SFR request | Total 2009 grant request |
|---|---|---|---|---|---|
| 09001 ... | Multistate Conservation Grant Program (MSCGP) Coordination .. | AFWA ..... | $190,560.00 | $190,560.00 | $381,120.00 |
| 09003 ... | Community Archery Programs as Recruitment and Retention Tools. | ATA ..... | 114,000.00 | 0.00 | 114,000.00 |
| 09004 ... | Coordination of the Industry, Federal, and State Agency Coalition. | AFWA ..... | 94,800.00 | 94,800.00 | 189,600.00 |
| 09005 ... | Return on Investment: An Analysis of Sport Fish Restoration and Wildlife Restoration Programs. | AFWA ..... | 192,397.20 | 94,762.80 | 287,160.00 |
| 09006 ... | Research Component for the 2011 National Survey ..... | USFWS .... | 1,029,522.00 | 1,029,522.00 | 2,059,044.00 |
| 09007 ... | Coordination Component for 2011 National Survey of Fishing, Hunting and Wildlife-Associated Recreation (FHWAR). | USFWS .... | 170,378.00 | 170,378.00 | 340,756.00 |
| 09008 ... | Trailblazer Adventure Program: Involving Youth and Families in Conservation. | USSAF ..... | 160,000.00 | 160,000.00 | 320,000.00 |
| 09009 ... | Western Native Trout Initiative (WNTI) Implementation ..... | WAFWA ... | 0.00 | 360,000.00 | 360,000.00 |
| 09012 ... | National CP33 Monitoring Program Phase II: Evaluating Mid-Contract Management to Increase Wildlife Benefits. | MSU ..... | 779,730.00 | 0.00 | 779,730.00 |
| 09013 ... | Improving Conservation Education and Connecting Families to Nature Through Programs Targeting the Wildlife Values of the Public. | WAFWA ... | 143,073.50 | 143,073.50 | 286,147.00 |
| 09015 ... | Eastern Brook Trout Joint Venture—Fish Habitat Partnership: Sustainable Infrastructure Development and Support. | VA Tech ... | 0.00 | 170,000.00 | 170,000.00 |
| 09016 ... | Effectiveness of Hunting, Fishing, and Shooting Recruitment and Retention Programs. | NWTF ..... | 160,993.61 | 160,993.61 | 321,987.21 |
| 09017 ... | Implementation of the Southeast Aquatic Habitat Plan and the National Fish Habitat Action Plan in the southeastern U.S. | SARP ..... | 0.00 | 468,000.00 | 468,000.00 |
| 09018 ... | Coordination, implementation and maximization of the Association's Conservation Education Strategy. | AFWA ..... | 297,000.00 | 297,000.00 | 594,000.00 |
| | | | 3,332,454.31 | 3,339,089.91 | 6,671,544.21 |

Dated: October 28, 2008.

**Kenneth Stansell,**

*Assistant Director, U.S. Fish and Wildlife Service.*

[FR Doc. E8–28830 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[AA–6696–E; AK–964–1410–HY–P]**

### Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of decision approving lands for conveyance.

**SUMMARY:** As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to St. George Tanaq Corporation. The lands are in the vicinity of Unalaska Island, Alaska, and are located in:

**Seward Meridian, Alaska**

T. 77 S., R. 122 W.,
Secs. 2, 4, and 11.
Containing 83.50 acres.
T. 78 S., R. 124 W.,
Sec. 5, 6, 7, and 10.
Containing 3.85 acres.
Aggregating 87.35 acres.

A portion of the subsurface estate in these lands will be conveyed to The Aleut Corporation when the surface estate is conveyed to St. George Tanaq Corporation. The remaining lands lie within the Aleutian Islands National Wildlife Refuge, now known as the Alaska Maritime National Wildlife Refuge, established by Executive Order No. 1733 on March 3, 1913. The subsurface estate in the refuge lands will be reserved to the United States at the time of conveyance. Notice of the decision will also be published four times in the Anchorage Daily News.

**DATES:** The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until January 8, 2009 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

**ADDRESSES:** A copy of the decision may be obtained from:

Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

**FOR FURTHER INFORMATION, CONTACT:** The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

**Hillary Woods,**

*Land Law Examiner, Land Transfer Adjudication I.*

[FR Doc. E8–29093 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–JA–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–923–1310–FI; WYW174821]**

### Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

**SUMMARY:** Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Whiting Oil and Gas Corporation for competitive oil and gas lease WYW174821 for land in Lincoln County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management,Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

**SUPPLEMENTARY INFORMATION:** The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW174821 effective October 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

**Pamela J. Lewis,**

*Chief, Branch of Fluid Minerals Adjudication.*

[FR Doc. E8–29081 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–22–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Agency Information Collection; Request for Extension of a Currently Approved Information Collection; Comment Request

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of renewal of currently approved collection (OMB No. 1006–0014).

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the intentions of the Bureau of Reclamation to seek extension of the information collection for the Lower Colorado River Well Inventory. The current OMB approval expires on March 31, 2009.

**DATES:** Comments on this notice must be received by *February 9, 2009.*

**ADDRESSES:** To obtain copies of the information collection form and to submit comments on this information collection contact: Ruth Thayer (BCOO–4200), PO Box 61470, Boulder City, NV 89006. Comments may also be submitted by email to *rthayer@lc.usbr.gov*.

**FOR FURTHER INFORMATION CONTACT:** Ruth Thayer, Group Manager, Boulder Canyon Operations Office, Bureau of Reclamation, 702–293–8426.

SUPPLEMENTARY INFORMATION:

*Title:* Lower Colorado River Well Inventory.

*OMB No.:* OMB No. 1006–0014.

*Abstract:* Pursuant to the Boulder Canyon Project Act (Pub. L. 70–642, 45 Stat. 1057), all diversions of mainstream Colorado River water must be in accordance with a Colorado River water entitlement. The Consolidated Decree of the United States Supreme Court in *Arizona* v *California*, 547 U.S. 150 (2006) requires the Secretary of the Interior to account for all diversions of mainstream Colorado River water along the lower Colorado River, including water drawn from the mainstream by underground pumping. To meet the water entitlement and accounting obligations, an inventory of wells and river pumps is required along the lower

Colorado River, and the gathering of specific information concerning these wells.

*Description of respondents:* The respondents will include well and river-pump owners and operators along the lower Colorado River in Arizona, California, and Nevada. Each diverter (including well pumpers) must be identified and their diversion locations and water use determined.

*Frequency:* These data are collected only once for each well or river-pump owner or operator as long as changes in water use, or other changes that would impact contractual or administrative requirements, are not made. A respondent may request that the data for their well or river pump be updated after the initial inventory.

*Estimated completion time:* An average of 20 minutes is required to interview individual well and river-pump owners or operators. Reclamation will use the information collected during these interviews to complete the information collection form.

*Annual responses:* 1,500.

*Annual burden hours:* 500 hours.

*Comments:*

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;

(c) Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

We will summarize all comments received regarding this notice. We will publish that summary in the **Federal Register** when the information collection request is submitted to OMB for review and approval.

Before including your address, telephone 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.

Dated: December 3, 2008.

**Lorri Gray,**

*Regional Director, Lower Colorado Region, Bureau of Reclamation.*

[FR Doc. E8–29080 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–MN–P

---

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### Notice of Proposed Information Collection for 1029–0111

**AGENCY:** Office of Surface Mining Reclamation and Enforcement.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection request for 30 CFR Part 761—Areas Designated by Act of Congress, has been submitted to the Office of Management and Budget (OMB) for review and approval. This information collection request describes the nature of the information collection and the expected burden and cost for 30 CFR Part 761.

**DATES:** OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, public comments should be submitted to OMB by January 8, 2009, in order to be assured of consideration.

**ADDRESSES:** Submit comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Department of Interior Desk Officer, by telefax at (202) 395–6566 or via e-mail to *OIRA_Docket@omb.eop.gov*. Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202–SIB, Washington, DC 20240, or electronically to *jtreleaseosmre.gov*.

**FOR FURTHER INFORMATION CONTACT:** To receive a copy of the information collection request, contact John Trelease at (202) 208–2783, or electronically at *jtreleaseosmre.gov*.

**SUPPLEMENTARY INFORMATION:** OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. OSM has submitted a request to OMB to renew its approval of the collection of information contained in 30 CFR Part 761—Areas Designated by Act of Congress. OSM is requesting a 3-year term of approval for this information collection activity.

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 number for this collection of information is 1029–0111.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments for these collections of information was published on September 3, 2008 (73 FR 51514). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity:

*Title:* 30 CFR Part 761—Areas Designated by Act of Congress.

*OMB Control Number:* 1029–0111.

*Summary:* OSM and State regulatory authorities use the information collected under 30 CFR Part 761 to ensure that persons planning to conduct surface coal mining operations on the lands protected by § 522(e) of the Surface Mining Control and Reclamation Act of 1977 have the right to do so under one of the exemptions or waivers provided by this section of the Act.

*Bureau Form Number:* None.

*Frequency of Collection:* Once.

*Description of Respondents:* 17 applicants for certain surface coal mine permits and the corresponding State regulatory authorities.

*Total Annual Responses:* 158.

*Total Annual Burden Hours:* 531.

*Total Annual Non-Hour Burden Costs:* $2,682.

Send comments on the need for the collections of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collections; and ways to minimize the information collection burdens on respondents, such as use of automated means of collections of the information, to the individual listed in **ADDRESSES**. Please refer to OMB control number 1029–0111 in all correspondence.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying

information from public review, we cannot guarantee that we will be able to do so.

Dated: November 12, 2008.

**John R. Craynon,**

*Chief, Division of Regulatory Support.*

[FR Doc. E8–29009 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–05–P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### Notice of Proposed Information Collection for 1029–0112

**AGENCY:** Office of Surface Mining Reclamation and Enforcement.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection request for 30 CFR Part 772—Requirements for Coal Exploration has been submitted to the Office of Management and Budget (OMB) for review and approval. This information collection request describes the nature of the information collection and the expected burden and cost for 30 CFR Part 772.

**DATES:** OMB has up to 60 days to approve or disapprove the information collections but may respond after 30 days. Therefore, public comments should be submitted to OMB by January 8, 2009, in order to be assured of consideration.

**ADDRESSES:** Submit comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Department of Interior Desk Officer, by telefax at (202) 395–6566 or via e-mail to *OIRA_Docket@omb.eop.gov*. Also, please send a copy of your comments to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202—SIB, Washington, DC 20240, or electronically to *jtrelease@osmre.gov*.

**FOR FURTHER INFORMATION CONTACT:** To receive a copy of the information collection request contact John Trelease at (202) 208–2783, or electronically at *jtrelease@osmre.gov*.

**SUPPLEMENTARY INFORMATION:** OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. OSM has submitted a request to OMB to renew its approval of the collection of information contained in 30 CFR Part 772—Requirements for Coal Exploration. OSM is requesting a 3-year term of approval for this information collection activity.

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 number for 30 CFR Part 772 is 1029–0112.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments for this collection of information was published on September 3, 2008 (73 FR 51513). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity:

*Title:* 30 CFR Part 772—Requirements for Coal Exploration.

*OMB Control Number:* 1029–0112.

*Summary:* OSM and State regulatory authorities use the information collected under 30 CFR Part 772 to maintain knowledge of coal exploration activities, evaluate the need for an exploration permit, and ensure that exploration activities comply with the environmental protection and reclamation requirements of 30 CFR Part 772 and section 512 of SMCRA (30 U.S.C. 1262).

*Bureau Form Number:* None.

*Frequency of Collection:* Once.

*Description of Respondents:* 1,212 operators planning to conduct coal exploration and 24 State regulatory authorities.

*Total Annual Responses:* 2,568.

*Total Annual Burden Hours:* 11,010.

*Total Annual Non-Wage Burden Costs:* $2,074.

Send comments on the need for the collections of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collections; and ways to minimize the information collection burdens on respondents, such as use of automated means of collections of the information, to the offices listed in **ADDRESSES**. Please refer to OMB control number 1029–0112 in all correspondence.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 2, 2008.

**John R. Craynon,**

*Chief, Division of Regulatory Support.*

[FR Doc. E8–29010 Filed 12–8–08; 8:45 am]

BILLING CODE 4310–05–M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of an Amendment to the Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on November 19, 2008, a proposed Amendment to the Consent Decree (''Amendment'') in *United States of America* v. *Ormet Primary Aluminum Corporation*, Civil Action No. C2–95–947, was lodged with the United States District Court for the Southern District of Ohio, Eastern Division.

In 1995, the United States entered into a Consent Decree with Ormet Primary Aluminum Corporation, Inc. (''Ormet Primary''), which settled a matter under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9606 & 9607, for the Ormet Corporation Superfund Site (''Site'') in Hannibal, Ohio. Under the Consent Decree, Ormet Primary is required to undertake work to address releases at the Site and provide financial assurance to ensure completion of the work. In 2007, the U.S. Environmental Protection Agency (''U.S. EPA'') determined that Ormet Primary had failed to meet the terms of the financial assurance provisions of the Consent Decree. The Amendment addresses Ormet Primary's failure to have adequate financial assurance by requiring scheduled submissions to the U.S. EPA of letter(s) of credit which by December 21, 2009, in the aggregate, will equal $3,400,000.00. The Amendment also requires, among other things, environmental covenants be recorded with the Register of Deeds, Monroe County, Ohio, identifying use restrictions for the Site and other specified property.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Amendment. Comments should be addressed to the Assistant

Attorney General, Environment and Natural Resources Division, and either emailed 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 Ormet Primary Aluminum Corporation, Inc., D.J. Ref. 90–11–3–1423.

During the public comment period, the Amendment may be examined at the Office of the United States Attorney, 303 Marconi Blvd., Suite 200, Columbus, Ohio 43215, and at U.S. EPA Region 5, 77 W. Jackson Blvd., Superfund Records Center, 7th Floor, Chicago, Illinois 60604 or a copy may be obtained from U.S. EPA Region 5 by calling (312) 886–0900. The Amendment may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Amendment may 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 $16.75 (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.

**William Brighton,**

*Assistant Chief Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. E8–29064 Filed 12–8–08; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9622, the Department of Justice gives notice that a proposed Consent Decree in *United States* v. *FMC Corporation and BAE Systems Land & Armaments, LLP*, Civil No. 08–cv–06240 (D. Minn.), was lodged with the United States District Court for the District of Minnesota on December 3, 2008, pertaining to the Naval Industrial Reserve Ordnance Plant Superfund Site (the ''Site''), located in Fridley, Anoka County, Minnesota. In this action, the United States brought civil claims under Sections 107 and 113(g)(2) of CERCLA, 42 U.S.C. 9607 and 9613(g)(2), against FMC Corporation (''FMC'') and BAE Systems Land & Armaments, LLP (''BAE Systems'') (collectively, ''Settling Defendants') for recovery of response costs incurred and to be incurred by the United States at the Site.

The proposed Consent Decree requires FMC and BAE Systems to reimburse the United States $4.14 million in payment of the Navy's response costs, and $460,000 in payment of EPA's response costs, incurred at the Site. A portion, $850,000, of the total payment has been designated as ''Consent Decree Unallowed Costs'' under Settling Defendants' Federal Contracts.

The Department of Justice will receive, for a period of fifteen (15) days from the date of this publication, comments relating to the proposed Consent Decree. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of the Resource Conservation and Recovery Act, 42 U.S.C. 6973(d). Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to United States Department of Justice, P.O. Box 7611, Washington, DC 20044–7611, and should refer to *United States* v. *FMC Corporation and BAE Systems Land & Armaments, LLP*, Civil No. 08–cv–06240 (D. Minn.), and DOJ Reference No. 90–11–3–07002/1.

The proposed Consent Decree may be examined at: (1) The Office of the United States Attorney for the District of Minnesota, 600 U.S. Courthouse, 300 South Fourth St., Minneapolis, MN 55415 ((612) 664–5697); (2) the United States Environmental Protection Agency (Region 5), 77 West Jackson Blvd., Chicago, IL 60604–3507 (contact: Timothy Thurlow (312) 886–6623); or (3) United States Department of Navy, Office of General Counsel, 720 Kennon St. SE., Bldg. 36, Rm. 233, Washington, DC 20374–5013 (contact: Perry Sobel (202) 685–6997).

During the public comment period, the proposed Consent Decree may also be examined on the following U.S. Department of Justice website, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation no. (202) 514–1547. In requesting a copy from the Consent Decree Library, please refer to the referenced case and DOJ Reference Number and enclose a check in the amount of $17.75 for the Consent Decree (71 pages including appendices, at 25 cents per page reproduction costs), made 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.

**William D. Brighton,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. E8–29063 Filed 12–8–08; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

December 3, 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 Darrin King on 202–693–4129 (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 Bureau of Labor Statistics (BLS), 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:* Bureau of Labor Statistics.

*Type of Review:* Extension without change of an existing OMB Control Number.

*Title of Collection:* Cognitive and Psychological Research.

*OMB Control Number:* 1220–0141.

*Affected Public:* Individuals and Households.

*Total Estimated Number of Respondents:* 1,200.

*Total Estimated Annual Burden Hours:* 1,200.

*Total Estimated Annual Costs Burden:* $0.

*Description:* The proposed laboratory research will be conducted from Fiscal Year (FY) 2009 through FY 2011 to enhance data quality in the Bureau of Labor Statistics' (BLS's) surveys. Improvements will be made by examining psychological and cognitive aspects of BLS's data collection procedures, including questionnaire design, interviewing procedures, collection modalities, and administrative technology. For additional information, see related notice published at 73 FR 54623 on September 22, 2008, and corrected at 73 FR 62325 on October 20, 2008.

**Darrin A. King,**

*Departmental Clearance Officer.*

[FR Doc. E8–29038 Filed 12–8–08; 8:45 am]

BILLING CODE 4510–24–P

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

December 3, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (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 each 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 Darrin King on 202–693–4129 (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 Occupational Safety and Health Administration (OSHA), 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:* Occupational Safety and Health Administration.

*Type of Review:* Extension without change of a previously approved collection.

*Title of Collection:* Telecommunications (29 CFR 1910.268).

*OMB Control Number:* 1218–0225.

*Affected Public:* Private Sector: Business or other for-profits.

*Estimated Number of Respondents:* 668.

*Estimated Total Annual Burden Hours:* 1,087.

*Estimated Total Annual Costs Burden:* $0.

*Description:* The Department's regulations at 29 CFR 1910.268 provide a safety standard for general industry titled ''Telecommunications'' (i.e., ''the Standard''). Paragraph 1910.268(c) requires that training certification records be generated and maintained for all employees covered by the Standard. For additional information, see the related 60-day preclearance notice published in the **Federal Register** at 73 FR 56615 on September 29, 2008. PRA documentation prepared in association with the preclearance notice is available on *http://www.regulations.gov* under docket number OSHA 2008–0023.

*Agency:* Occupational Safety and Health Administration.

*Type of Review:* Extension without change of a previously approved collection.

*Title of Collection:* Vehicle-Mounted Elevating and Rotation Work Platforms (Aerial Lifts) (29 CFR 1910.67).

*OMB Control Number:* 1218–0230.

*Affected Public:* Private Sector: Business or other for-profits.

*Estimated Number of Respondents:* 1,000.

*Estimated Total Annual Burden Hours:* 21.

*Estimated Total Annual Costs Burden:* $0.

*Description:* The Department's regulations at 29 CFR 1910.67 require employers to obtain a written certification of any field modification made to aerial lifts. Such certifications must be prepared in writing by either the manufacturer of the aerial lift or by a nationally recognized laboratory. The purpose of this certification is to provide documentation attesting to the safety of the lift after modifications. For additional information, see the related 60-day preclearance notice published in the **Federal Register** at 73 FR 57384 on October 2, 2008. PRA documentation prepared in association with the preclearance notice is available on *http://www.regulations.gov* under docket number OSHA 2008–0040.

**Darrin A. King,**

*Departmental Clearance Officer.*

[FR Doc. E8–29065 Filed 12–8–08; 8:45 am]

BILLING CODE 4510–26–P

## DEPARTMENT OF LABOR

## Occupational Safety and Health Administration

**[Docket No. OSHA–V05–2–2006–0785]**

# AmerenUE; American Airlines, Inc.; CBS Outdoor, Inc.; Dixie Divers, Inc.; Graver Tank and Mfg. Co.; Hamon Custodis, Inc.; International Paper Co.; Metalplate Galvanizing, Inc.; Fisher Mills, Inc.; Pullman Power, LLC; U.S. Ecology Idaho, Inc.; West Pharmaceutical Services, Inc.; Zurn Industries, Inc.; and 3M Co: Technical Amendments to, and Revocation of, Permanent Variances

**AGENCY:** Occupational Safety and Health Administration (OSHA), Department of Labor.

**ACTION:** Notice of technical amendments to, and revocation of, permanent variances.

**SUMMARY:** With this notice, the Occupational Safety and Health Administration (''OSHA'' or ''the Agency'') is making technical amendments to existing permanent variances, and revoking several others. The technical amendments involve renaming the employers identified on eight of the variances, and also revising the worksites covered by one of these variances. In addition, the Agency is revoking six variances based on evidence that the employers no longer need the variances.

**DATES:** The effective date of the permanent variance is December 9, 2009.

**FOR FURTHER INFORMATION:** Contact Ms. MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, Room N–3655, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2110; fax (202) 693–1644. Access electronic copies of this notice at OSHA's Web site, *http://www.osha.gov*, by selecting **Federal Register**, ''Date of Publication,'' and then ''2008.''

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Agency has 23 permanent variances currently in effect. After reviewing these variances, OSHA found that employers identified in eight of these variances had new names (two resulting from the sale of company assets), and one of these employers relocated several worksites specified in the variance. The review also found that six of the employers do not need variances because: The conditions requiring the variance no longer exist; a new standard replaced the standard from which the employer received the variance; or the employer is no longer in business. With this notice, the Agency is correcting these problems. OSHA believes this notice will: Enable the Agency to accurately and expeditiously determine the employers covered by a variance, thereby enhancing enforcement of the variance; ensure that a variance identifies and covers the appropriate worksites; and, for revoked variances, notify employees that the employer is no longer covered by the variance and must comply with the appropriate OSHA standard.

The technical amendments implemented by this notice do not alter the substantive requirements of the variances that remain in effect. For variances revised by this notice, these amendments maintain the regulatory obligations specified in the variances granted to the employers, thereby continuing to ensure the safety and health protection afforded to employees by the variances. For variances revoked by this notice, existing OSHA standards will provide employees with the necessary protection. A list of variances that remain in effect by this notice is available on OSHA's Web site at *http://www.osha.gov/dts/otpca/variances/variances.html*.

With this notice, the Agency is making only technical corrections to existing variances, or revoking variances no longer needed by employers for employee protection. Accordingly, this notice will not have a substantive effect on employers or employees, and OSHA therefore finds that public notice-and-comment procedures specified under Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), and by 29 CFR 1905.11 or 1905.13, are unnecessary.

The following table provides details about the variances affected by this notice:

| Name of employer (company)* | Variance No. | Date granted | Federal Register cite | OSHA standards affected |
|---|---|---|---|---|
| American Airlines, Inc | V–73–3 | 06/27/1973 | 38 FR 16944 | 1910.107(g)(7) and 1910.108(f)(4). |
| Custodis Construction Co., Inc. (now Hamon Custodis, Inc.). | V–73–13 | 04/03/1973 | 38 FR 8545 | 1926.552(c), 1926.451(1), 1926.451(4), and 1926.451(5). |
| Dixie Divers, Inc. | V–97–1 | 12/20/1999 | 64 FR 71242 | 1910.423(b)(2), 1910.423(c)(3)(iii), and 1910.426(b)(1). |
| Hammermill Papers Group (now International Paper Co.). | V–83–1 | 09/07/1983 | 48 FR 40463 | 1910.261(c)(9)(i). |
| Envirosafe Services of Idaho, Inc. (now US Ecology Idaho, Inc.). | V–93–1 | 06/07/1994 | 59 FR 29440 | 1910.106(b)(2)(viii)(F). |
| Fisher Mills, Inc. | V–74–2 | 01/11/1974 | 39 FR 1677–1678 | 1910.176(f). |
| Gannett Outdoor Companies (now CBS Outdoor, Inc.). | V–90–1 | 03/01/1991 | 56 FR 8801 | 1910.27(d)(1)(ii), 1910.27(d)(2), and 1910.27(d)(5). |
| Graver Tank & Mfg. Co., Inc | V–85–6 | 04/03/1973 | 39 FR 8545–8548 | 1926.552(c). |
| Metalplate and Coatings, Inc. (now Metalplate Galvanizing, Inc.). | V–74–49 | 12/28/1976 | 41 FR 56110 | 1910.22(c) and 1910.23(c)(3). |
| Minnesota Mining and Manufacturing Co. (now the 3M Co.). | V–77–4<br>V–77–14 | 03/10/1978 | 43 FR 9887 | 1910.106(d)(5)(vi)(B). |
| M. W. Kellogg Co. (now Pullman Power, LLC). | V–73–13 | 04/03/1973 | 38 FR 8545 | 1926.552(c). |
| Union Electric Co. (now AmerenUE) | V–74–5 | 10/18/1974 | 39 FR 37278 | 1910(28)(g)(1). |
| West Co., Inc. (now West Pharmaceutical Services, Inc.). | V–77–9 | 01/20/1978 | 43 FR 2945 | 1910.217(c)(3)(iii)(E). |
| Zurn Industries, Inc | V–82–7 | 05/14/1985 | 50 FR 2145–2149 | 1926.552(c)(1), 1926.552(c)(2), 1926.552(c)(3), and 1926.552(c)(14)(i). |

*As listed on the original variance.

## II. Technical Amendments to Permanent Variances

### *A. Renaming Companies*

1. AmerenUE; CBS Outdoor, Inc.; Metalplate Galvanizing, Inc.; U.S. Ecology Idaho, Inc.; Viacom Outdoor, Inc.; West Pharmaceutical Services, Inc.; and the 3M Co. In the original variances, the names of these companies were, respectively, Union Electric Co.; Gannett Outdoor Services; Metalplate and Coatings, Inc.; Envirosafe Services of Idaho, Inc.; West Co., Inc.; and Minnesota Mining and Manufacturing Co. Recently, officers of these companies sent letters to OSHA stating that these names were no longer valid, and requesting the Agency to correct the variances using the new names (Exs. OSHA–V05–2–2006–0785–0002–004).

2. Hamon Custodis, Inc. By letter dated June 20, 1989, Charles Williams, Director of Marketing and Construction for Custodis Cottrell, Inc., notified the Agency that the company changed its name from Custodis Construction Co., Inc., the name under which OSHA granted the original variance (Ex. OSHA–V05–2–2006–0785–0005). In a letter dated April 27, 2005, Thomas Pratt, Director of Health, Safety, and Quality at Hamon Custodis, informed OSHA that ''Hamon Custodis'' was now the corporate name for Custodis Cottrell, Inc. (Ex. OSHA–V05–2–2006–0785–0006). A subsequent letter dated August 10, 2005, provided documentation showing that Hamon Custodis acquired the business assets, including the chimney-construction assets, of Custodis Cottrell, Inc. on July 23, 1998 (Ex. OSHA–V05–2–2006–0785–0007). This documentation also included certification from the Director of Construction for Hamon Custodis, John Huchko, attesting that Hamon Custodis continues to perform chimney-construction work under the conditions specified by the variance order (Ex. OSHA–V05–2–2006–0785–0008).

3. Pullman Power, LLC. A letter from Pullman Power, LLC (''Pullman Power'') dated July 7, 2005, provided OSHA with a copy of an Asset Purchase Agreement showing that Pullman Power acquired the business assets of Pullman Power Products Corp., including equipment and property, on October 4, 2000 (Ex. OSHA–V05–2–2006–0785–0009). In this letter, Mr. Dan Fangio, president of Pullman Power, stated that the company continues to perform chimney-construction work as described in the variance, and complies with the conditions specified in the variance order when doing so. In a subsequent letter from Pullman Power, Mr. Fangio verified that Pullman Power was a successor to the M. W. Kellogg Co., the employer identified in the original variance (Ex. OSHA–V05–2–2006–0785–0010). In this letter, Mr. Fangio also certified the following merger-and-acquisition history of Pullman Power:

(a) 1980—M. W. Kellogg Co. acquired by Wheelabrator-Frye, Inc.

(b) 1983—Wheelabrator-Frye, Inc. merged with the Signal Companies.

(c) 1985—the Signal Companies merged with Allied Corp. to form Allied-Signal, Inc.

(d) 1986—Allied-Signal, Inc. formed a holding corporation, the Henley Group, Inc., that included Wheelabrator Technologies, Inc. as a wholly owned subsidiary.

(e) 1990—Waste Management, Inc. assumed control of Wheelabrator Technologies, Inc., forming Pullman Power Products Corp. as a subsidiary corporation.

(f) 2000—Resco Holdings, Inc., a subsidiary of Waste Management, Inc., sold Pullman Power Products Corp. to Pullman Power and Structural Technologies, LLC (the parent company of Pullman Power).

### *B. Revising Covered Worksites*

West Pharmaceutical Services, Inc. By facsimile letter dated May 19, 2004, (Ex. OSHA–V05–2–2006–0785–0011), West Pharmaceutical Services, Inc., asked OSHA to revise the worksites covered by the variance. This letter also noted that several of the original facilities, in Phoenixville, PA, Millville, NJ, and Kinston, NC, either did not require coverage by the variance or were no longer in operation. The employer is retaining coverage for the worksites at Kearny, NE, and St. Petersburg, FL, and is requesting to add coverage to the following worksites:

West Pharmaceutical Services, Inc., 347 Oliver Street, Jersey Shore, PA 17740.

West Pharmaceutical Services, Inc., 101 Gordon Drive, Lionville, PA 19341.

West Pharmaceutical Services, Inc., 179 West Airport Road, Lititz, PA 17543.

West Pharmaceutical Services, Inc., Route 70, Kinston, NC 28501.

### *C. Revoking Permanent Variances*

1. American Airlines, Inc. The Agency granted American Airlines, Inc. a variance permitting it to use painted lines instead of ''no smoking'' signs to identify smoking areas at its Maintenance and Engineering Center in Tulsa, OK. The employer subsequently prohibited smoking at this facility, and, in an e-mail to OSHA, stated that it no longer needed the variance (Ex. OSHA–V05–2–2006–0785–0012).

2. Dixie Divers, Inc. On February 17, 2004, OSHA published a final rule that added Appendix C to its Commercial Diving Operations (''CDO'') Standard at 29 CFR 1910, subpart T (69 FR 7351). The appendix permits employers of recreational diving instructors and diving guides to comply with an alternative set of requirements instead of the decompression-chamber requirements specified in the CDO Standard. This set of requirements duplicates the conditions of the variance granted to Dixie Divers, Inc. Therefore, these requirements provide the employer with the same relief, and employees with the same protection, afforded to them by the variance. Accordingly, the variance is redundant and unnecessary.

3. Graver Tank & Mfg. Co. On March 28, 1996, Graver Tank was acquired by Astrotech International Corporation. Effective October 28, 1997, Astrotech merged with ITEQ Storage Systems Inc., as noted in a 1998 10–K filing with the Securities and Exchange Commission (SEC) (Ex. OSHA–V05–2–2006–0785–0013). In February 2000, ITEQ sold Graver Tank's assets to a private entity. The company was liquidated soon thereafter, obviating the need for a variance, as documented by SEC Proxy Statement Form DEF 14A, dated May 1, 2000 (Ex. OSHA–V05–2–2006–0785–0014).

4. Fisher Mills, Inc. On March 20, 2001, Fisher Communications Inc. sold the assets of Fisher Mills to Pendleton Flour Mills, Inc. Pendleton subsequently closed the mill's operations, obviating the need for a variance. This sale is documented in Fisher Communication's 8–K form filed with the SEC on March 16, 2001 (Ex. OSHA–V05–2–2006–0785–0015). The mill site, which is no longer in operation, was purchased by King County, WA, on July 28, 2003 (Ex. OSHA–V05–2–2006–0785–0016).

5. International Paper Co. International Paper Co. submitted a letter to OSHA dated August 11, 2005, stating that it was the successor to Hammermill Papers Group (Ex. OSHA–V05–2–2006–0785–0017). In this letter, International Paper Co. noted that its Erie, PA, mill, the only mill covered by the variance granted to Hammermill, is no longer in operation, thereby obviating the need for the variance.

6. Zurn Industries. Zurn Industries submitted a letter to OSHA dated April 16, 2004, stating that it sold its chimney- and tower-erection businesses (Ex. OSHA–V05–2–2006–0785–0018), thereby making the variance unnecessary.

## III. Decision

Based on the information described herein, including the finding that this notice will not alter the substantive requirements of the variances and will maintain the protection afforded to employees by the variances, the Agency is taking the following actions:

A. Revising the names of employers as shown in the following table:

| Name in original variance | Revised name |
|---|---|
| Metalplate and Coatings, Inc.. | Metalplate Galvanizing, Inc. |
| West Co. ..... | West Pharmaceutical Services, Inc. |
| Minnesota Mining and Manufacturing Co.. | 3M Co. |
| Custodis Construction Co., Inc. | Hamon Custodis, Inc. |
| M. W. Kellogg Co. ..... | Pullman Power, LLC |
| Envirosafe Services of Idaho, Inc. | US Ecology Idaho, Inc. |
| Union Electric Co. ..... | AmerenUE |
| Gannett Outdoor Services. | CBS Outdoor, Inc. |

B. Adding worksites at Jersey Shore, Pa., Lionville, Pa., Lititz, Pa., and Kinston, N.C. to the variance granted to West Pharmaceutical Services, Inc. (formerly the West Co.).

C. Revoking the variances granted to American Airlines, Inc., Dixie Divers, Inc., Graver Tank and Mfg. Co., Fisher Mills Co., International Paper Co. (the successor employer to Hammermill Papers Group), and Zurn Industries.

## IV. Authority and Signature

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC, directed the preparation of this notice. This notice is issued under the authority specified by Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Secretary of Labor's Order No. 5–2007 (72 FR 31160), and 29 CFR part 1905.

Signed at Washington, DC, on November 18, 2008.

**Thomas M. Stohler,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. E8–29002 Filed 12–8–08; 8:45 am]

BILLING CODE 4510–26–P

## LEGAL SERVICES CORPORATION

### Notice of Availability of Calendar Year 2009 Competitive Grant Funds; Correction

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice; correction. The LSC grant award date is revised. See the revised grant award date under Summary.

**SUMMARY:** The Legal Services Corporation (LSC) is the national organization charged with administering Federal funds provided for civil legal services to low-income people. LSC hereby announces the availability of competitive grant funds for the provision of a full range of civil legal services to eligible clients in Wyoming. Grants will be awarded in or around July 2009. The estimated annualized grant amounts for service areas in Wyoming are: $478,874 for the provision of civil legal services to the general low-income population throughout the state (i.e., service area WY–4); $12,054 for the provision of civil legal services to the migrant farmworker population throughout the state (i.e., service area MWY); and $167,794 for the provision of civil legal services to the Native American population throughout the state (i.e., service area NWY–1).

**DATES:** *See* **SUPPLEMENTARY INFORMATION** section for grants competition dates.

**ADDRESSES:** Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007–3522.

**FOR FURTHER INFORMATION CONTACT:** Reginald Haley, Office of Program Performance, 202.295.1545.

**SUPPLEMENTARY INFORMATION:** The Request for Proposals (RFP) is available at *http://www.grants.lsc.gov.* Once at the Web site, click on *FY 2009 Request For Proposals Narrative Instruction* to access the RFP and other information pertaining to the LSC competitive grants process. Refer to the RFP for instructions on preparing the grant proposal; the regulations and guidelines governing LSC funding; the definition of a full range of legal services; and grant proposal submission requirements.

Applicants must file a NIC (RFP Form–H) to participate in the competitive grants process. The deadline for filing the NIC is March 2, 2009, 5 p.m. E.D.T. The deadline for filing grant proposals is April 13, 2009, 5 p.m. E.D.T. The dates shown in this notice for filing the NIC and the grant proposals supersede the dates in the RFP. All other instructions, regulations, guidelines, definitions, and grant proposal submission requirements remain in effect unless otherwise noted.

The following persons, groups, and entities are qualified applicants who may submit a Notice of Intent to Compete (NIC; RFP Form–H) and an application to participate in the competitive grants process: (1) Current recipients of LSC grants; (2) non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (3) private attorneys, groups of attorneys or law firms; (5) state or local governments; and (6) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

LSC will not fax the RFP to interested parties. Interested parties are asked to visit *http://www.grants.lsc.gov* regularly for updates and correction notices pertaining to the LSC competitive grants process.

Dated: December 4, 2008.

**Janet LaBella,**

*Director, Office of Program Performance, Legal Services Corporation.*

[FR Doc. E8–29109 Filed 12–8–08; 8:45 am]

BILLING CODE 7050–01–P

## NATIONAL INDIAN GAMING COMMISSION

### Fee Rate

**AGENCY:** National Indian Gaming Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given, pursuant to 25 CFR 514.1(a) (3), that the National Indian Gaming Commission has adopted final annual fee rates of 0.00% for tier 1 and 0.057% (.00057) for tier 2 for calendar year 2008. These rates shall apply to all assessable gross revenues from each gaming operation under the jurisdiction of the Commission. If a tribe has a certificate of self regulation under 25 CFR part 518, the final fee rate on class II revenues for calendar year 2008 shall be one-half of the annual fee rate, which is 0.0285% (.000285).

**FOR FURTHER INFORMATION CONTACT:** Kwame Mambo, National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington, DC 20005; telephone (202) 632–7003; fax (202) 632–7066 (these are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** The Indian Gaming Regulatory Act (IGRA) established the National Indian Gaming Commission which is charged with, among other things, regulating gaming on Indian lands.

The regulations of the Commission (25 CFR part 514), as amended, provide for a system of fee assessment and payment that is self-administered by gaming operations. Pursuant to those

regulations, the Commission is required to adopt and communicate assessment rates; the gaming operations are required to apply those rates to their revenues, compute the fees to be paid, report the revenues, and remit the fees to the Commission on a quarterly basis.

The regulations of the Commission and the final rate being adopted today are effective for calendar year 2008. Therefore, all gaming operations within the jurisdiction of the Commission are required to self administer the provisions of these regulations, and report and pay any fees that are due to the Commission by December 31, 2008.

Dated: December 1, 2008.

**Philip N. Hogen,**

*Chairman, National Indian Gaming Commission.*

[FR Doc. E8–29062 Filed 12–8–08; 8:45 am]

BILLING CODE 7565–01–M

## NATIONAL SCIENCE FOUNDATION

### Notice of Intent To Extend an Information Collection

**AGENCY:** National Science Foundation.

**ACTION:** Notice and Request for Comments.

**SUMMARY:** Under the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501 *et seq.*), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection. The National Science Foundation (NSF) will publish periodic summaries of proposed projects.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Written comments on this notice must be received by February 9, 2009 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

**FOR ADDITIONAL INFORMATION OR COMMENTS:** For further information or for a copy of the collection instruments and instructions, contact Ms. Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device 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:**

*Title of Collection:* Survey of Earned Doctorates.

*OMB Approval Number:* 3145–0019.

*Expiration Date of Approval:* May 31, 2009.

*Type of Request:* Intent to seek approval to extend an information collection for three years.

1. *Abstract:* The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge to ''* * * provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government.'' The Survey of Earned Doctorates is part of an integrated survey system that meets the human resources part of this mission.

The Survey of Earned Doctorates has been conducted continuously since 1958 and is jointly sponsored by six Federal agencies in order to avoid duplication. It is an accurate, timely source of information on our Nation's most precious resource—highly educated individuals. Data are obtained via paper questionnaire or Web survey from each person earning a research doctorate at the time they receive the degree. Data are collected on their field of specialty, educational background, sources of support in graduate school, debt level, postgraduation plans for employment, and demographic characteristics.

The Federal government, universities, researchers, and others use the information extensively. The National Science Foundation, as the lead agency, publishes statistics from the survey in several reports, but primarily in the annual publication series, ''Science and Engineering Doctorates'' and the Interagency Report, ''Doctorate Recipients from U.S. Universities: Summary Report.'' These reports are available in print and electronically on the World Wide Web.

The survey will be collected in conformance with the Privacy Act of 1974. Responses from individuals are voluntary. NSF will ensure that all individually identifiable information collected will be kept strictly confidential and will be used for research or statistical purposes, analyzing data, and preparing scientific reports and articles.

2. *Expected Respondents:* A total response rate of 91.6% of the total 48,079 persons who earned a research doctorate was obtained in academic year 2006/2007. This level of response rate has been consistent for several years. The respondents will be individuals and the estimated number of respondents annually is around 45,000 (based on 2007 data).

3. *Estimate of Burden:* The Foundation estimates that, on average, 20 minutes per respondent will be required to complete the survey. The total annual respondent burden for the Survey of Earned Doctorates is therefore estimated at 15,000 hours, based on 45,000 respondents. This is higher than the last annual estimate approved by OMB due to the increased number of respondents (doctorate recipients).

Dated: December 4, 2008.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. E8–29091 Filed 12–8–08; 8:45 am]

BILLING CODE 7555–01–P

## NUCLEAR REGULATORY COMMISSION

### Notice; Application and Amendment to Facility Operating Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information or Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information or Safeguards Information

### I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding

the pendency before the Commission of a request for a hearing from any person.

This notice includes a notice of amendment containing sensitive unclassified non-safeguards information (SUNSI) or safeguards information (SGI).

*Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing*

The Commission has made a proposed determination that the following amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, or at *http://www.nrc.gov/reading-rm/doc-collections/cfr/part002/part002–0309.html.* Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm.html.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing

held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer(tm) to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer(tm) is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC Meta-System Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday. The Meta-System Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov*.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/ehd_proceeding/home.asp* , unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by email to *pdr.resource@nrc.gov*.

*FPL Energy, Point Beach, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin*

*Date of amendment request:* July 24, 2008.

*Description of amendment request:* This amendment request contains sensitive unclassified non-safeguards information (SUNSI). This amendment requests changes to Operating Licenses DPR–24 and DPR–27, Point Beach Nuclear Plant (PBNP) Units 1 and 2. The proposed changes to the PBNP Operating Licenses will revise the Technical Specifications (TS) to incorporate the results of a new spent fuel pool criticality analysis. The results of the new criticality analysis will provide the basis necessary for changes to TS 3.7.12—Spent Fuel Pool Storage and TS 4.3.1—Criticality.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:* No

Operation of the facility in accordance with the proposed amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated. The presence of soluble boron in the SFP [spent fuel pool] water being used for criticality control does not increase the probability of a dropped fuel assembly accident. The handling of the fuel assemblies in the SFP has always been performed and will continue to be performed in borated water.

There is no increase in the probability of the accidental misloading of fuel assemblies into the SFP fuel storage racks when considering the presence of soluble boron for criticality control. Fuel assembly placement will continue to be controlled pursuant to approved fuel handling procedures and in accordance with the spent fuel storage rack limitations specified in the TS. There is no increase in the consequences for an accidental misloading of fuel assemblies in the SFP fuel storage racks because the criticality analyses demonstrate that the pool will remain subcritical following an accidental misloading.

Soluble boron credit is used to provide margin to offset uncertainties, tolerances, and off-normal/accident conditions, and to provide subcritical margin such that the SFP is keff maintained less than or equal to 0.95. The plant-specific criticality analysis results demonstrate that the spent fuel rack keff [effective multiplication factor] will remain <1.0 (at a 95/95 percent probability and confidence level) even with the SFP flooded with unborated water.

There is no increase in the probability of the loss of normal cooling to the SFP when considering the presence of soluble boron criticality control since a high concentration of soluble boron has always been maintained in the SFP water. A loss of normal cooling to the SFP will result in a reactivity increase for fuel assemblies stored in the All-Cell storage configuration. Maintaining 664 ppm [parts per million] boron in the SFP ensures that keff remains less than or equal to 0.95 for this accident scenario. Because adequate soluble boron will be maintained in the SFP water the consequences of a loss of normal cooling to the SFP will not be increased.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

*Response:* No

Under the proposed amendment, no changes are being made to the fuel storage racks themselves, to any other systems, or to the physical structures of the primary auxiliary building. Therefore, there are no changes proposed to the plant configuration, equipment design, or installed equipment.

Criticality accidents in the SFP are not new or different types of accidents. They have been analyzed in the FSAR and in fuel storage criticality analysis reports associated with specific license amendments. The proposed new SFP storage limitations are those made in the new criticality analysis. They will not have a significant effect on normal SFP operations and maintenance. The most limiting accident scenario changes from a misloaded fresh fuel assembly adjacent to the storage racks, to a misloaded fuel assembly in a 1 out of 4 storage pattern. Established administrative controls will prevent a misloading event in the SFP. Administrative controls include use of independently prepared and reviewed fuel movement authorization paperwork, use of qualified fuel handling operators and oversight of fuel handling operations by an SRO [senior reactor operator].

The current TS include a SFP boron concentration limit that conservatively bounds the required boron concentration of the new criticality analysis. Since soluble boron has always been maintained in the SFP water, implementation of this requirement for SFP criticality control purposes has no effect on normal pool operations and maintenance. Since soluble boron has always been present in the SFP, a dilution event has always been a possibility. The loss of substantial amounts of soluble boron from the SFP that could lead to keff exceeding 0.95 was evaluated as part of the analyses in support of this license amendment request. The evaluation demonstrates that if a dilution event were to occur, plant operators would have sufficient time to detect and mitigate the accident before the minimum boron concentration is reached.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment result in a significant reduction in a margin of safety?

*Response:* No

The proposed amendment uses a different methodology to ensure the SFP will remain subcritical. The current licensing basis requires the SFP keff be less than or equal to 0.95 when flooded with unborated water. Approval of this license amendment request will change licensing basis to 10 CFR 50.68, which allows credit for soluble boron. The new methodology calculates the minimum boron concentration to ensure the SFP keff will be less than or equal to 0.95 when flooded with borated water.

The current TS SFP boron requirement significantly exceeds the required boron concentration determined in the new criticality analysis. Supporting analysis determined there is sufficient time for plant operators to detect and mitigate a boron dilution event in the SFP. Should an undetected dilution event occur, the new methodology also demonstrates the SFP keff will be less than 1.0 when flooded with unborated water. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* Antonio Fernandez, Esquire, Senior Attorney, FPL Energy Point Beach, LLC, P.O. Box 14000, Juno Beach, FL 33408–0420.

*NRC Branch Chief:* Lois M. James.

## Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI) for Contention Preparation

*FPL Energy, Point Beach, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin*

1. This order contains instructions regarding how potential parties to the proceedings listed above may request access to documents containing sensitive unclassified information (SUNSI and SGI).

2. Within ten (10) days after publication of this notice of opportunity for hearing, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI or SGI is necessary for a response to the notice may request access to SUNSI or SGI. A ''potential party'' is any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309. Requests submitted later than ten (10) days will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

3. The requester shall submit a letter requesting permission to access SUNSI and/or SGI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, MD 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *hearing.docket@nrc.gov* and *ogcmailcenter.resource@nrc.gov,*

respectively.[1] The request must include the following information:

a. A description of the licensing action with a citation to this **Federal Register** notice of opportunity for hearing;

b. The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in (a);

c. If the request is for SUNSI, the identity of the individual requesting access to SUNSI and the requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention;

d. If the request is for SGI, the identity of the individual requesting access to SGI and the identity of any expert, consultant or assistant who will aid the requester in evaluating the SGI, and information that shows:

(i) Why the information is indispensable to meaningful participation in this licensing proceeding; and

(ii) The technical competence (demonstrable knowledge, skill, experience, training or education) of the requester to understand and use (or evaluate) the requested information to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant or assistant who demonstrates technical competence as well as trustworthiness and reliability, and who agrees to sign a non-disclosure affidavit and be bound by the terms of a protective order; and

e. If the request is for SGI, Form SF–85, ''Questionnaire for Non-Sensitive Positions,'' Form FD–258 (fingerprint card), and a credit check release form completed by the individual who seeks access to SGI and each individual who will aid the requester in evaluating the SGI. For security reasons, Form SF–85 can only be submitted electronically, through a restricted-access database. To obtain online access to the form, the requester should contact the NRC's Office of Administration at 301–415–0320.[2] The other completed forms must be signed in original ink, accompanied by a check or money order payable in the amount of $191.00 to the U.S. Nuclear Regulatory Commission for each individual, and mailed to the: Office of Administration, Security Processing Unit, Mail Stop TWB–05–B32M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0012.

These forms will be used to initiate the background check, which includes fingerprinting as part of a criminal history records check. **Note**: copies of these forms do *not* need to be included with the request letter to the Office of the Secretary, but the request letter should state that the forms and fees have been submitted as described above.

4. To avoid delays in processing requests for access to SGI, all forms should be reviewed for completeness and accuracy (including legibility) before submitting them to the NRC. Incomplete packages will be returned to the sender and will not be processed.

5. Based on an evaluation of the information submitted under items 2 and 3.a through 3.d, above, the NRC staff will determine within ten days of receipt of the written access request whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI or need to know the SGI requested. For SGI, the need to know determination is made based on whether the information requested is necessary (*i.e.*, indispensable) for the proposed recipient to proffer and litigate a specific contention in this NRC proceeding[3] and whether the proposed recipient has the technical competence (demonstrable knowledge, skill, training, education, or experience) to evaluate and use the specific SGI requested in this proceeding.

6. If standing and need to know SGI are shown, the NRC staff will further determine based upon completion of the background check whether the proposed recipient is trustworthy and reliable. The NRC staff will conduct (as necessary) an inspection to confirm that the recipient's information protection systems are sufficient to protect SGI from inadvertent release or disclosure. Recipients may opt to view SGI at the NRC's facility rather than establish their own SGI protection program to meet SGI protection requirements.

7. A request for access to SUNSI or SGI will be granted if:

a. The request has demonstrated that there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in this proceeding;

b. The proposed recipient of the information has demonstrated a need for SUNSI or a need to know for SGI, and that the proposed recipient of SGI is trustworthy and reliable;

c. The proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI; and

d. The presiding officer has issued a protective order concerning the information or documents requested.[4] Any protective order issued shall provide that the petitioner must file SUNSI or SGI contentions 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.

8. If the request for access to SUNSI or SGI is granted, the terms and conditions for access to sensitive unclassified information will be set forth in a draft protective order and affidavit of non-disclosure appended to a joint motion by the NRC staff, any other affected parties to this proceeding,[5] and the petitioner(s). If the diligent efforts by the relevant parties or petitioner(s) fail to result in an agreement on the terms and conditions for a draft protective order or non-disclosure affidavit, the relevant parties to the proceeding or the petitioner(s) should notify the presiding officer

[1] See footnote 6. While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI and/or SGI under these procedures should be submitted as described in this paragraph.

[2] The requester will be asked to provide his or her full name, social security number, date and place of birth, telephone number, and email address. After providing this information, the requester usually should be able to obtain access to the online form within one business day.

[3] Broad SGI requests under these procedures are thus highly unlikely to meet the standard for need to know; furthermore, staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requester's need to know than ordinarily would be applied in connection with an already-admitted contention.

[4] If a presiding officer has not yet been designated, the Chief Administrative Judge will issue such orders, or will appoint a presiding officer to do so.

[5] Parties/persons other than the requester and the NRC staff will be notified by the NRC staff of a favorable access determination (and may participate in the development of such a motion and protective order) if it concerns SUNSI and if the party/person's interest independent of the proceeding would be harmed by the release of the information (e.g., as with proprietary information).

within ten (10) days, describing the obstacles to the agreement.

9. If the request for access to SUNSI is denied by the NRC staff or a request for access to SGI is denied by NRC staff either after a determination on standing and need to know or, later, after a determination on trustworthiness and reliability, the NRC staff shall briefly state the reasons for the denial. Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. The requester may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing or need to know for SGI by filing a challenge within ten (10) days of receipt of that determination with (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to § 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer. In the same manner, an SGI requester may challenge an adverse determination on trustworthiness and reliability by filing a challenge within fifteen (15) days of receipt of that determination.

In the same manner, a party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within ten (10) days of the notification by the NRC staff of its grant of such a request.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[6]

10. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI and/or SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR

Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

Dated at Rockville, Maryland, this 2nd day of December 2008.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

## ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI) AND SAFEGUARDS INFORMATION (SGI) IN THIS PROCEEDING

| Day | Event/Activity |
|---|---|
| 0 | Publication of FEDERAL REGISTER notice/other notice of proposed action and opportunity for hearing, including order with instructions for access requests. |
| 10 | Deadline for submitting requests for access to SUNSI and/or SGI with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted (e.g., showing technical competence for access to SGI); and, for SGI, including application fee for fingerprint/background check. |
| 60 | Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI and/or SGI (+25 Answers to petition for intervention; +7 petitioner/requestor reply). |
| 20 | NRC staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows (1) need for SUNSI or (2) need to know for SGI. (For SUNSI, NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). If NRC staff makes the finding of need to know for SGI and likelihood of standing, NRC staff begins background check (including fingerprinting for a criminal history records check), information processing (preparation of redactions or review of redacted documents), and readiness inspections. |
| 25 | If NRC staff finds no ''need,'' ''need to know,'' or likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access. |
| 30 | Deadline for NRC staff reply to motions to reverse NRC staff determination(s). |
| 40 | (Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI. |
| 190 | (Receipt +180) If NRC staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC staff to file motion for Protective Order and draft Non-disclosure Affidavit (or to make a determination that the proposed recipient of SGI is not trustworthy or reliable). Note: Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. |
| 205 | Deadline for petitioner to seek reversal of a final adverse NRC staff determination either before the presiding officer or another designated officer. |
| A | If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff. |
| A + 3 | Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI and/or SGI consistent with decision issuing the protective order. |

[6] As of October 15, 2007, the NRC's final ''E-Filing Rule'' became effective. See Use of Electronic Submissions in Agency Hearings (72 FR 49139; Aug. 28, 2007). Requesters should note that the filing requirements of that rule apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI/SGI requests submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI) AND SAFEGUARDS INFORMATION (SGI) IN THIS PROCEEDING—Continued

| Day | Event/Activity |
|---|---|
| A + 28 | Deadline for submission of contentions whose development depends upon access to SUNSI and/or SGI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline. |
| A + 53 | (Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI and/or SGI. |
| A + 60 | (Answer receipt +7) Petitioner/Intervenor reply to answers. |
| B | Decision on contention admission. |

[FR Doc. E8–28949 Filed 12–8–08; 8:45 am]
BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[DOCKET NO. 030–31474]**

## Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment to Byproduct Materials License No. 06–28473–01, for Termination of the License and Unrestricted Release of the Neurogen Corporation's Facility in Branford, CT

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Issuance of Environmental Assessment and Finding of No Significant Impact for License Amendment.

**FOR FURTHER INFORMATION CONTACT:** Betsy Ullrich, Senior Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406; telephone (610) 337–5040; fax number (610) 337–5268; or by e-mail: *Elizabeth.Ullrich@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Byproduct Materials License No. 06–28473–01. This license is held by Neurogen Corporation (the Licensee), for its Neurogen Branford facility (the Facility), located on Northeast Industrial Road in Branford, Connecticut. Issuance of the amendment would authorize release of the Facility for unrestricted use and termination of the NRC license. The Licensee requested this action in a letter dated September 1, 2008. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, Code of Federal Regulations (CFR), Part 51 (10 CFR part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The amendment will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register**.

### II. Environmental Assessment

*Identification of Proposed Action*

The proposed action would approve the Licensee's September 1, 2008, license amendment request, resulting in release of the Facility for unrestricted use and the termination of its NRC materials license. License No. 06–28473–01 was issued on May 8, 1990, pursuant to 10 CFR part 30, and has been amended periodically since that time. This license authorized the Licensee to use unsealed byproduct material for purposes of conducting research and development activities on laboratory bench tops and in hoods.

The Facility is situated on 8.8 acres, and consists of four one- and two-story buildings located at 15, 35, and 45 Northeast Industrial Road. The buildings contain approximately 132,200 square feet of office space and laboratories. The Facility is located in a mixed industrial/commercial area. Within the Facility, use of licensed materials was confined to 15 areas: Laboratories 055, 071, 073, 215, 313, 314, 315, 316, 320, 335, 362, and 662, used for research activities; and Rooms 134 and 361, used for low-level radioactive waste storage.

In March 2008, the Licensee ceased licensed activities and initiated a survey and decontamination of the Facility. Based on the Licensee's historical knowledge of the site and the conditions of the Facility, the Licensee determined that only routine decontamination activities, in accordance with their NRC-approved, operating radiation safety procedures, were required. The Licensee was not required to submit a decommissioning plan to the NRC because worker cleanup activities and procedures are consistent with those approved for routine operations. The Licensee conducted surveys of the Facility and provided information to the NRC to demonstrate that it meets the criteria in Subpart E of 10 CFR part 20 for unrestricted release and for license termination.

*Need for the Proposed Action*

The Licensee has ceased conducting licensed activities at the Facility, and seeks the unrestricted use of its Facility and the termination of its NRC materials license. Termination of its license would end the Licensee's obligation to pay annual license fees to the NRC.

*Environmental Impacts of the Proposed Action*

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclides with half-lives greater than 120 days: Hydrogen-3 and carbon-14. Prior to performing the final status survey, the Licensee conducted decontamination activities, as necessary, in the areas of the Facility affected by these radionuclides. The Licensee conducted a final status survey between March 28 and August 11, 2008. This survey covered the 15 areas where licensed materials were used or stored. The final status survey report was attached to the Licensee's amendment request dated September 1, 2008. The Licensee elected to demonstrate compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402 by using the screening approach described in NUREG–1757, ''Consolidated NMSS Decommissioning Guidance,'' Volume 2. The Licensee used the radionuclide-specific derived concentration guideline levels (DCGLs), developed there by the NRC, which comply with the dose criterion in 10 CFR 20.1402. These DCGLs define the maximum amount of residual radioactivity on building surfaces, equipment, and materials, and in soils, that will satisfy the NRC requirements in Subpart E of 10 CFR

part 20 for unrestricted release. The Licensee's final status survey results were below these DCGLs and are in compliance with the As Low As Reasonably Achievable (ALARA) requirement of 10 CFR 20.1402. The NRC thus finds that the Licensee's final status survey results are acceptable.

Based on its review, the staff has determined that the affected environment and any environmental impacts associated with the proposed action are bounded by the impacts evaluated by the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities'' (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. No such hazards or impacts to the environment were identified. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use and the termination of the NRC materials license is in compliance with 10 CFR 20.1402. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will not have a significant effect on the quality of the human environment.

*Environmental Impacts of the Alternatives to the Proposed Action*

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Licensee's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release and for license termination. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

*Conclusion*

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

*Agencies and Persons Consulted*

NRC provided a draft of this Environmental Assessment to the State of Connecticut Department of Environmental Protection (DEP) for review on October 9, 2008. On November 6, 2008, DEP responded by e-mail. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

## III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

## IV. Further Information

Documents related to this action, including the application for license amendment and supporting documentation, are available electronically at the NRC(s Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. Letter dated September 1, 2008, with ''Radiological Assessment Report, Neurogen Corporation, Northeast Industrial Road, Branford, CT 06504,'' dated August 26, 2008;
2. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance;''
3. Title 10, Code of Federal Regulations, Part 20, Subpart E, ''Radiological Criteria for License Termination;''
4. Title 10, Code of Federal Regulations, Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions;'' and
5. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities.''

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at 475 Allendale Road, King of Prussia, Pennsylvania this 2nd day of December 2008.

For the Nuclear Regulatory Commission.

**James Dwyer,**

*Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.*

[FR Doc. E8–29083 Filed 12–8–08; 8:45 am]

BILLING CODE 7590–01–P

---

## NUCLEAR REGULATORY COMMISSION

### Draft Regulatory Guide: Issuance, Availability

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance and Availability of Draft Regulatory Guide, DG–1203.

**FOR FURTHER INFORMATION CONTACT:** Syed K. Shaukat, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: (301) 251–7646; e-mail to *Syed.Shaukat@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft guide in the agency's ''Regulatory Guide'' series. This series

was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide, entitled, ''Containment Performance for Pressure Loads,'' is temporarily identified by its task number, DG–1203, which should be mentioned in all related correspondence. This guide describes methods that the staff of the NRC considers acceptable for demonstrating containment performance in nuclear power plants, in accordance with regulatory requirements and Commission's performance goals for pressure loadings of containment structures. To meet these objectives, the NRC has developed formal regulatory requirements and has established several performance goals related to evaluating the maximum internal pressure capacity.

**II. Further Information**

The NRC staff is soliciting comments on DG–1203. Comments may be accompanied by relevant information or supporting data, and should mention DG–1203 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS). Personal information will not be removed from your comments. You may submit comments by any of the following methods:

1. *Mail comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

2. *E-mail comments to: nrcrep.resource@nrc.gov.*

3. *Hand-deliver comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

4. *Fax comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about DG–1203 may be directed to Syed K. Shaukat at (301) 251–7646 or by e-mail to *Syed.Shaukat@nrc.gov.*

Comments would be most helpful if received by February 9, 2009. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before February 9, 2009. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of DG–1203 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/.* Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession No. ML082050539.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 1st day of December 2008.

For the Nuclear Regulatory Commission.

**Andrea D. Valentin,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. E8–29099 Filed 12–8–08; 8:45 am]

BILLING CODE 7590–01–P

---

## NUCLEAR REGULATORY COMMISSION

### Draft Regulatory Guide: Issuance, Availability

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance and Availability of Draft Regulatory Guide (DG)–1189.

**FOR FURTHER INFORMATION CONTACT:** John Voglewede, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 251–7555 or e-mail to *John.Voglewede@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide (DG), entitled, ''An Acceptable Model and Related Statistical Methods for the Analysis of Fuel Densification,'' is temporarily identified by its task number, DG–1189, which should be mentioned in all related correspondence. DG–1189 is proposed Revision 2 of Regulatory Guide 1.126.

This guide describes an analytical model and related assumptions and procedures that the staff of the NRC considers acceptable for predicting the effects of fuel densification in light-water-cooled nuclear power reactors. To meet these objectives, the guide describes statistical methods related to product sampling that will ensure that this and other approved analytical models will adequately describe the effects of densification for each initial core and reload fuel quantity produced.

**II. Further Information**

The NRC staff is soliciting comments on DG–1189. Comments may be accompanied by relevant information or supporting data and should mention DG–1189 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS).

Personal information will not be removed from your comments. You may submit comments by any of the following methods:

1. *Mail comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

2. *E-mail comments to: nrcrep.resource@nrc.gov.*

3. *Hand-deliver comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

4. *Fax comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about DG–1189 may be directed to the

NRC contact, John Voglewede at (301) 251–7555 or e-mail to *John.Voglewede@nrc.gov*.

Comments would be most helpful if received by February 9, 2009. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of DG–1189 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/*. Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession No. ML081700257.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov*.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 2d day of December 2008.

For the Nuclear Regulatory Commission.

**Andrea D. Valentin,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. E8–29100 Filed 12–8–08; 8:45 am]

**BILLING CODE 7590–01–P**

---

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–289]**

## Amergen Energy Company, LLC, Three Mile Island Nuclear Station, Unit 1; Notice of Availability of the Draft Supplement 37 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, and Public Meeting for the License Renewal of Three Mile Island Nuclear Station, Unit 1

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC, Commission) has published a draft plant-specific supplement to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS), NUREG–1437, regarding the renewal of operating license DPR–50 for an additional 20 years of operation for Three Mile Island Nuclear Station, Unit 1 (TMI–1). TMI–1 is located in Londonderry Township in Dauphin County, Pennsylvania, on the northern end of Three Mile Island near the eastern shore of the Susquehanna River. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

The draft Supplement 37 to the GEIS is publicly available at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible at *http://adamswebsearch.nrc.gov/dologin.htm*. The Accession Number for the draft Supplement 37 to the GEIS is ML083250417. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail at *pdr@nrc.gov*. In addition, the following three locations have agreed to make the draft supplement to the GEIS available for public inspection: Londonderry Township Municipal Building, 783 South Geyers Church Road, Middletown, PA 17057; Middletown Public Library, 20 North Catherine Street, Middletown, PA 17057; and Penn State Harrisburg Library, 351 Olmsted Drive, Middletown, PA 17057.

Any interested party may submit comments on the draft supplement to the GEIS for consideration by the NRC staff. To be considered, comments on the draft supplement to the GEIS and the proposed action must be received by March 4, 2009; the NRC staff is able to ensure consideration only for comments received on or before this date. Comments received after the due date will be considered only if it is practical to do so. Written comments on the draft supplement to the GEIS should be sent to: Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Comments may be hand-delivered to the NRC at 11545 Rockville Pike, Room T–6D59, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Electronic comments may be submitted to the NRC by e-mail at *ThreeMileIslandEIS@nrc.gov*. All comments received by the Commission, including those made by Federal, State, local agencies, Native American Tribes, or other interested persons, will be made available electronically at the Commission's PDR in Rockville, Maryland, and through ADAMS. The NRC staff will hold public meetings to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. The public meetings will be held on January 28, 2009, at The Elks Theatre, 4 West Emaus Street, Middletown, PA 17057. There will be two sessions to accommodate interested parties. The first session will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second session will convene at 7 p.m. with a repeat of the overview portions of the afternoon meeting, and will continue until 10 p.m., as necessary. Both meetings will be transcribed and will include: (1) A presentation of the contents of the draft plant-specific supplement to the GEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may pre-register to attend or present oral comments at the meeting by contacting Ms. Sarah Lopas, the NRC Environmental Project Manager at 1–800–368–5642, extension 1147, or by e-mail at *ThreeMileIslandEIS@nrc.gov*, no later than Monday, January 26, 2009. Members of the public may also register to provide oral comments within 15 minutes of the start of each session. Individual, oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Ms. Lopas' attention no later than January 14, 2009, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sarah Lopas, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Mail Stop O–11F1, Washington, DC 20555–0001. Ms.

Lopas may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 3rd day of December, 2008.

For the Nuclear Regulatory Commission.

**Samson Lee,**

*Deputy Director, Division of License Renewal, Office of Nuclear Reactor Regulation.*

[FR Doc. E8–29078 Filed 12–8–08; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–280 and 50–281]**

## Virginia Electric and Power Company; Surry Power Station, Unit Nos. 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, for Renewed Facility Operating License No. DPR–32, and Renewed Facility Operating License No. DPR–37 issued to Virginia Electric and Power Company (the licensee), for operation of the Surry Power Station, Unit Nos. 1 and 2 (Surry 1 and 2), located in Surry County. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

### Environmental Assessment

*Identification of the Proposed Action*

The proposed action would revise TS Section 5.0, ''Design Features,'' to delete certain design details and descriptions included in TS 5.0 that are already contained in the Updated Final Safety Analysis Report or are redundant to existing TS requirements, and are not required to be included in the TSs by Title 10 of the *Code of Federal Regulations* (10 CFR), Part 50, Section 50.36(c)(4). The proposed change also revises the format of, and incorporates design descriptions into, TS 5.0 consistent with the content and format of NUREG–1431, ''Standard Technical Specifications, Westinghouse Plants,'' to the extent practical. A minor editorial change is proposed to address a previously deleted paragraph.

The proposed action is in accordance with the licensee's application dated April 2, 2008.

*The Need for the Proposed Action*

The proposed action allows the licensee to remove redundant or obsolete information from Technical Specification Section 5.0, ''Design Features.'' The proposed change would also correct a TS numbering discrepancy introduced by a previous license amendment.

*Environmental Impacts of the Proposed Action*

The NRC has completed its safety evaluation of the proposed action and concludes that (1) There is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the Commission's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or the health and safety of the public.

The details of the staff's safety evaluation will be provided in the license amendment that will be issued as part of the letter to the licensee approving the license amendment.

The proposed action will not significantly increase the probability or consequences of accidents. No changes are being made in the types of effluents that may be released offsite. There is no significant increase in the amount of any effluent released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential non-radiological impacts, the proposed action does not have a potential to affect any historic and cultural resources. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

*Alternative Use of Resources*

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for Surry 1 and 2, NUREG–1766, dated December 2002 and Final Supplemental Environmental Impact Statement (NUREG–1437 Supplement 6) dated November 2002.

Agencies and Persons Consulted

In accordance with its stated policy, on November 20, 2008, the staff consulted with the Virginia State official, Karen Remley of the Virginia Department of Health, regarding the environmental impact of the proposed action. The State official had no comments.

### Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated April 2, 2008. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 2nd day of December 2008.

For the Nuclear Regulatory Commission.

**John Stang,**

*Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. E8–29101 Filed 12–8–08; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

## Sunshine Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATES:** Weeks of December 8, 15, 22, 29, 2008; January 5, 12, 2009.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

*Week of December 8, 2008*

Tuesday, December 9, 2008

9:25 a.m. Affirmation Session (Public Meeting) (Tentative)

a. Final Rule—Power Reactor Security Requirements (RIN 3150–AG63) (Tentative)

b. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), re Appeal of Order Striking WestCAN's Request for Hearing (July 31, 2008) (Tentative)

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

9:30 a.m. Briefing on Equal Employment Opportunity (EEO) and Small Business Programs (Public Meeting) (Contact: Sandy Talley, 301–415–8059).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Thursday, December 11, 2008

9:30 a.m. Briefing on Uranium Recovery—Part 1 (Public Meeting).

1:30 p.m. Briefing on Uranium Recovery—Part 2 (Public Meeting) (Contact for both parts: Dominick Orlando, 301–415–6749).

Both parts of this meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Friday, December 12, 2008

9:30 a.m. Discussion of Management Issues (Closed—Ex. 2).

*Week of December 15, 2008—Tentative*

Monday, December 15, 2008

1 p.m. Discussion of Management Issues (Closed—Ex. 2).

Wednesday, December 17, 2008

2 p.m. Briefing on Threat Environment Assessment (Closed—Ex. 1).

*Week of December 22, 2008—Tentative*

There are no meetings scheduled for the week of December 22, 2008.

*Week of December 29, 2008—Tentative*

There are no meetings scheduled for the week of December 29, 2008.

*Week of January 5, 2009—Tentative*

There are no meetings scheduled for the week of January 5, 2009.

*Week of January 12, 2009—Tentative*

There are no meetings scheduled for the week of January 12, 2009.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *darlene.wright@nrc.gov*.

Dated: December 4, 2008.

**Rochelle C. Bavol,**

*Office of the Secretary.*

[FR Doc. E8–29183 Filed 12–5–08; 11:15 am]

BILLING CODE 7590–01–P

## OFFICE OF PERSONNEL MANAGEMENT

### Excepted Service

**AGENCY:** U.S. Office of Personnel Management (OPM).

**ACTION:** Notice.

**SUMMARY:** This gives notice of OPM decisions granting authority to make appointments under Schedules A, B, and C in the excepted service as required by 5 CFR 6.6 and 213.103.

**FOR FURTHER INFORMATION CONTACT:** M. Lamary, Group Manager, Executive Resources Services Group, Center for Human Resources, Division for Human Capital Leadership and Merit System Accountability, 202–606–2246.

**SUPPLEMENTARY INFORMATION:** Appearing in the listing below are the individual authorities established under Schedules A, B, and C between October 1, 2008, and October 31, 2008. Future notices will be published on the fourth Tuesday of each month, or as soon as possible thereafter. A consolidated listing of all authorities as of September 30 is published each year.

**Schedule A**

No Schedule A appointments were approved for October 2008.

**Schedule B**

No Schedule B appointments were approved for October 2008.

**Schedule C**

The following Schedule C appointments were approved during October 2008.

*Section 213.3303 Executive Office of the President*

Office of Management and Budget

BOGS80013 Deputy General Counsel to the General Counsel and Senior Policy Advisor. Effective October 03, 2008.

*Section 213.3304 Department of State*

DSGS69756 Foreign Affairs Officer. Effective October 10, 2008.

DSGS69757 Protocol Assistant to the Foreign Affairs Officer (Visits). Effective October 16, 2008.

*Section 213.3311 Department of Homeland Security*

DMGS00764 Director of Private Sector Initiatives to the Director of External Affairs and Communications. Effective October 08, 2008.

DMGS00738 Deputy Director of Advance and Travel to the Director of Scheduling and Advance. Effective October 10, 2008.

DMGS00690 Advance Representative to the Director of Scheduling and Advance. Effective October 31, 2008.

*Section 213.3315 Department of Labor*

DLGS60171 Advance Representative to the Director of Planning, Scheduling, and Advance. Effective October 16, 2008.

DLGS60269 Director, Office of Faith Based Community Initiatives to the Deputy Secretary of Labor. Effective October 16, 2008.

*Section 213.3316 Department of Health and Human Services*

DHGS60131 Confidential Assistant to the Special Assistant to the Assistant Secretary for Health. Effective October 03, 2008.

DHGS60399 Special Assistant to the Assistant Secretary for Children and Families. Effective October 03, 2008.

*Section 213.3317 Department of Education*

DBGS00672 Confidential Assistant to the White House Liaison. Effective October 10, 2008.

*Section 213.3323 Federal Communications Commission*

FCGS80008 Special Assistant to the Chairman. Effective October 15, 2008.

*Section 213.3325 United States Tax Court*

JCGS60081 Chambers Administrator to the Chief Judge. Effective October 01, 2008.

CGS60058 Chambers Administrator to the Chief Judge. Effective October 03, 2008.

*Section 213.3327 Department of Veterans Affairs*

DVGS60058 Special Assistant to the Assistant Secretary for Public and Intergovernmental Affairs. Effective October 31, 2008.

DVGS60107 Legislative Assistant to the Assistant Secretary for Congressional and Legislative Affairs. Effective October 31, 2008.

*Section 213.3331 Department of Energy*

DEGS00679 Assistant Press Secretary to the Director, Public Affairs. Effective October 10, 2008.

*Section 213.3332 Small Business Administration*

SBGS00576 Deputy Assistant Administrator for the Office of Communications and Public Liaison to the Assistant Administrator for Communications and Public Liaison. Effective October 16, 2008.

*Section 213.3337 General Services Administration*

GSGS00170 Special Assistant to the Chief of Staff. Effective October 10, 2008.

*Section 213.33 Merit System Protection Board*

MPGS60014 Counsel to the Chairman. Effective October 07, 2008.

*Section 213.338 National Endowment for the Humanities*

NHGS90082 Special Assistant to the Chairman and Director of Government and Community Relations to the Deputy Chairman. Effective October 10, 2008.

*Section 213.3384 Department of Housing and Urban Development*

UGS60190 Special Policy Advisor to the Assistant Secretary for Housing, Federal Housing Commissioner. Effective October 03, 2008.

*Section 213.3394 Department of Transportation*

DTGS60364 Special Assistant for Transportation Policy to the Assistant Secretary for Transportation Policy. Effective October 10, 2008.

DTGS60357 Special Assistant to the White House Liaison and Scheduling and Advance to the Director for Scheduling and Advance. Effective October 24, 2008.

DTGS60311 Special Assistant to the Chief of Staff. Effective October 31, 2008.

**Authority:** 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

Office of Personnel Management.

**Howard Weizmann,**

*Deputy Director.*

[FR Doc. E8–29067 Filed 12–8–08; 8:45 am]

BILLING CODE 6325–39–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59044; File No. SR–NSCC–2007–08]**

## Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Amend Membership Disqualification Criteria Rules

December 3, 2008.

### I. Introduction

On April 30, 2007, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commissio (''Commission'') and on February 7, 2008, and on March 18, 2008, amended proposed rule change SR–NSCC–2007–08 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on July 18, 2008.[2] The Commission received no comment letters. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description

The purpose of this filing is to amend the NSCC rules as they relate to membership disqualification criteria in an effort to create more uniformity between the rules of NSCC and the rules of NSCC's affiliates, the Fixed Income Clearing Corporation (''FICC'') and The Depository Trust Company (''DTC'').

Currently, Addendum S of NSCC's rules sets forth its policy as to standards relating to competence for membership. Addendum S includes both objective and subjective factors that may be considered by NSCC in its evaluation of an applicant or of the continued membership of a member. Going forward, NSCC seeks to amend its rules to only include those disqualification criteria that can be objectively monitored by Risk Management staff. For example, NSCC proposes to delete from its rules specific references to criteria that may not be reported in a regulatory background check, such as an entity being subject to ''heightened supervision'' by a regulatory body. NSCC is proposing to include in its rules a general provision to permit consideration of events with respect to an applicant or member that may not be expressly mentioned but that may impact an applicant's or member's suitability as a member.

In addition, pursuant to NSCC's current disqualification criteria, NSCC can consider the criteria with respect to a person or entity that has ''significant managerial responsibility'' over the applicant or member. Because it is not easily ascertainable as to what entities or individuals have ''significant managerial responsibility'' over a particular entity, NSCC is proposing to amend these provisions in the rules so that they are consistent with its internal surveillance procedures. Going forward, NSCC will extend the reach of certain disqualification criteria to persons and entities acting as ''controlling management,'' which will include those officers of the entity that are currently screened by Risk Management staff pursuant to internal procedures.

Specifically, NSCC's disqualification criteria will now include:

(i) An applicant or member being subject to statutory disqualification as defined in Section 3(a)(39) of that Act.[3]

(ii) An applicant, member, or its controlling management making a misstatement of material facts; committing fraudulent acts; or being

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 58123 (July 9, 2008), 73 FR 41390.

[3] While this provision currently exists in the rules, it will be moved within the rules and will be grouped with all other disqualification criteria. The NSCC rules will also provide that applicants and members must notify NSCC if any member of its controlling management is or becomes subject to a statutory disqualification, as defined in Section 3(a)(39) of the Act.

convicted of any of the crimes listed in the rule.

(iii) An applicant, member, or its controlling management being permanently or temporarily enjoined from acting on behalf of a financial institution such as a broker-dealer.

(iv) An applicant or member's suspension or termination from participation in a national securities association, exchange registered under the Exchange Act, a self-regulatory organization, clearing agency, or securities depository.

Pursuant to the proposed change, NSCC will continue to be able to cease to act for a member when any of the factors in sections (i) through (iv) above are present. Addendum S will be struck entirely from the rules, and the listed disqualification criteria will be included in NSCC's proposed Rule 2A ''Initial Membership Requirements.'' [4]

## III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to remove impediments to the perfection of a national system for the prompt and accurate clearance and settlement of securities transactions and are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency.[5] The Commission believes that NSCC's rule change, which refines NSCC's rules and procedures with regard to applicants and members, is consistent with these obligations and in general will protect investors and the public interest.

## IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder. In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–NSCC–2007–08) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[6]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–29037 Filed 12–8–08; 8:45 am]

BILLING CODE 8011–01–P

[4] NSCC has also filed, and the Commission has published notice of, proposed rule change SR–NSCC–2006–17 which seeks to reorganize NSCC's rules related to membership standards and membership requirements. Securities Exchange Act Release No. 58100 (July 3, 2008), 73 FR 39759 (July 10, 2008) [SR–NSCC–2006–17].

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 17 CFR 200.30–3(a)(12).

---

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59039; File No. SR–NYSEArca–2006–21]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data

December 2, 2008.

On May 23, 2006, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (''Proposal'') to establish fees for the receipt and use of certain market data that the Exchange makes available. The Proposal was published for comment in the **Federal Register** on June 9, 2006.[3] On October 12, 2006, the Commission issued an order, by delegated authority, approving the Proposal.[4] On November 6, 2006, NetCoalition (''Petitioner'') submitted a notice, pursuant to Rule 430 of the Commission's Rules of Practice, indicating its intention to file a petition requesting that the Commission review and set aside the Delegated Order.[5] On November 8, 2006, the Exchange submitted a response to the Petitioner's Notice.[6] On November 15, 2006, Petitioner submitted its petition requesting that the Commission review and set aside the Delegated Order.[7] On December 27, 2006, the Commission issued an order: (1) Granting Petitioner's request for the Commission to review the Delegated Order; (2) allowing any party or other person to file a statement in support of or in opposition to the action made by delegated authority; and (3) continuing the effectiveness of the automatic stay provided in Rule 431(e) of the Commission's Rules of Practice.[8] The Commission received 25 comments regarding the Petition.[9]

On June 4, 2008, the Commission published notice of a proposed order (''Draft Order'') approving the NYSE Arca proposed fees to give the public an additional opportunity to comment.[10] The Commission received 16 comments and three economic assessments in response to the Draft Order.

The Commission has considered the Petition, comments, and economic assessments submitted in response to the Proposal, Petition, and Draft Order. For the reasons described below, it is setting aside the earlier action taken by delegated authority and approving the Proposal directly.

**Table of Contents**

I. Introduction
II. Description of Proposal
III. Summary of Comments Received
A. Commenters Opposing the Action by Delegated Authority
1. Need for a Comprehensive Review of Market Data Issues
2. Need for a Cost-Based Justification of Market Data Fees
3. Exchange Act Rule 19b–4 Process
4. Importance of Depth-of-Book Data
5. Lack of Competition in Market Data Pricing
6. Increase in Market Data Revenues
7. Recommended Solutions
B. Commenters Supporting the Action by Delegated Authority
IV. NYSE Arca Responses to Commenters
A. Response to Commenters on Proposal
B. Response to Commenters on Petition
V. Comments on the Draft Order
VI. Discussion
A. Commission Review of Proposals for Distributing Non-Core Data
B. Review of Competitive Forces Applicable to NYSE Arca
1. Competition for Order Flow
2. Availability of Alternatives to ArcaBook Data

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 53952 (June 7, 2006), 71 FR 33496 (June 9, 2006).

[4] Securities Exchange Act Release No. 54597 (October 12, 2006) 71 FR 62029 (October 20, 2006) (''Delegated Order'').

[5] Letter from Markham C. Erikson, Executive Director and General Counsel, NetCoalition, to the Honorable Christopher Cox, Chairman, SEC, dated November 6, 2006 (''Notice'').

[6] Letter from Mary Yeager, Corporate Secretary, NYSE Arca Inc., to the Honorable Christopher Cox, Chairman, SEC, dated November 8, 2006 (''NYSE ARCA Petition Response'').

[7] Petition for Commission Review submitted by Petitioner, dated November 14, 2006 (''Petition'').

[8] Securities Exchange Act Release No. 55011 (December 27, 2006).

[9] The comments on the Petition, as well as the earlier comments on the Proposal, are identified and summarized in section III below. NYSE Arca's responses to the commenters are summarized in section IV below. Comments on the Draft Order are summarized in section V below.

[10] Securities Exchange Act Release No. 57917 (June 4, 2008), 73 FR 32751 (June 10, 2008) (''Draft Order'').

3. Response to Commenters on Competition Issues
4. Response to Economic Assessments of the Draft Order
a. Order Flow and Market Data Competition
b. Substitutes for Depth-of-Book Data
c. Efficacy of Regulatory Alternatives
C. Review of Terms of the Proposal
VII. Conclusion

## I. Introduction

The Commission's Rules of Practice set forth procedures for the review of actions made pursuant to delegated authority. Rule 431(b)(2) provides that the Commission, in deciding whether to accept or decline a discretionary review, will consider the factors set forth in Rule 411(b)(2). One of these factors is whether an action pursuant to delegated authority embodies a decision of law or policy that is important and that the Commission should review.

The Petitioner and commenters raised a number of important issues that the Commission believes it should address directly at this time. In particular, section VI below addresses issues related to the nature of the Commission's review of proposed rule changes for the distribution of ''non-core'' market data, which includes the NYSE Arca data that is the subject of the Proposal. Individual exchanges and other market participants distribute non-core data independently. Non-core data should be contrasted with ''core'' data—the best-priced quotations and last sale information of all markets in U.S.-listed equities that Commission rules require to be consolidated and distributed to the public by a single central processor.[11] Pursuant to the authority granted by Congress under section 11A of the Exchange Act, the Commission requires the self-regulatory organizations (''SROs'') to participate in joint-industry plans for disseminating core data, and requires broker-dealers and vendors to display core data to investors to help inform their trading and order-routing decisions. In contrast, no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.

Price transparency is critically important to the efficient functioning of the equity markets. In 2006, the core data feeds reported prices for more than $39.4 *trillion* in transactions in U.S.-listed equities.[12] In 2006, U.S. broker-dealers earned $21.7 *billion* in commissions from trading in U.S.-listed equities—an amount that does not include any revenues from proprietary trading by U.S. broker-dealers or other market participants.[13] Approximately 420,000 securities industry professionals subscribe to the core data products of the joint-industry plans, while only about 5% of these professionals have chosen to subscribe to the non-core data products of exchanges.[14]

In June 2008, NYSE Arca executed a 16.5% share of trading in U.S.-listed equities.[15] The reasonably projected revenues from the proposed fees for NYSE Arca's non-core data are $8 million per year.[16] Commenters opposing the Proposal claimed that NYSE Arca exercised monopoly power to set excessive fees for its non-core data and recommended that the Commission adopt a ''cost-of-service'' ratemaking approach when reviewing exchange fees for non-core data—an approach comparable to the one traditionally applied to utility monopolies.[17]

In 2005, however, the Commission stated its intention to apply a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.[18] This approach follows the clear intent of Congress in adopting section 11A of the Exchange Act that, whenever possible, competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities. Section VI discusses this market-based approach and applies it in the specific context of the Proposal by NYSE Arca. The Commission is approving the Proposal primarily because NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal. The Commission believes that reliance on competitive forces, whenever possible, is the most effective means to assess whether proposed fees for non-core data meet the applicable statutory requirements.

The Petitioner and commenters discussed and recommended solutions for a wide range of market data issues that were beyond the scope of the Proposal. The Petitioner particularly called attention to the data needs of users of advertiser-supported Internet Web sites, many of whom are individual retail investors. In this regard, the Commission recognizes that exchanges have responded by developing innovative new data products specifically designed to meet the reference data needs and economic circumstances of these Internet users.[19]

As noted in section III.A.1 below, some commenters also suggested that, pending a comprehensive resolution of all market data issues (including those related to core data), the Commission should impose a moratorium on all proposed rule changes related to market data. The Commission recognizes the importance of many of the issues raised by commenters relating to core data that are beyond the scope of the Proposal. It is continuing to consider these issues, and others, as part of its ongoing review of SRO structure, governance, and transparency.[20] The Commission does not, however, believe that imposing a moratorium on the review of proposed rule changes related to market data products and fees would be appropriate or consistent with the Exchange Act. A primary Exchange Act objective for the national market system is to promote fair competition.[21] Failing to act on the proposed rule changes of particular exchanges would be inconsistent with this Exchange Act objective, as well as with the requirements pertaining to SRO rule filings more generally. Accordingly, the Commission will continue to act on proposed rule changes for the distribution of market data in accordance with the applicable Exchange Act requirements.

## II. Description of Proposal

Through NYSE Arca, LLC, the equities trading facility of NYSE Arca Equities, Inc., the Exchange makes available on a real-time basis ArcaBook℠, a compilation of all limit orders resident in the NYSE Arca limit order book. In addition, the Exchange makes available real-time information relating to transactions and limit orders in debt securities that are traded

[11] *See* section VI.A below for a fuller discussion of the arrangements for distributing core and non-core data.

[12] *Source:* ArcaVision (available at *http://www.arcavision.com*).

[13] Frank A. Fernandez, Securities Industry and Financial Markets Association Research Report, ''Securities Industry Financial Results: 2006'' (May 2, 2006) (''SIFMA Research Report''), at 7–9, 21.

[14] *See* note 233 below and accompanying text.

[15] *See* note 205 below and accompanying text.

[16] *See* note 318 below and accompanying text.

[17] The commenters' views are summarized in section III.A.2 below.

[18] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37566–37568 (June 29, 2005) (''Regulation NMS Release'').

[19] *See* Securities Exchange Act Release No. 57966 (June 16, 2008), 73 FR 35182 (June 20, 2008) (File No. SR–NYSE–2007–04) (NYSE Real-Time Reference Prices); Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060) (Nasdaq Last Sale Data Feeds).

[20] *See* Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (proposed rules addressing SRO governance and transparency); Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) (''Concept Release Concerning Self-Regulation'').

[21] Section 11A(a)(1)(C)(ii) of the Exchange Act, 15 U.S.C. 78k–1(a)(1)(C)(ii).

through the Exchange's facilities. The Exchange makes ArcaBook and the bond transaction and limit order information (collectively, ''NYSE Arca Data'') available to market data vendors, broker-dealers, private network providers, and other entities by means of data feeds. Currently, the Exchange does not charge fees for the receipt and use of NYSE Arca Data.

The Exchange's proposal would establish fees for the receipt and use of NYSE Arca Data. Specifically, the Exchange proposes to establish a $750 per month access fee for access to the Exchange's data feeds that carry the NYSE Arca Data. In addition, the Exchange proposes to establish professional and non-professional device fees for the NYSE Arca Data.[22] For professional subscribers, the Exchange proposes to establish a monthly fee of $15 per device for the receipt of ArcaBook data relating to exchange-traded funds (''ETFs'') and those equity securities for which reporting is governed by the CTA Plan (''CTA Plan and ETF Securities'') and a monthly fee of $15 per device for the receipt of ArcaBook data relating to those equity securities, excluding ETFs, for which reporting is governed by the Nasdaq UTP Plan (''Nasdaq UTP Plan Securities'').[23] For non-professional subscribers, the Exchange proposes to establish a monthly fee of $5 per device for the receipt of ArcaBook data relating to CTA Plan and ETF Securities and a monthly fee of $5 per device for the receipt of ArcaBook data relating to Nasdaq UTP Plan Securities.[24]

The Exchange also proposes a maximum monthly payment for device fees paid by any broker-dealer for non-professional subscribers that maintain brokerage accounts with the broker-dealer.[25] For 2006, the Exchange proposed a $20,000 maximum monthly payment. For the months falling in a subsequent calendar year, the maximum monthly payment will increase (but not decrease) by the percentage increase (if any) in the annual composite share volume[26] for the calendar year preceding that subsequent calendar year, subject to a maximum annual increase of five percent.

Lastly, the Exchange proposes to waive the device fees for ArcaBook data during the duration of the billable month in which a subscriber first gains access to the data.

## III. Summary of Comments Received

The Commission received four comments from three commenters regarding the Proposal after it was published for comment.[27] NYSE Arca responded to the comments.[28] After granting the Petition, the Commission received 25 comments from 17 commenters regarding the approval of the Proposal by delegated authority.[29] Nine commenters urged the Commission to set aside the action by delegated authority,[30] and five commenters supported the action by delegated authority.[31] One commenter expressed no views regarding the specifics of the Proposal, but urged the Commission to address market data fees as part of a more comprehensive modernization of SROs in light of recent market structure developments.[32] NYSE Arca responded to the comments submitted after the Commission granted the Petition.[33] Three commenters submitted additional comments

[22] In differentiating between professional and non-professional subscribers, the Exchange proposes to apply the same criteria used by the Consolidated Tape Association Plan (''CTA Plan'') and the Consolidated Quotation Plan (''CQ Plan'') for qualification as a non-professional subscriber. The two plans, which have been approved by the Commission, are available at *http://www.nysedata.com*.

[23] The ''Nasdaq UTP Plan'' is the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis. The plan, which has been approved by the Commission, is available at *http://www.utpdata.com*.

[24] There will be no monthly device fees for limit order and last sale price information relating to debt securities traded through the Exchange's facilities.

[25] Professional subscribers may be included in the calculation of the monthly maximum amount so long as: (1) Nonprofessional subscribers comprise no less than 90% of the pool of subscribers that are included in the calculation; (2) each professional subscriber that is included in the calculation is not affiliated with the broker-dealer or any of its affiliates (either as an officer, partner or employee or otherwise); and (3) each such professional subscriber maintains a brokerage account directly with the broker-dealer (that is, with the broker-dealer rather than with a correspondent firm of the broker-dealer).

[26] ''Composite share volume'' for a calendar year refers to the aggregate number of shares in all securities that trade over NYSE Arca facilities for that calendar year.

[27] Web comment from Steven C. Spencer, dated June 18, 2006 (''Spencer Letter''); letter from Markham C. Erickson, Executive Director and General Counsel, NetCoalition, to Christopher Cox, Chairman, Commission, dated August 9, 2006 (''NetCoalition I''); and letters from Gregory Babyak, Chairman, Market Data Subcommittee of the Securities Industry Association (''SIA'') Technology and Regulation Committee, and Christopher Gilkerson, Chairman, SIA Technology and Regulation Committee, to Nancy Morris, Secretary, Commission, dated June 30, 2006 (''SIFMA I'') and August 18, 2006 (''SIFMA II''). The SIA has merged into the Securities Industry and Financial Markets Association (''SIFMA'').

[28] Letters from Janet Angstadt, Acting General Counsel, NYSE Arca, to Nancy J. Morris, Secretary, Commission, dated July 25, 2006 (''NYSE Arca Response I''), and August 25, 2006 (''NYSE Arca Response II'').

[29] Letters from Christopher Gilkerson and Gregory Babyak, Co-Chairs, Market Data Subcommittee of SIFMA Technology and Regulation Committee, dated February 14, 2008 (''SIFMA VIII''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated February 7, 2007 (''SIFMA VII''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated January 11, 2008 (''NetCoalition V''); The Honorable Paul E. Kanjorski, Chairman, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, dated December 12, 2007 (''Kanjorski Letter''); Melissa MacGregor, Vice President and Assistant General Counsel, SIFMA, dated November 7, 2007 (''SIFMA VI''); The Honorable Richard H. Baker, Member of Congress, dated October 1, 2007 (''Baker Letter''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated September 14, 2007 (''NetCoalition IV''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated August 1, 2007 (''SIFMA V''); Jeffrey Davis, Vice President and Deputy General Counsel, The Nasdaq Stock Market (''Nasdaq''), dated May 18, 2007 (''Nasdaq Letter''); David T. Hirschmann, Senior Vice President, Chamber of Commerce of the United States of America, dated May 3, 2007 (''Chamber of Commerce Letter''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated March 6, 2007 (''NetCoalition III''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated March 5, 2007 (''SIFMA IV''); Joseph Rizzello, Chief Executive Officer, National Stock Exchange (''NSX''), dated February 27, 2007 (''NSX Letter''); Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association (''ABA''), dated February 12, 2007 (''ABA Letter''); James A. Forese, Managing Director and Head of Global Equities, Citigroup Global Markets Inc. (''Citigroup''), dated February 5, 2007 (''Citigroup Letter''); Meyer S. Frucher, Chairman and Chief Executive Officer, PHLX, dated January 31, 2007 (''PHLX Letter''); Amex, Boston Stock Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, ISE, The Nasdaq Stock Market, NYSE, NYSE Arca, and Philadelphia Stock Exchange (''PHLX'') (collectively, the ''Exchange Market Data Coalition''), dated January 26, 2007 (''Exchange Market Data Coalition Letter''); Oscar N. Onyema, Senior Vice President and Chief Administrative Officer, American Stock Exchange LLC (''Amex''), dated January 18, 2007 (''Amex Letter''); Sanjiv Gupta, Bloomberg, dated January 17, 2007 (''Bloomberg Letter''); Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, dated January 17, 2007 (''Financial Services Roundtable Letter''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated January 17, 2007 (''NetCoalition II''); Michael J. Simon, Secretary, International Securities Exchange, LLC (''ISE''), dated January 17, 2007 (''ISE Letter''); Jeffrey T. Brown, Senior Vice President, Office of Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (''Schwab''), dated January 17, 2007 (''Schwab Letter''); and Ira Hammerman, Senior Managing Director and General Counsel, SIFMA, dated January 17, 2007 (''SIFMA III''); and letter from David Keith, Vice President, Web Products and Solutions, The Globe and Mail, to the Honorable Christopher Cox, Chairman, Commission, dated January 17, 2007 (''Globe and Mail Letter'').

[30] SIFMA III and IV, and Bloomberg, Chamber of Commerce, Citigroup, Financial Services Roundtable, Globe and Mail, NetCoalition, NSX, and Schwab Letters.

[31] Amex, Exchange Market Data Coalition, ISE, Nasdaq, and PHLX Letters.

[32] ABA Letter at 1.

[33] Letter from Mary Yeager, Corporate Secretary, NYSE Arca, to the Honorable Christopher Cox, Chairman, Commission, dated February 6, 2007 (''NYSE Arca Response III'').

addressing NYSE Arca's response and arguments raised by other commenters, or provided additional information.[34]

The comments submitted in connection with the Proposal and the Petition are summarized in this section. NYSE Arca's responses are summarized in section IV below.

*A. Commenters Opposing the Action by Delegated Authority*

1. Need for a Comprehensive Review of Market Data Issues

Several commenters seeking a reversal of the staff's approval of the Proposal by delegated authority believed that recent regulatory and market structure developments warrant a broader review of market data fees and of the Commission's procedures for reviewing and evaluating market data proposals.[35] According to these commenters, these developments include the transformation of most U.S. securities exchanges into for-profit entities; the increasing importance of single-market depth-of-book information following decimalization and the adoption of Regulation NMS; and the absence of competitive forces that could limit the fees that an exchange may charge for its depth-of-book data. Some commenters believed that the Commission should consider not only market data fees, but also the contract terms governing the use of an exchange's market data, which may impose additional costs and include restrictions on the use of the data.[36]

In light of the significance and complexity of the issues raised, several commenters asked the Commission not only to reverse the staff's action, but also to impose a moratorium on the approval or processing of market data proposals while the Commission conducts a broader review of the issues associated with market data, including ''the underlying issues of market structure, market power, transparency, and ease of dissemination and analysis of market data.'' [37]

2. Need for a Cost-Based Justification of Market Data Fees

Several commenters argued that the staff erred in approving the Proposal because NYSE Arca did not provide a cost-based justification for the Proposal's market data fees or other evidence to demonstrate that its proposed fees meet the applicable Exchange Act standards.[38] They asserted that the Exchange Act requires that an exchange's market data fees be ''fair and reasonable,'' ''not unreasonably discriminatory,'' and ''an equitable allocation of costs,'' [39] and that the Commission apply a cost-based standard in evaluating market data fees.[40] One commenter argued that market data fees ''must be reasonably related to market data costs'' and that the Commission should require exchanges to identify and substantiate their market data costs in their market data fee proposals.[41]

Several commenters argued that the Commission itself has recognized the need for a cost-based justification of market data fees.[42] They believed that the Commission's position in its 1999 market information concept release [43] ''underscores the fundamental role that a rigorous cost-based analysis must play in reviewing market data fee filings.'' [44] In particular, these commenters cited the following statement from the release:

> [T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low. The Commission therefore believes that the total amount of market information revenues should remain reasonably related to the cost of market information.[45]

Similarly, a commenter stated that the Commission acknowledged in its Concept Release Concerning Self-Regulation that the amount of market data revenues should be reasonably related to the cost of market information.[46] Another commenter, citing proceedings involving Instinet's challenge to proposed NASD market data fees,[47] argued that the Commission in that case ''emphatically embraced the cost-based approach to setting market data fees * * *,'' and insisted on a strict cost-based justification for the market data fees at issue.[48]

The commenters believed, further, that the costs attributable to market data should be limited to the cost of collecting, consolidating, and distributing the data,[49] and that market data fees should not be used to fund regulatory activities or to cross-subsidize an exchange's competitive operations.[50] One commenter maintained that, in the absence of cost data, the Commission cannot determine whether NYSE Arca uses market data revenues to subsidize competitive activities.[51] In particular, the commenter believed that the Commission must scrutinize the cost justification for NYSE Arca's fees to ''be sure that NYSE Arca is not using its market power in the upstream data market as the exclusive processor for this data * * * to price squeeze its competitors in the downstream transaction market and to cross-subsidize its reduction in transaction fees.'' [52]

One commenter argued that NYSE Arca's proposed fees are not an ''equitable allocation'' of costs among its users and are unreasonably discriminatory because the fees are based on the number of people who view the data. Thus, a broker-dealer with many customers seeking to view

[34] Nasdaq Letter; SIFMA IV, V, and VI; NetCoalition III and IV.

[35] Citigroup Letter at 2; SIFMA III at 10, 26; SIFMA IV at 15. *See also* ABA Letter at 1; Bloomberg Letter at 7–8; NetCoalition I at 2; NetCoalition III at 13. Among other things, the Bloomberg and Citigroup Letters support the recommendations in SIFMA III. Bloomberg Letter at 8 n. 19; Citigroup Letter at 1.

[36] Citigroup Letter at 2; SIFMA III at 23.

[37] Citigroup Letter at 2. *See also* ABA Letter at 3; Financial Services Roundtable Letter at 1; NetCoalition III at 13; Schwab Letter at 1; SIFMA III at 26; SIFMA IV at 15.

[38] Bloomberg Letter at 3; Petition at 5; SIFMA I at 6; SIFMA III at 20.

[39] Schwab Letter at 4; SIFMA III at 19; SIFMA IV at 7.

[40] Bloomberg Letter at 2; NetCoalition II at 3; NetCoalition III at 11; Schwab Letter at 3; SIFMA I at 6; SIFMA III at 16; SIFMA IV at 10.

[41] SIFMA III at 1, 20.

[42] Bloomberg Letter at 2; NetCoalition II at 3; NetCoalition III at 11; Schwab Letter at 3; SIFMA III at 20; SIFMA IV at 10.

[43] Securities Exchange Act Release No. 42208 (December 9, 1999), 64 FR 70613 (December 17, 1999) (''Market Information Concept Release'').

[44] NetCoalition II at 3. *See also* Bloomberg Letter at 2; SIFMA I at 6.

[45] 64 FR at 70627 (cited in Bloomberg Letter at 2; NetCoalition II at 3; NetCoalition III at 11 n. 47; SIFMA III at 1). One commenter maintained that the cost-based analysis requirement is based on Congressional concerns regarding the dangers of exclusive processors, in the context of either consolidated or single-market data. NetCoalition II at 3.

[46] NetCoalition III at 11 n. 47.

[47] Securities Exchange Act Release No. 20874 (April 17, 1984), 49 FR 17640 (April 24, 1984), aff'd sub nom. *NASD, Inc.* v. *SEC*, 802 F.2d 1415 (D.C. Cir. 1986).

[48] SIFMA IV at 10.

[49] Citigroup Letter at 1; SIFMA III at 21. One commenter believed that the Commission ''should create standards that allow producers of market data to recover their costs and make a reasonable profit (*e.g.*, a 10% return), but not an excessive profit.'' Schwab Letter at 6.

[50] SIFMA III at 8; SIFMA IV at 10. The commenter believed that other costs, including member regulation and market surveillance, should be funded by listing, trading, and regulatory fees, rather than market data fees. *See* SIFMA III at 21. Another commenter maintained that funding regulatory activities through an explicit regulatory fee, rather than through market data revenues, ''would be more logical and transparent * * *.'' NSX Letter at 2. *See also* Schwab Letter at 5.

[51] SIFMA IV at 10.

[52] SIFMA IV at 10.

market data pays considerably more for market data than an institution or algorithmic trader that pays only for the data link to its computer systems.[53]

3. Exchange Act Rule 19b–4 Process

One commenter argued that the Proposal fails to satisfy the requirements of Exchange Act Rule 19b–4 and Form 19b–4, because, among other things, the Proposal does not: (1) Explain why NYSE Arca must charge for data that it previously provided free of charge; (2) address the change in circumstances caused by the NYSE's conversion from a member-owned, not-for-profit entity to a shareholder-owned, for-profit entity; (3) address the effect of the fee on retail investors, whom the commenter believes will be denied access to NYSE Arca's data as a result of the fees; (4) explain how making available a faster single-market data feed at a high price, while most investors must rely on slower consolidated market data products, is consistent with the mandates under the Exchange Act for equal access to and transparency in market data; and (5) include the contract terms governing access to and use of NYSE Arca's data or address the administrative costs and burdens that the contract terms impose.[54] Another commenter, citing the Petition, asserted that the Proposal fails to satisfy the requirements of Form 19b–4 because it provides no disclosure regarding the burdens on competition that could result from its proposed fees or a justification for the proposed fees.[55]

Commenters also raised more general concerns regarding the Exchange Act Rule 19b–4 rule filing process as it applies to proposed rule changes relating to market data. In light of the significant policy issues that market data proposals raise, commenters questioned whether such proposals should be eligible to be effective upon filing pursuant to Exchange Act Rule 19b–4(f)(6).[56] One commenter believed that all market data proposals should be subject to notice and comment, and that the Commission should provide a 30-day comment period for such proposals.[57] In addition, the commenter cautioned that the rule filing process should not become a ''rubberstamp'' of an exchange's proposal.[58] One commenter suggested that the Commission narrow its delegation of authority with respect to proposed rule changes to exclude proposals that have generated significant public comment.[59]

4. Importance of Depth-of-Book Data

One commenter maintained that because single-market depth-of-book data products have significant advantages over consolidated top-of-book products in terms of both speed and the depth of interest displayed, many broker-dealers believe that it is prudent to purchase single-market depth-of-book data to satisfy their best execution and Regulation NMS order routing obligations.[60] The commenter noted that NYSE Arca has indicated in its advertising materials that its ArcaBook data feed is approximately 60 times faster than the consolidated data feeds and displays six times the liquidity within five cents of the inside quote.[61] The commenter also maintained that the NYSE has linked its depth-of-book products to best execution by stating that ''NYSE Arca's market data products are designed to improve trade execution.'' [62]

One commenter argued that the central processors that distribute consolidated data have little incentive to invest in modernizing their operations.[63] Another commenter believed that the disparity between faster and more expensive depth-of-book proprietary data feeds and the slower, less costly, and less valuable consolidated data feeds results in a ''two-tiered structure with institutions having access to prices not reasonably available to small investors * * *,'' circumstances that the commenter believed ''recreate the informational advantage that once existed on the physical floors of the open outcry markets.'' [64]

Another commenter believed that depth-of-book information should be considered basic information for retail investors as well as professional investors and that one goal of the National Market System should be to assure that ''all investors * * * whether professional or non-professional * * * have equal access to the same quality information, at a reasonable price, and at the same time.'' [65] Similarly, a commenter believed that retail investors require quotations beyond the national best bid or offer to assess the quality of the executions they receive.[66]

5. Lack of Competition in Market Data Pricing

Commenters argued that there are no effective competitive or market forces that limit what an exchange may charge for its depth-of-book data.[67] Although one commenter acknowledged the argument that competition in the market for liquidity and transactions could serve as a constraint on what exchanges may charge for their data products, the commenter believed that the consolidations of the NYSE with Archipelago and Nasdaq with BRUT and INET have limited this constraint.[68] The commenter also asserted that competition in the market for order execution is not the same as competition in the market for market data, and that an economic analysis must consider the market for market data from the consumer's perspective.[69] Because proprietary market data is a ''sole-source product,'' the commenter believed that no market forces operate on the transaction between an exchange and the consumer of its data.[70] The commenter believed that the unique characteristics of the market for market data—including increased market concentration and market participants' obligation to purchase sole-source proprietary market data to trade effectively—resulted in a ''classic economic market failure * * * that requires comprehensive regulatory intervention to ensure 'fair and reasonable' prices.'' [71] Similarly, another commenter maintained that,

[53] Schwab Letter at 4. The commenter argued that this fee structure ''is a subsidization program whereby exchanges rebate revenue to their favored traders based on market data fees imposed on retail investors.'' *Id.*

[54] SIFMA III at 11–12.

[55] Bloomberg Letter at 3. *See also* Petition at 6–7.

[56] Baker Letter at 1–2; SIFMA III at 22; Bloomberg Letter at 6.

[57] SIFMA III at 22.

[58] SIFMA I at 2 n. 3.

[59] NetCoalition III at 3–4.

[60] SIFMA III at 5–6. The commenter stated that depth-of-book information has become more important because of the reduction in liquidity at the inside quote and the increase in quote volatility since decimalization, and because depth-of-book quotations are likely to become more executable following the implementation of Regulation NMS. SIFMA III at 12–13. Similarly, another commenter maintained that, through Regulation NMS, the Commission ''has imposed a system that requires access to depth-of-book information.'' Schwab Letter at 5. Likewise, a commenter believed that market participants require depth-of-book information to trade effectively in decimalized markets. SIFMA IV at 8. *See also* NetCoalition III at 5.

[61] SIFMA III at 14 n. 24.

[62] SIFMA IV at 12.

[63] SIFMA III at 13.

[64] Financial Services Roundtable Letter at 3. One commenter believed that market participants who choose not to purchase depth-of-book data will face the informational disadvantages that Regulation NMS seeks to eliminate. NSX Letter at 2.

[65] SIFMA IV at 13.

[66] NetCoalition III at 5 n. 16.

[67] NetCoalition III at 9; SIFMA III at 16–17; SIFMA IV at 5.

[68] SIFMA III at 17.

[69] SIFMA IV at 5. *See also* NetCoalition III at 2.

[70] SIFMA IV at 5.

[71] SIFMA IV at 8. The commenter believed that Congress envisioned the Commission regulating exclusive processors in a manner similar to the way in which public utilities are regulated. SIFMA I at 5.

with respect to market data that is exclusive to an exchange, ''[t]here is no way for competitive forces to produce market-driven or 'fair and reasonable' prices required by the Exchange Act * * *.''[72]

Other commenters believed that an exchange has a monopoly position as the exclusive processor of its proprietary data that ''creates a serious potential for abusive pricing practices,''[73] and urged the Commission to consider the lack of competition and the inability to obtain market data from other sources.[74] One commenter asserted that ''broker-dealers will * * * be forced to purchase market data at a fixed and * * * arbitrary price'' until market data fees are reformed.[75]

In addition, several commenters believed that the transformation of most U.S. securities exchanges from not-for-profit membership organizations to for-profit entities has eliminated an important constraint on market data fees as the for-profit exchanges seek to maximize value for their shareholders.[76] In this regard, one commenter explained that ''exchanges are beholden to their shareholders to increase revenue, and market data is the revenue stream that holds the greatest potential for doing so.''[77] Other commenters argued that the advent of for-profit exchanges has eliminated the governance checks on market data pricing that operated when exchange members—broker-dealers who were obligated to purchase consolidated market data—sat on the boards of the non-profit, member-owned exchanges.[78]

6. Increase in Market Data Revenues

With respect to the increase in the NYSE Group's market data revenues following its merger with Archipelago, one commenter stated that ''NYSE Group's reported market data segment revenues totaled $57.5 million in the third quarter of 2006: Up 33.7% from the same three-month period in 2005.''[79] According to the commenter, the NYSE Group attributed its revenue growth in market data to the contribution of NYSE Arca's operations following the completion of the merger between the NYSE and Archipelago on March 7, 2006.[80] The commenter maintained that Nasdaq has experienced similar growth in its market data revenues and that the exchanges ''propose to charge fees for a series of market data products that, when multiplied by the number of potential subscribers, are resulting in increased costs of doing business totaling tens of millions of dollars per year for some individual firms and hundreds of millions of dollars per year across the financial markets.''[81] The commenter identified the current fees for proprietary and consolidated market data products and claimed that investors ultimately pay these fees.[82]

7. Recommended Solutions

To address the issues raised by market data fees, the commenters suggested several potential solutions. One commenter recommended that the Commission adopt a specialized market data form for market data rule proposals that would require a detailed justification of proposed fee changes by the SROs.[83] The commenter believed that the form should, among other things, require an exchange to substantiate its historical costs of producing market data, its current market data revenues, how and why its costs have changed and the existing revenue is no longer appropriate, how the fee would impact market participants, how the revenues would be used, and the contract terms, system specifications, and audit requirements that would be associated with the proposed fee change.[84]

The commenter also believed that the contract terms governing the use of market data should be included in market data rule filings and subject to notice and comment.[85] The commenter maintained that the contract terms are effectively non-negotiable and that the compliance costs associated with them may affect the efficiency and transparency of the markets. Another commenter asserted that exchange market data contracts limit the use and dissemination of the data provided under the contracts, potentially impairing the flow and further analysis of the information, and impose administrative and technological burdens on firms.[86]

The commenters also suggested structural changes to address market data issues, including requiring exchanges to place their market data operations in a separate subsidiary and to make their raw market data available to third parties on the same terms as they make the data available to their market data subsidiary and to the independent central processor.[87] The commenters believed that this could encourage competition in providing market data products and services[88] and create a mechanism for free market pricing.[89]

Finally, the commenters suggested that the Commission increase the quality and depth of the required consolidated quotation information to allow retail investors to determine the prices at which their orders will be executed and to observe pricing movements in the market.[90] One commenter recommended that the Commission require exchanges to consolidate and distribute their top and depth-of-book data, and that the associated costs be paid by investors who act on the information.[91]

*B. Commenters Supporting the Action by Delegated Authority*

Several commenters who supported the approval of the Proposal by delegated authority argued that the staff applied the correct legal standard[92] and that the broader policy questions raised by the Petition should be addressed in the context of Commission rulemaking, rather than in connection with a specific exchange market data proposal.[93]

Several commenters rejected the assertion that a cost-based standard is the correct standard for the Commission to apply in reviewing market data fee proposals.[94] In this regard, the commenters distinguished between the standards applicable to ''core'' market data (*i.e.*, consolidated quotation and last sale data for U.S.-listed equities) and the standards applicable to

[72] NetCoalition III at 2.

[73] Schwab Letter at 6. *See also* Spencer Letter.

[74] Citigroup Letter at 1. Similarly, a commenter believed that ''[u]nless checked by effective regulatory oversight * * * exchanges have both the incentives and the power to charge whatever they can for the market data over which they have exclusive control.'' SIFMA III at 4. The commenter also asserted that ''[t]he lack of both economic market forces and comprehensive oversight of exchanges as the sole-source processors of market data * * * has allowed the exchange to simply 'name their prices' * * *.'' SIFMA IV at 2.

[75] NSX Letter at 2.

[76] ABA Letter at 2–3; Financial Services Roundtable Letter at 2; Schwab Letter at 5; SIFMA III at 24.

[77] Schwab Letter at 5. *See also* NetCoalition II at 4; SIFMA III at 24; SIFMA IV at 2.

[78] Financial Services Roundtable Letter at 2; NetCoalition II at 4; SIFMA III at 15.

[79] SIFMA III at 18–19 (citations omitted).

[80] SIFMA III at 18 (citation omitted).

[81] SIFMA III at 4.

[82] SIFMA IV at 14 and Appendix A.

[83] SIFMA III at 21–22.

[84] SIFMA III at 21–22.

[85] SIFMA III at 23.

[86] Citigroup Letter at 2.

[87] Bloomberg Letter at 4; Kanjorski Letter at 1; NetCoalition I at 2; Schwab Letter at 7; SIFMA III at 24–25.

[88] SIFMA III at 25.

[89] Schwab Letter at 7.

[90] Schwab Letter 5; SIFMA III at 25–26.

[91] NSX Letter at 2. Other commenters endorse this recommendation.NetCoalition III at 7, 13; SIFMA IV at 15.

[92] Amex Letter at 2; ISE Letter at 3; PHLX Letter at 2–3.

[93] Amex Letter at 4; PHLX Letter at 8.

[94] Exchange Market Data Coalition Letter at 2; ISE Letter at 3; PHLXLetter at 4.

proprietary market data products.[95] One commenter maintained that the Commission, in adopting Regulation NMS, authorized exchanges to distribute market data outside of the national market system plans, subject to the general fairness and nondiscrimination standards of Rule 603 of Regulation NMS, but ''otherwise [left] to free market forces the determination of what information would be provided and at what price.'' [96] Another commenter, noting that the Commission specifically considered and refrained from adopting the cost-based standard that NetCoalition proposes, argued that NetCoalition's approach ''would replace Regulation NMS * * * with a complex and intrusive rate-making approach that is inconsistent with the goals of the * * * [Exchange Act] and would be more costly than beneficial.'' [97]

One commenter disagreed with the assertion that an exchange possesses monopoly pricing power with respect to its proprietary data products. It contended that assertions concerning an exchange's monopoly pricing power ''ignore * * * market reality and market discipline. If any exchange attempts to charge excessive fees, there simply will not be buyers for such products.'' [98] Nasdaq noted that, as of April 30, 2007, over 420,000 professional users purchased core data, but less than 19,000 professional users purchased TotalView, Nasdaq's proprietary depth-of-book order product.[99] It concluded that ''[b]roker-dealers may claim they are required to purchase TotalView, but their actions indicate otherwise.'' [100]

The commenters emphasized that the exchanges face significant competition in their efforts to attract order flow:

> Exchanges compete not only with one another, but also with broker-dealers that match customer orders within their own systems and also with a proliferation of alternative trading systems (''ATSs'') and electronic communications networks (''ECNs'') that the Commission has also nurtured and authorized to execute trades in any listed issue. As a result, market share of trading fluctuates among execution facilities based on their ability to service the end customer. The execution business is highly competitive and exhibits none of the characteristics of a monopoly as suggested in the NetCoalition Petition.[101]

Similarly, another commenter stated that ''the market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves.'' [102] It also noted that market data ''is the totality of the information assets that each Exchange creates by attracting order flow'' and emphasized that ''[i]t is in each Exchange's best interest to provide proprietary information to investors to further their business objectives, and each Exchange chooses how best to do that.'' [103] Commenters stated that, in the absence of a regulatory requirement to provide non-core market data, it is necessary to provide a financial or other business incentive for exchanges to make such data available.[104]

## IV. NYSE Arca Responses to Commenters

### *A. Response to Commenters on Proposal*

In its responses to commenters on the Proposal, the Exchange argued that the Proposal establishes ''a framework for distributing data in which all vendors and end users are permitted to receive and use the Exchange's market data on equal, non-discriminatory terms.'' [105] The Exchange asserted that the proposed professional and non-professional device fees for the NYSE Arca Data were fair and reasonable because they ''are far lower than those already established—and approved by the Commission—for similar products offered by other U.S. equity exchanges and stock markets.'' [106] In particular, the Exchange noted that the proposed $15 per month device fee for each of the ArcaBook data products is less than both the $60 per month and $70 per month device fees that the NYSE and Nasdaq, respectively, charge for comparable market data products.[107]

With respect to its proposed fees, the Exchange noted, further, that it had invested significantly in its ArcaBook products, including making technological enhancements that allowed the Exchange to expand capacity and improve processing efficiency as message traffic increased, thereby reducing the latency associated with the distribution of ArcaBook data.[108] The Exchange stated that ''[i]n determining to invest the resources necessary to enhance ArcaBook technology, the Exchange contemplated that it would seek to charge for the receipt and use of ArcaBook data.'' [109] The Exchange also emphasized the reasonableness of its proposed fee relative to other comparable market data products, asserting, for example, that ''NYSE Arca is at the inside price virtually as often as Nasdaq, yet the proposed fee for ArcaBook is merely one-fifth of the TotalView fee.'' [110] Moreover, it stated that its decision to commence charging for ArcaBook data was based on its view that ''market data charges are a particularly equitable means for funding a market's investment in technology and its operations. In contrast with transaction, membership, listing, regulatory and other SRO charges, market data charges cause all consumers of a securities market's services, including investors and market data vendors, to contribute.'' [111]

The Exchange stated that it proposes to use the CTA and CQ Plan contracts to govern the distribution of NYSE Arca Data and that it was not amending the terms of these existing contracts or imposing restrictions on the use or display of its data beyond those that are currently set forth in the contracts.[112] Further, the Exchange specifically noted that these contracts do not prohibit a broker-dealer from making its own data available outside of the CTA and CQ Plans.[113] Finally, the Exchange argued that by using this current structure, it believes that the administrative burdens on firms and vendors should be low.[114]

### *B. Response to Commenters on Petition*

In its response to commenters on the Petition, the Exchange argued that recent market-based solutions have mooted the concerns expressed in the

[95] Amex Letter at 1; ISE Letter at 2–3; PHLX Letter at 4–5.

[96] Amex Letter at 2. The commenter noted that exchange fees also aresubject to the requirements of Section 6(b)(4) of the Exchange Act. *See also* PHLX Letter at 7.

[97] Exchange Market Data Coalition Letter at 2. One commenter asserted that ''[a]pplying NetCoalition's proposed strict cost-based fee analysis to every exchange market data rule filing is unworkable and * * * is not required under the Act.'' ISE Letter at 3. Similarly, noting that SROs must ensure that market data is not corrupted by fraud or manipulation, another commenter believed that it would be virtually impossible to identify the costs specifically associated with the production of market data versus other SRO functions. PHLX Letter at 6.

[98] ISE Letter at 3. Similarly, another commenter noted that the users of data will purchase data ''if it provides them value and is priced reasonably.'' Amex Letter at 1.

[99] Nasdaq Letter at 6.

[100] Nasdaq Letter at 6.

[101] Exchange Market Data Coalition Letter at 4.

[102] Nasdaq Letter at 7.

[103] *Id.* at 3, 4.

[104] Amex Letter at 1; ISE Letter at 2; PHLX Letter at 7.

[105] NYSE Arca Response I at 2.

[106] *Id.*

[107] NYSE Arca Response I at 2–3.

[108] NYSE Arca Response II at 2.

[109] *Id.* at 3.

[110] *Id.*

[111] *Id.* at 4.

[112] NYSE Arca Response I at 3.

[113] *Id.* at n. 12 and accompanying text.

[114] *Id.* at 5.

Petition regarding the affordability of market data for internet portals.[115] In particular, the Exchange noted that the NYSE recently submitted a proposed rule change for a market data product that would provide unlimited real-time last sale prices to vendors for a fixed monthly fee (''NYSE Internet Proposal'').[116] The Exchange stated that this NYSE Internet Proposal ''would meet the needs of internet portals and add to the number of choices that are available to intermediaries and investors for their receipt of real-time prices.'' [117] The Exchange asserted that the NYSE Internet Proposal ''provides a significant benefit to investors'' since ''it adds to the data-access alternatives available to them and improves the quality, timeliness and affordability of data they can receive over the internet.'' [118]

The Exchange also reiterated the argument that the proposed market data fees meet the statutory standards for such fees under the Exchange Act.[119] The Exchange argued that the fees represent an equitable allocation of fees and charges since they ''represent the first time that [the Exchange] has established a fee that a person or entity other than an [Exchange] member or listed company must pay'' and are being imposed ''on those who use the facilities of [the Exchange] but do not otherwise contribute to [the Exchange's] operating costs.'' [120]

The Exchange argued that the proposed market data fees are not ''unreasonably discriminatory'' since ''all professional subscribers are subject to the same fees and all nonprofessional subscribers are subject to the same fees.'' [121] The Exchange noted that the only discrimination that occurs is the ''reasonable'' distinction that would require professional subscribers to pay higher fees than nonprofessional subscribers.[122]

The Exchange asserted that the fees are fair and reasonable because: (1) ''They compare favorably to the level of fees that other U.S. markets and the CTA and Nasdaq/UTP Plans impose for comparable products''; (2) ''the quantity and quality of data NYSE Arca includes in Arca Book compares favorably to the data that other markets include in their market data products''; and (3) ''the fees will enable NYSE Arca to recover the resources that NYSE Arca devoted to the technology necessary to produce Arca Book data.'' [123]

The Exchange also rejected the Petitioner's assertion that the Exchange acted ''arbitrarily or capriciously'' by using a comparison of similar market data fees in setting the level of the proposed fees.[124] The Exchange noted that in addition to studying ''what other markets charge for comparable products,'' the Exchange also considered: (1) The needs of those entities that would likely purchase the Arca Book data; (2) the ''contribution that revenues from Arca Book Fees would make toward replacing the revenues that NYSE Arca stands to lose as a result of the removal of the NQDS service from the Nasdaq/UTP Plan''; (3) ''the contribution that revenues accruing from Arca Book Fees would make toward NYSE Arca's market data business''; (4) the contribution that revenues accruing from Arca Book Fees would make toward meeting the overall costs of NYSE Arca's operations''; (5) ''projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to Arca Book Fees''; and (6) ''the fact that Arca Book is primarily a product for market professionals, who have access to other sources of market data and who will purchase Arca Book only if they determine that the perceived benefits outweigh the cost.'' [125]

The Exchange also rejected the Petitioner's assertion that all proposed market data fees must be subjected to a rigorous cost-based analysis.[126] The Exchange noted that the Petitioner ''is able to cite only one instance'' that supports such an assertion.[127] The Exchange also noted that Petitioner ''fails to mention that a significant portion of the industry'' expressed opposition to a cost-based approach to analyzing market data fees in response to various Commission releases and other initiatives.[128] The Exchange argued that a cost-based analysis of market data fees is impractical because ''[i]t would inappropriately burden both the government and the industry, stifle competition and innovation, and in the end, *raise* costs and, potentially, fees.'' [129]

The Exchange also disputed Petitioner's argument that the Exchange's proposed market data fees amount to an exercise of monopoly pricing power.[130] It noted that ''[m]arkets compete with one another by seeking to maximize the amount of order flow that they attract. The markets base the competition for order flow on such things as technology, customer service, transaction costs, ease of access, liquidity and transparency.'' [131] The Exchange noted that ''[t]he Commission has prescribed top-of-the-book consolidated market data as the data required for best execution purposes'' and that there is ''no regulatory requirement'' for brokers to receive depth-of-book or other proprietary market data products.[132] Accordingly, the Exchange asserted that no monopoly power exists, and that the marketplace determines the fees charged by the Exchange for depth-of-book market data.[133] Further, the Exchange claimed that if the market data fees were excessive, market participants ''would forego Arca Book data and would choose to receive the depth-of-book service of other markets.'' [134] It noted that:

> As a result of all of the choices and discretion that are available to brokers, the displayed depth-of-book data of one trading center does not provide a complete picture of the full market for the security. It displays only a portion of all interest in the security. A brokerage firm has potentially dozens of different information sources to choose from in determining if, where, and how to represent an order for execution.[135]

The Exchange also addressed other concerns raised by commenters in connection with the Petition. First, the Exchange indicated that it has no intention of retroactively imposing the proposed market data fees.[136] The Exchange also disputed a commenter's statement which indicated that ''market data revenues of the NYSE Group (the parent company of Exchange and NYSE) for the third quarter of 2006 rose 33.7%

[115] NYSE Arca Response III at 5–6.

[116] *See id.* at 5.

[117] NYSE Arca Response III at 5.

[118] *Id.*

[119] *Id.* at 11.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 11–12.

[124] *Id.* at 12.

[125] *Id.* at 12–13.

[126] *Id.* at 13.

[127] *Id.*

[128] *Id.* at 14–15. The Exchange referenced opposition in the industry to a cost-based analysis of market data fees expressed in connection with the Market Information Concept Release, the Concept Release Concerning Self-Regulation, the Regulation NMS initiative, and the Commission's Advisory Committee on Market Information.

[129] *Id.* at 15 (citing NYSE Response to Market Information Concept Release (April 10, 2000)) (emphasis in original).

[130] *Id.* at 16.

[131] *Id.* at 16. *See also id.* at 18 (''If too many market professionals reject Arca Book as too expensive, NYSE Arca would have to reassess the Arca Book Fees because Arca Book data provides transparency to NYSE Arca's market, transparency that plays an important role in the competition for order flow.'').

[132] *Id.* at 18.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 17.

[136] *Id.* at 20.

from the year-earlier.'' [137] According to the Exchange, this statistic does not demonstrate ''a significant increase in market data revenues during 2006'' since the 2005 market data revenue from the NYSE Group used to generate this statistic did not include the Exchange's market data revenue because the Exchange was not part of the NYSE Group in 2005.[138] The Exchange notes that the combined market data revenues for the Exchange and NYSE have actually declined slightly.[139] Lastly, the Exchange rejects the commenters' contention that a significant speed variance exists between proprietary market data products and the consolidated data feed that markets make available under the CQ and Nasdaq/UTP Plans. The Exchange notes that the ''variations in speed are measured in milliseconds'' and that ''[f]rom a display perspective the difference is imperceptible.'' [140] Furthermore, the Exchange notes that the CQ Plan participants have undertaken a technology upgrade that would reduce the latency of the consolidated feed from ''several hundred milliseconds to approximately 30 milliseconds.'' [141]

## V. Comments on the Draft Order

The Commission received 16 comments from 12 commenters regarding the Draft Order,[142] three of which also submitted economic studies analyzing the Draft Order's rationale for approving the Proposal.[143]

NetCoalition and SIFMA did not believe that the Draft Order's analytical framework would meet the Commission's responsibilities under the Exchange Act for reviewing market data fees.[144] In this regard, SIFMA stated that ''there is * * * no basis for the presumption in the [Draft] Order that [the] statutory requirements are satisfied if the Commission is able to conclude that 'significant competitive forces' exist in the context of an exchange fee proposal.'' [145] NetCoalition asserted that Congress urged the Commission not to rely on competitive forces in the context of exclusive processors of data.[146]

Some commenters questioned the extent of exchange competition for order flow and whether such competition results in fair and reasonable market data fees.[147] The SLCG Study asserted that competition for order flow does not assure competitive pricing for depth-of-book data and that reliance on competitive forces was inappropriate because the NYSE and Nasdaq exert monopoly pricing power with respect to their depth-of-book data.[148] The Evans Report maintained that order flow competition is reflected in transaction fees and liquidity rebates, which are structured to attract order flow, but not in depth-of-book data fees, which do not vary according to the data purchaser's trading volume.[149] NetCoalition and SIFMA also questioned whether the Draft Order's conclusion that depth-of-book data is not necessary to meet a broker-dealer's duty of best execution would be reached in other legal contexts.[150]

Several commenters believed that the NYSE and NYSE Arca must be considered to be a single enterprise for purposes of analyzing market power with respect to depth-of-book data, and that the Draft Order erred in treating them as separate entities.[151] In this regard, the Evans Report found that, because the NYSE and NYSE Arca are controlled by a single corporate entity that will coordinate the pricing of the depth-of-book products of its subsidiaries to maximize its own profits, the NYSE's depth-of-book data cannot act as a competitive constraint on the pricing of NYSE Arca's depth-of-book data.[152]

Commenters opposing the Draft Order also believed that the Commission must obtain and analyze data regarding NYSE Arca's costs of collecting and disseminating depth-of-book information to determine whether its proposed fees meet the Exchange Act's requirements.[153] One commenter stated that, in the absence of cost data, the Commission lacks an effective basis for evaluating whether proposed market data fees are fair or reasonable.[154] In addition, these commenters suggested that because the Commission concluded that a cost-based analysis was required in the context of a fee dispute between Nasdaq and the CTA, the Commission should require the same cost-based analysis for exchanges' market data fees.[155] Another commenter believed that the exchanges' use of market data fees to fund rebates to order entry firms suggested that market data pricing is ''neither competitive nor efficient.'' [156]

NetCoalition and SIFMA asserted that the Draft Order would in effect be an amendment of Rule 19b–4 and thus

[137] *Id*.

[138] *Id*.

[139] *Id*. at n. 50 and accompanying text. According to the Exchange, pro forma results indicate that the Exchange and NYSE received a combined $242 million in 2005, while they only received a combined $235 million in 2006.

[140] *Id*. at 21.

[141] *Id*.

[142] Letters from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated November 17, 2008 (''SIFMA X'') (attaching supplemental report by Securities Litigation & Consulting Group, Inc.); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated October 14, 2008 (''NetCoalition VII'') (attaching report by Dr. David S. Evans dated October 10, 2008); Bart M. Green, Chairman, and John Giesea, President and CEO, Security Traders Association (''STA''), dated September 11, 2008 (''STA Letter''); Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq OMX Group, Inc., dated September 10, 2008 (''Nasdaq III'') and August 1, 2008 (''Nasdaq II''); Joseph Rizzello, Chief Executive Officer, NSX, dated September 9, 2008 (''NSX II''); Richard Bartlett, Managing Director, Citigroup Global Markets Inc., dated July 11, 2008 (''Citigroup II''); David T. Hirschmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness of the United States Chamber of Commerce, dated July 10, 2008 (''Chamber of Commerce II''); Michael J. Simon, Secretary, ISE, dated July 10, 2008 (''ISE II''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated July 10, 2008 (attaching report by Dr. David S. Evans) (''NetCoalition VI''); Markham C. Erickson, Executive Director and General Counsel, NetCoalition, dated July 10, 2008 (''NetCoalition V''); Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, dated July 10, 2008 (attaching report by the Securities Litigation & Consulting Group, Inc.) (''SIFMA IX''); Mary Yeager, Corporate Secretary, NYSE Arca, to Florence Harmon, Acting Secretary, Commission, dated July 8, 2008 (''NYSE Arca IV''); and Christopher Perry, Thomson Reuters Markets, dated July 8, 2008 (''Thomson Reuters Letter''); and web comments from William C. Martin, Principal, Indie Research, LLC and Founder, RagingBull.com, dated July 9, 2008 (''Indie Research Comment''); and Kreg Rutherford (''Rutherford Comment'').

[143] David S. Evans, ''Response to Ordover and Bamberger's Statement Regarding the SEC's Proposed Order Concerning the Pricing of Depth-of-Book Market Data'' (''Evans II''), which was submitted with NetCoalition VII; David S. Evans, ''An Economic Assessment of Whether 'Significant Competitive Forces' Constrain an Exchange's Pricing of Its Depth-of-Book Market Data'' (''Evans Report''), which was submitted with NetCoalition VI; Securities Litigation and Consulting Group, Inc. (''SLCG''), ''An Economic Study of Securities Market Data Pricing by the Exchanges'' (''SLCG Study''), which was submitted with SIFMA IX and a supplemental analysis to the SLCG Study (''SLCG II''), which was submitted with SIFMA X; and Statement of Janusz Ordover and Gustavo Bamberger, dated August 1, 2008 (''Ordover/Bamberger Statement'' or ''Statement''), which was submitted with Nasdaq II.

[144] NetCoalition V at 7–9; SIFMA IX at 9–11.

[145] SIFMA IX at 10.

[146] NetCoalition V at 9–10.

[147] Citigroup II at 2; Indie Research Comment; NetCoalition VI at 1; NSX II at 5; SIFMA IX at 3; STA Letter at 3.

[148] SLCG Study at 2 and 34.

[149] Evans Report at 13–16.

[150] NetCoalition V at 7; SIFMA IX at 20.

[151] SIFMA IX at 3; Evans Report at 5–6; SLCG Study at 12.

[152] Evans Report at 5–6.

[153] NetCoalition V at 15–18; SIFMA IX at 4.

[154] SIFMA IX at 4. Similarly, the SLCG Study maintained that it is not possible to assess the extent of NYSE Arca's market power in establishing fees for Arca Book data without information concerning the costs of collecting and distributing the data. Accordingly, the SLCG Study asserted that the Commission could not reasonably conclude that the NYSE was subject to competitive forces in establishing the proposed Arca Book data fees. SLCG Study at 31–32.

[155] NetCoalition V at 15–18; SIFMA IX at 11–13.

[156] STA Letter at 3.

would constitute agency rulemaking that must be published for notice and comment under the Administrative Procedures Act.[157] Another commenter believed that greater transparency prior to the publication of the Draft Order would have allowed the Commission to gather additional data.[158]

Five commenters, including NYSE Arca, supported issuance of the Draft Order.[159] They generally agreed that significant competitive forces operate in the distribution of non-core data and will constrain the exchanges in setting the terms for such data. For example, ISE agreed with the Draft Order's analysis of the relationship between non-core data and attracting order flow, noting that it views its proprietary depth-of-book options data service as an important means to advertise the prices available on the ISE and to attract orders to ISE.[160] It currently offers the service free of charge, but only 15% of its members have chosen to subscribe to the service.[161]

Similarly, Thomson Reuters believed that the Commission's Draft Order correctly analyzed the competitive forces applicable to the establishment of fees for depth-of-book data.[162] In particular, the commenter agreed that, in light of the competitive market for order flow and trade execution, an exchange would have strong competitive reasons to price its depth-of-book data so that the data would be distributed widely to those most likely to use it to trade.[163] The commenter also believed that ''the application of market forces to the consolidation and distribution of market data is generally preferable to increased government supervision of the process of setting fees for and licensing subscribers to market data.'' [164]

The Ordover/Bamberger Statement noted that unnecessary regulation of a market characterized by effective competition can distort the operation of the market and produce ''unforeseen and unintended consequences,'' and that ''cost-based regulation can create significant inefficiencies and distortions.'' [165] It identified market data and trade execution services as an example of ''joint products'' with ''joint costs'' that determine a trading platform's total return.[166] The Statement noted that competition among trading platforms could be expected to limit the return each platform earned from the sale of joint products, although different platforms could select different pricing strategies and means of recovering costs.[167]

Another commenter believed that NYSE Arca's proprietary data would benefit retail investors and that the Exchange's proposed fees are fair compensation for its data.[168] Noting that U.S. exchanges face increasing competition from foreign markets, dark pools, and electronic communications networks, the commenter stated that it is important for U.S. exchanges to have the ability to offer real-time market data.[169] Finally, NYSE Arca believed that the Commission's standard would spur innovation and allow markets to introduce new market data products more quickly, thereby enhancing the competitiveness of the U.S. securities markets.[170]

## VI. Discussion

The Commission finds that the Proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, it is consistent with section 6(b)(4) of the Exchange Act,[171] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and section 6(b)(5) of the Exchange Act,[172] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the Proposal is consistent with the provisions of section 6(b)(8) of the Exchange Act,[173] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Finally, the Commission finds that the Proposal is consistent with Rule 603(a) of Regulation NMS,[174] adopted under section 11A(c)(1) of the Exchange Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[175]

### *A. Commission Review of Proposals for Distributing Non-Core Data*

The standards in section 6 of the Exchange Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.[176] In contrast, individual exchanges and other market participants distribute non-core data voluntarily. As discussed further below, the mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees. Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. For example, the Commission does not believe that broker-dealers are required to purchase depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution.[177] The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of section 6 and Rule 603.

[157] NetCoalition V at 18; SIFMA IX at 16.

[158] Chamber of Commerce II at 2.

[159] ISE II, Nasdaq II, NYSE Arca IV, Rutherford Comment, and Thomson Reuters Letter.

[160] ISE II at 2.

[161] *Id*.

[162] Thomson Reuters Letter at 3.

[163] *Id*.

[164] *Id*. at 2.

[165] Ordover/Bamberger Statement at 2, 3 n. 4.

[166] *Id*. at 3–4.

[167] *Id*. at 4. *See also id*. at 3 n. 4 (''It is widely accepted that there is no meaningful way to allocate 'common costs' across different joint products. For this reason, 'cost-based' regulation of the price of market data would require inherently arbitrary cost allocations.'').

[168] Rutherford Comment.

[169] *Id*.

[170] NYSE Arca IV at 2.

[171] 15 U.S.C. 78f(b)(4).

[172] 15 U.S.C. 78f(b)(5).

[173] 15 U.S.C. 78f(b)(8).

[174] 17 CFR 242.603(a).

[175] NYSE Arca is an exclusive processor of the NYSE Arca Data under Section 3(a)(22)(B) of the Exchange Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

[176] *See* Rule 603(b) of Regulation NMS (''Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.'')

[177] *See* notes 259–266 below and accompanying text.

The requirements for distributing core data to the public were first established in the 1970s as part of the creation of the national market system for equity securities.[178] Although Congress intended to rely on competitive forces to the greatest extent possible to shape the national market system, it also granted the Commission full rulemaking authority in the Exchange Act to achieve the goal of providing investors with a central source of consolidated market information.[179]

Pursuant to this Exchange Act authority, the Commission has required the SROs to participate in three joint-industry plans (''Plans'') pursuant to which core data is distributed to the public.[180] The Plans establish three separate networks to disseminate core data for NMS stocks: (1) Network A for securities primarily listed on the NYSE; (2) Network C for securities primarily listed on Nasdaq; and (3) Network B for securities primarily listed on exchanges other than the NYSE and Nasdaq. For each security, the data includes: (1) A national best bid and offer (''NBBO'') with prices, sizes, and market center identifications; (2) the best bids and offers from each SRO that include prices, sizes, and market center identifications; and (3) last sale reports from each SRO. The three Networks establish fees for this core data, which must be filed for Commission approval.[181] The Networks collect the applicable fees and, after deduction of Network expenses, distribute the remaining revenues to their individual SRO participants.

The Plans promote the wide availability of core market data.[182] For each of the more than 7000 NMS stocks, quotations and trades are continuously collected from many different trading centers and then disseminated to the public by the central processor for a Network in a consolidated stream of data. As a result, investors have access to a reliable source of information for the best prices in NMS stocks. Commission rules long have required broker-dealers and data vendors, if they provide any data to customers, to also provide core data to investors in certain contexts, such as trading and order-routing.[183] In addition, compliance with the trade-through requirements of Rule 611 of Regulation NMS [184] necessitates obtaining core quotation data because it includes all the quotations that are entitled to protection against trade-throughs.[185]

For many years, the core data distributed through the Networks overwhelmingly dominated the field of equity market data in the U.S. With the initiation of decimal trading in 2001, however, the value to market participants of non-core data, particularly depth-of-book order data, increased.[186] An exchange's depth-of-book order data includes displayed trading interest at prices *inferior* to the best-priced quotations that exchanges are required to provide for distribution in the core data feeds. Prior to decimal trading, significant size accumulated at the best-priced quotes because the minimum spread between the national best bid and the national best offer was 1/16th, or 6.25 cents. When the minimum inside spread was reduced to one cent, the size displayed at the best quotes decreased substantially, while the size displayed at the various one-cent price points away from the inside quotes became a more useful tool to assess market depth.

In 2005, the Commission adopted new rules that, among other things, addressed market data.[187] Some commenters on the rule proposals recommended that the Commission eliminate or substantially modify the consolidation model for distributing core data. In addressing these comments, the Commission described both the strengths and weaknesses of the consolidation model. It emphasized the benefits of the model for retail investors, but noted the limited opportunity for market forces to determine the level and allocation of fees for core data and the negative effects on innovation by individual markets in the provision of their data.[188]

The Commission ultimately decided that the consolidation model should be retained for core data because of the benefit it afforded to investors, namely ''helping them to assess quoted prices at the time they place an order and to evaluate the best execution of their orders against such prices by obtaining data from a single source that is highly reliable and comprehensive.'' [189]

With respect to the distribution of non-core data, however, the Commission decided to maintain a deconsolidation model that allows greater flexibility for market forces to determine data products and fees.[190] In particular, the Commission both authorized the independent dissemination of an individual market's or broker-dealer's trade data, which previously had been prohibited by Commission rule, and streamlined the requirements for the consolidated display of core market data to customers of broker-dealers and vendors.[191] Most commenters supported this approach.[192] A few commenters, however, recommended that ''the Commission should expand the consolidated display requirement to include additional information on depth-of-book quotations, stating that the NBBO alone had become less informative since decimalization.'' [193] Such an approach effectively would have treated an individual market's depth-of-book order data as consolidated core data and thereby eliminated the operation of

[178] These requirements are discussed in detail in section III of the Concept Release on Market Information, 64 FR at 70618–70623.

[179] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 92 (1975) (''Conference Report'').

[180] The three joint-industry plans, approved by the Commission, are: (1) The CTA Plan, which is operated by the Consolidated Tape Association and disseminates transaction information for securities primarily listed on an exchange other than Nasdaq; (2) the CQ Plan, which disseminates consolidated quotation information for securities primarily listed on an exchange other than Nasdaq; and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq. The CTA Plan and CQ Plan are available at *http://www.nysedata.com*. The Nasdaq UTP Plan is available at *http://www.utpdata.com*.

[181] Rule 608(b)(1) of Regulation NMS, 17 CFR 242.608(b)(1).

[182] The Plan provisions for distributing quotation and transaction information are discussed in detail in section II of the Concept Release on Market Information, 64 FR at 70615–70618.

[183] Rule 603(c) of Regulation NMS, 17 CFR 242.603(c).

[184] 17 CFR 242.611.

[185] Rule 600(b)(57)(iii) of Regulation NMS, 17 CFR 242.600(b)(57)(iii) (definition of ''protected bid'' and ''protected offer'' limited to the best bids and best offers of SROs). The Commission decided not to adopt a proposal which would have protected depth-of-book quotations against trade-throughs if the market displaying such quotations voluntarily disseminated them in the consolidated quotation stream. Regulation NMS Release, 70 FR at 37529.

[186] Commenters on the Draft Order cited statements by the Commission's Chairman in 2002 as indicating competitive forces do not apply to non-core market data. SIFMA IX at 4–5; SLCG Study at 28–29; STA Letter at 3–4. Up to that time, however, nearly all market data revenues had been derived from core data. Accordingly, the characteristics of market data revenues in the 70 years prior to 2002 shed no light on the current state of competition for non-core data.

[187] Regulation NMS Release, 70 FR at 37557–37570.

[188] *Id.* at 37558.

[189] *Id.* at 37504.

[190] When describing the deconsolidation model in the context of deciding whether to propose a new model for core data, the Commission noted that ''the strength of this model is the maximum flexibility it allows for competitive forces to determine data products, fees, and SRO revenues.'' Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126, 11177 (March 9, 2004). As discussed in the text, the Commission decided to retain the consolidation model, rather than proposing a new deconsolidation model, for core data.

[191] *See* Regulation NMS Release, 70 FR at 37566–37567 (addressing differences in distribution standards between core data and non-core data).

[192] *Id.*

[193] *Id.* at 37567 (citation omitted).

competitive forces on depth-of-book order data. The Commission did not adopt this recommendation, but instead decided to:

allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors. Investors who need the BBOs of each SRO, as well as more comprehensive depth-of-book information, will be able to obtain such data from markets or third party vendors.[194]

Some commenters on the Proposal and the Petition recommended fundamental changes in the regulatory treatment of non-core data in general and depth-of-book quotations in particular.[195] The Commission, however, considered this issue in 2005 and continues to hold the views just described. It does not believe that circumstances have changed significantly since 2005 and will continue to apply a primarily market-based approach for assessing whether exchange proposals to distribute non-core data meet the applicable statutory standards.

The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.[196] A national market ''system'' can be contrasted with a single monopoly market that overwhelmingly dominates trading its listed products. Congress repeatedly emphasized the benefits of competition among markets in protecting investors and promoting the public interest. When directing the Commission to facilitate the establishment of a national market system, for example, Congress emphasized the importance of allowing competitive forces to work:

In 1936, this Committee pointed out that a major responsibility of the SEC in the administration of the securities laws is to ''create a fair field of competition.'' This responsibility continues today. The bill would more clearly identify this responsibility and clarify and strengthen the SEC's authority to carry it out. The objective would be to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations in practices and services.[197]

In addition, Congress explicitly noted the importance of relying on competition in overseeing the activities of the SROs:

S. 249 would give the SEC broad authority not only to oversee the general development of a national market system but also to insure that the ancillary programs of the self-regulatory organizations and their affiliates are consistent with the best interests of the securities industry and the investing public * * *. This is not to suggest that under S. 249 the SEC would have either the responsibility or the power to operate as an 'economic czar' for the development of a national market system. Quite the contrary, for a fundamental premise of the bill is that the initiative for the development of the facilities of a national market system must come from private interests and will depend on the vigor of competition within the securities industry as broadly defined.[198]

With respect to market information, Congress again expressed its preference for the Commission to rely on competition, but noted the possibility that competition might not be sufficient in the specific context of core data—the central facilities for the required distribution of consolidated data to the public:

It is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed. The conferees expect, however, that in those situations where competition may not be sufficient, such as in the creation of a *composite* quotation system or a *consolidated* transactional reporting system, the Commission will use the powers granted to it in this bill to act promptly and effectively to insure that the essential mechanisms of an integrated secondary trading system are put into effect as rapidly as possible.[199]

The Commission's approach to core data and non-core data follows this Congressional intent exactly. With respect to the systems for the required distribution of consolidated core data, the Commission retained a regulatory approach that uses joint-industry plans and a central processor designed to assure access to the best quotations and most recent last sale information that is so vital to investors. With respect to non-core data, in contrast, the Commission has maintained a market-based approach that leaves a much fuller opportunity for competitive forces to work.

This market-based approach to non-core data has two parts. The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.

As discussed above, the Commission believes that, when possible, reliance on competitive forces is the most appropriate and effective means to assess whether terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory. If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior. As discussed further below, when an exchange is subject to competitive forces in its distribution of non-core data, many market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory. As a result, competitive forces generally will constrain an exchange in setting fees for non-core data because it should recognize that its own profits will suffer if it attempts to act unreasonably or unfairly. For example, an exchange's attempt to impose unreasonably or unfairly discriminatory fees on a certain category of customers would likely be counter-productive for the exchange because, in a competitive environment, such customers generally would be able to respond by using alternatives to the exchange's data.[200] The Commission therefore believes that the existence of significant competition provides a substantial basis for finding that the

[194] *Id.* (citations omitted) (emphasis added).

[195] *See* section III.A.4 above.

[196] *See, e.g.*, Exchange Act Section 11A(a)(1)(C)(ii).

[197] S. Rep. No. 94–75, 94th Cong., 1st Sess. 8 (1975) (''Senate Report'').

[198] Senate Report at 12.

[199] Conference Report at 92 (emphasis added).

[200] *See, e.g.*, Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (''DOJ Merger Guidelines'') (explaining the importance of alternative products in evaluating the presence of competition and defining markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.

Even when competitive forces are operative, however, the Commission will continue to review exchange proposals for distributing non-core data to assess whether there is a substantial countervailing basis for determining that a proposal is inconsistent with the Exchange Act.[201] For example, an exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange would present a substantial countervailing basis for finding unreasonable and unfair discrimination and likely would prevent the Commission from approving an exchange proposal.[202] In the absence of such a substantial countervailing basis for finding that a proposal failed to meet the applicable statutory standards, the Commission would approve the exchange proposal as consistent with the Exchange Act and rules applicable to the exchange.

*B. Review of Competitive Forces Applicable to NYSE Arca*

The terms of an exchange's proposed rule change to distribute market data for which it is an exclusive processor must, among other things, provide for an equitable allocation of reasonable fees under section 6(b)(4), not be designed to permit unfair discrimination under section 6(b)(5), be fair and reasonable under Rule 603(a)(1), and not be unreasonably discriminatory under Rule 603(a)(2). Because NYSE Arca is proposing to distribute non-core data, the Commission reviewed the terms of the Proposal under the market-based approach described above. The first question is whether NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal.

At least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal to distribute the ArcaBook data: (1) NYSE Arca's compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data.

1. Competition for Order Flow

Attracting order flow is the core competitive concern of any equity exchange—it is the ''without which, not'' of an exchange's competitive success. If an exchange cannot attract orders, it will not be able to execute transactions. If it cannot execute transactions, it will not generate transaction revenue. If an exchange cannot attract orders or execute transactions, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue.[203]

In the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution. They include, of course, any of the nine national securities exchanges that currently trade equities, but also include a wide variety of non-exchange trading venues: (1) Electronic communication networks (''ECNs'') that display their quotes directly in the core data stream by participating in FINRA's Alternative Display Facility (''ADF'') or displaying their quotations through an exchange; (2) alternative trading systems (''ATSs'') that offer a wide variety of order execution strategies, including block crossing services for institutions that wish to trade anonymously in large size and midpoint matching services for the execution of smaller orders; and (3) securities firms that primarily trade as principal with their customer order flow.

NYSE Arca must compete with all of these different trading venues to attract order flow, and the competition is fierce. For example, in its response to the commenters, NYSE Arca notes that its share of trading in 2005 was 3.6% in Network A stocks, 23% in Network C stocks, and 30% in Network B stocks.[204] More recently during June 2008, NYSE Arca share volume was 14.0% in Network A stocks, 16.1% in Network C stocks, and 26.7% in Network B stocks, adding up to 16.5% of total U.S. market volume.[205]

Given the competitive pressures that currently characterize the U.S. equity markets, no exchange can afford to take its market share percentages for granted—they can change significantly over time, either up or down.[206] Even the most dominant exchanges are subject to severe pressure in the current competitive environment. For example, the NYSE's reported market share of trading in NYSE-listed stocks declined from 79.1% in January 2005 to 30.6% in June 2008.[207] In addition, a non-exchange entrant to equity trading—the BATS ECN—has succeeded in capturing 7.4% of trading in NYSE-listed stocks and 10.3% of trading in Nasdaq-listed stocks.[208] Another ECN—Direct Edge—has a matched market share of 3.7% in NYSE-listed stocks and 5.8% in Nasdaq-listed stocks.[209] Moreover, nearly all venues now offer trading in all U.S.-listed equities, no matter the particular exchange on which a stock is listed or on which the most trading occurs. As a result, many trading venues stand ready to provide an immediately accessible order-routing alternative for broker-dealers and investors if an exchange

[201] *See* Exchange Act Section 19(b)(2) (''The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding.'').

[202] *Cf.* Regulation NMS Release, 70 FR at 37540 (in discussion of market access fees under Rule 610 of Regulation NMS, the Commission noted that ''any attempt by an SRO to charge differential fees based on the non-member status of the person obtaining indirect access to quotations, such as whether it is a competing market maker, would violate the anti-discrimination standard of Rule 610.'').

[203] *See* Exchange Market Data Coalition Letter at 3 (''The end product of these efforts—the listings, the members, the trading facilities, the regulation—is market data. Market data is the totality of the information assets that each Exchange creates by attracting order flow.'').

[204] NYSE Arca Response III at 18 n. 44. The NYSE and NYSE Arca are wholly-owned subsidiaries of NYSE Group, Inc. One commenter stated that the NYSE had ''combined Arca's liquidity pool with its own,'' and that ''the networking effect of the NYSE Group's *combined* pool of liquidity'' had resulted in ''greater market power over its pricing for market data.'' SIFMA IV at 8 (emphasis in original). In fact, the NYSE and NYSE Arca liquidity pools have not been combined. The two exchanges operate as separate trading centers with separate limit order books, and each distributes its depth-of-book order data separately for separate fees. In analyzing the competitive position of NYSE Arca for purposes of distributing such data, the Commission has considered NYSE Arca both as a trading center separate from the NYSE and as part of the same corporate group as NYSE. It finds that in both contexts NYSE Arca was subject to significant competitive forces in setting the terms for the ArcaBook data. *See* section VI.C below for a discussion of the regulatory requirements applicable to individual national securities exchanges operating separate liquidity pools.

[205] Source: ArcaVision (available at *http://www.arcavision.com*); *see also* NYSE Arca Response III at 18 (''NYSE Arca does not maintain a dominant share of the market in any of the three networks.'').

[206] *See* Exchange Market Data Coalition Letter at 4 (''Exchanges compete not only with one another, but also with broker dealers that match customer orders within their own systems and also with a proliferation of alternative trading systems (''ATSs'') and electronic communications networks (''ECNs'') that the Commission has also nurtured and authorized to execute trades in any listed issue. As a result, market share of trading fluctuates among execution facilities based upon their ability to service the end customer.'').

[207] *Source:* ArcaVision (available at *http://www.arcavision.com*).

[208] Lehman Brothers, Inc., Equity Research, ''Exchanges June Volume Analysis'' at 2 (July 2, 2008) (''Lehman Trading Volume Analysis'') at 2. The Commission recently granted an application by BATS Exchange, Inc. for registration as a national securities exchange. Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008).

[209] Lehman Trading Volume Analysis at 2.

attempts to act unreasonably in setting the terms for its services.

Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of June 2008:[210]

TABLE 1—REPORTED SHARE VOLUME IN U.S.-LISTED EQUITIES DURING JUNE 2008

[Percent]

| Trading venue | All stocks | NYSE-listed | Nasdaq-listed |
|---|---|---|---|
| All Non-Exchange | 31.9 | 28.9 | 38.0 |
| Nasdaq | 30.4 | 23.0 | 42.7 |
| NYSE | 17.4 | 30.6 | 0.0 |
| NYSE Arca | 16.5 | 14.0 | 16.1 |
| National Stock Exchange | 1.8 | 1.4 | 2.4 |
| International Stock Exchange | 0.9 | 1.4 | 0.2 |
| American Stock Exchange | 0.5 | 0.0 | 0.0 |
| Chicago Stock Exchange | 0.4 | 0.5 | 0.3 |
| CBOE Stock Exchange | 0.1 | 0.1 | 0.2 |
| Philadelphia Stock Exchange | 0.1 | 0.1 | 0.1 |

Perhaps the most notable item of information from Table 1 is that non-exchange trading venues collectively have a larger share of trading than any single exchange. Much of this volume is attributable to ECNs such as BATS and Direct Edge, noted above. In addition, the proliferation of non-exchange pools of liquidity has been a significant development in the U.S. equity markets.[211] Broker-dealers often check the liquidity available in these pools as a first choice prior to routing orders to an exchange. In sum, no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker-dealers.

The market share percentages in Table 1 strongly indicate that NYSE Arca must compete vigorously for order flow to maintain its share of trading volume. As discussed below, this compelling need to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for depth-of-book order data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca must attract order flow.[212] These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[213]

Some commenters asserted that an exchange's distribution of depth-of-book order data is not affected by its need to attract order flow.[214] Attracting order flow and distributing market data, however, are in fact two sides of the same coin and cannot be separated.[215] Moreover, the relation between attracting order flow and distributing market data operates in both directions. An exchange's ability to attract order flow determines whether it has market data to distribute, while the exchange's distribution of market data significantly affects its ability to attract order flow.[216]

For example, orders can be divided into two broad types—those that seek to offer liquidity to the market at a particular price (non-marketable orders) and those that seek an immediate execution by taking the offered liquidity (marketable orders). The wide distribution of an exchange's market data, including depth-of-book order data, to many market participants is an important factor in attracting both types of orders. Depth-of-book order data consists of non-marketable orders that a prospective buyer or seller has chosen to display. The primary reason for a prospective buyer or seller to display its trading interest at a particular price, and thereby offer a free option to all market participants at that price, is to attract contra trading interest and a fast execution. The extent to which a displayed non-marketable order attracts contra interest will depend greatly on the wide distribution of the displayed order to many market participants. If only a limited number of market participants receive an exchange's depth-of-book order data, it reduces the chance of an execution for those who display non-marketable orders on that exchange. Limited distribution of displayed orders thereby reduces the ability of the exchange to attract such orders. Moreover, by failing to secure wide distribution of its displayed orders, the exchange will reduce its ability to attract marketable orders seeking to take the displayed liquidity. In other words, limited distribution of depth-of-book order data will limit an

[210] Source: ArcaVision (available at *http://www.arcavision.com*).

[211] *See, e.g.,* NYSE Arca Response III at 17 (''If the brokerage firm is unable to internalize the trade, typically, it next takes the order to dark pools, crossing networks, ECNs, alternative trading systems, or other non-traditional execution facilities to search for an execution.''); *http://www.advancedtrading.com/directories/darkpool* (directory of more than 20 non-exchange pools of liquidity that are classified as ''independent,'' ''broker-dealer-owned,'' and ''consortium-owned.'').

[212] *See, e.g.,* Exchange Market Data Coalition Letter at 4 (''It is in the Exchange's best interest to provide proprietary information to investors to further their business objectives, and each Exchange chooses how best to do that.''); Nasdaq Letter at 9 (''Like the market for electronic executions, the related market for proprietary data is also influenced by the equity investments of major financial institutions in one or more exchanges * * *. Equity investors control substantial order flow and transaction reports that are the essential ingredients of successful proprietary data products. Equity investors also can enable exchanges to develop competitive proprietary products * * *.'').

[213] *See* NYSE Arca Response III at 16 (''Markets compete with one another by seeking to maximize the amount of order flow that they attract. The markets base competition for order flow on such things as technology, customer service, transaction costs, ease of access, liquidity and transparency. In recent months, significant changes in market share, the rush to establish trade-reporting facilities for the reporting of off-exchange trades, frequent changes in transaction fees and new market data proposals have provided evidence of the intensity of the competition for order flow.'').

[214] *See* section III.A.5 above.

[215] *See, e.g.,* Larry Harris, *Trading and Exchanges, Market Microstructure for Practitioners* 99 (2003) (noting that it would be ''very difficult for innovative trading systems to compete for order flow'' if the data from those trading venues were not distributed).

[216] *See, e.g.,* NYSE Arca Response III at 13 (in setting level of fees, one factor was ''projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to Arca Book Fees''); Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (September 14, 2001), Section VII.B.1 (available at *www.sec.gov*) (''[A] market's inability to widely disseminate its prices undoubtedly will adversely impact its ability to attract limit orders and, ultimately, all order flow. This barrier to intermarket competition, in turn, could decrease liquidity and innovation in the marketplace.'').

exchange's ability to attract both non-marketable and marketable orders. Consequently, an exchange generally will have strong competitive reasons to price its depth-of-book order data so that it will be distributed widely to those most likely to use it to trade.[217]

A notable example of the close connection between a trading venue's distribution of order data and its ability to attract order flow was provided by the Island ECN in 2002. To avoid the application of certain regulatory requirements, Island ceased displaying its order book to the public in three very active exchange-traded funds (''ETFs'') in which it enjoyed a substantial market share. After going ''dark,'' Island's market share in the three ETFs dropped by 50%.[218]

This competitive pressure to attract order flow is likely what led NYSE Arca, and its predecessor corporation, to distribute its depth-of-book order data without charge in the past.[219] It now has made a business decision to begin charging for that data, apparently believing that it has a sufficiently attractive data product that the benefit obtained from increased data revenues will outweigh the potential harm of reduced order flow if significant numbers of data users choose not to pay the fee.[220] Commenters concede that NYSE Arca is entitled to charge a fee for its depth-of-book order data,[221] but claim that the fee chosen by NYSE Arca is unaffected by its need to attract order flow.[222] The Commission disagrees and notes that NYSE Arca, in setting the fee, acknowledged that it needed to balance its desire for market data revenues with the potential damage that a high fee would do to its ability to attract order flow.[223]

2. Availability of Alternatives to ArcaBook Data

In addition to the need to attract order flow, the availability of alternatives to an exchange's depth-of-book order data significantly affects the terms on which an exchange distributes such data.[224] The primary use of depth-of-book order data is to assess the depth of the market for a stock beyond that which is shown by the best-priced quotations that are distributed in core data. Institutional investors that need to trade in large size typically seek to assess market depth beyond the best prices, in contrast to retail investors who generally can expect to receive the best price or better when they trade in smaller sizes.[225]

In setting the fees for its depth-of-book order data, an exchange must consider the extent to which sophisticated traders would choose one or more alternatives instead of purchasing the exchange's data.[226] Of course, the most basic source of information concerning the depth generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds. In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's depth-of-book data product.

For more specific information concerning depth, market participants can choose among the depth-of-book order products offered by the various exchanges and ECNs.[227] A market participant is likely to be more interested in other exchange and ECN products when the exchange selling its data has a small share of trading volume, because the depth-of-book order data provided by other exchanges and ECNs will be proportionally more important in assessing market depth. As a result, smaller exchanges may well be inclined to offer their data for no charge or low fees as a means to attract order flow. Even larger exchanges, however, must consider the lower fees of other exchanges in setting the fees for the larger exchanges' data. Significant fee differentials could lead to shifts in order flow that, over time, could harm a larger exchange's competitive position and the value of its non-core data.

Market depth also can be assessed with tools other than depth-of-book order data. For example, market participants can ''ping'' the various markets by routing oversized marketable limit orders to access an exchange's total liquidity available at an order's limit price or better.[228] In contrast to depth-of-book order data, pinging orders have the important advantage of searching out both displayed and reserve (*i.e.*, nondisplayed) size at all price points within an order's limit price. Reserve size can represent a substantial portion of the liquidity available at exchanges.[229] It often will

[217] *See* NYSE Arca Response III at 18 (''If too many market professionals reject Arca Book as too expensive, NYSE Arca would have to reassess the Arca Book Fees because Arca Book data provides transparency to NYSE Arca's market, transparency that plays an important role in the competition for order flow.''). This pressure on exchanges to distribute their order data widely is heightened for those exchanges that have converted from member-owned, not-for profit entities to shareholder-owned, for-profit companies. For-profit exchanges are more likely to place greater importance on distributing market information widely than on limiting such information for the use of their members.

[218] *See* Terrence Hendershott and Charles. M. Jones, ''Island Goes Dark: Transparency, Fragmentation, and Regulation,'' 18 *The Review of Financial Studies* (No. 3) 743, 756 (2005); *see also* Nasdaq Letter at 7 (''[T]he market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary data products themselves.''). In contrast to the Island example, and as noted in the Nasdaq Letter at 9, an element of the BATS ECN's business strategy over the last two years in gaining order flow has been to provide its order data to customers free of charge. *See* BATS Trading, Newsletter (July 2007) (available at *http://www.batstrading.com/newsletters/0707Newsletter.pdf*) (''BATS has chosen not to charge for many of the things for which our competitors charge. * * * More importantly, our market data is free. Why would a market charge its participants for the data they send to that market? Feel free to pose this same question to our competitors.'').

[219] *Cf.* NYSE Arca Response III at 4 (''Several years ago, certain [ECNs] began to make their real-time quotes available for free in order to gain visibility in the market place.'').

[220] NYSE Arca Response I at 4 (''[F]ees will enable the Exchange to further diversify its revenue to compete with its rivals. The Exchange believes that its business has reached the point where its customers are willing to pay for the value of the Exchange's information.'').

[221] *See, e.g.*, Petition at 9; SIFMA I at 7.

[222] *See* notes 147–149 above and accompanying text.

[223] NYSE Arca Response III at 13 (in setting the level of fees for ArcaBook data, NYSE Arca considered ''projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to'' the fees).

[224] *See* NYSE Arca Response III at 13 (in setting fees for ArcaBook data, NYSE Arca considered ''the fact that Arca Book is primarily a product for market professionals, who have access to other sources of market data and who will purchase Arca Book only if they determine that the perceived benefits outweigh the cost''); *see also* the authorities cited in note 200 above. In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g.*, *Leegin Creative Leather Products* v. *PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.*, 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.*, 356 U.S. 1 (1958).

[225] The market information needs of retail investor are discussed at notes 229–336 below and accompanying text.

[226] *See* NYSE Arca Response III at 17 (''As a result of all of the choices and discretion that are available to brokers, the displayed depth-of-book data of one trading center does not provide a complete picture of the full market for a security * * *. A brokerage firm has potentially dozens of different information sources to choose from in determining if, where, and how to represent an order for execution.'').

[227] *See* Nasdaq Letter at 7–8 (''The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. As shown on Exhibit A, each SRO, TRF, ECN and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSEArca, and BATS.'').

[228] *See* Regulation NMS Release, 70 FR at 37514 (discussion of pinging orders noting that they ''could as aptly be labeled 'liquidity search' orders'').

[229] *See, e.g.*, NYSE Arca Response III at 17 (noting that brokers ''may elect to have NYSE Arca hold a portion of the order as hidden interest that NYSE

be available at prices that are better than or equal to an exchange's best displayed prices, and none of this liquidity will be discernible from an exchange's depth-of-book order data. Pinging orders thereby give the sender an immediate and more complete indication of the *total* liquidity available at an exchange at a particular time. Moreover, sophisticated order routers are capable of maintaining historical records of an exchange's responses to pinging orders over time to gauge the extent of total liquidity that generally can be expected at an exchange. These records are a key element used to program smart order routing systems that implement the algorithmic trading strategies that have become so prevalent in recent years.[230]

Another alternative to depth-of-book order data products offered by exchanges is the threat of independent distribution of order data by securities firms and data vendors.[231] As noted above, one of the principal market data reforms adopted in 2005 was to authorize the independent distribution of data by individual firms. To the extent that one or more securities firms conclude that the cost of exchange depth-of-book order products is too high and appreciably exceeds the cost of aggregating and distributing such data, they are entitled to act independently and distribute their own order data, with or without a fee. Indeed, a consortium of major securities firms in Europe has undertaken such a market data project as part of the implementation of the Markets in Financial Instruments Directive (''MiFID'') adopted by the European Union.[232] No securities statute or regulation prevents U.S. firms from undertaking an analogous project in the U.S. for the display of depth-of-book order data. This data could encompass orders that are executed off of the exchanges, as well as orders that are submitted to exchanges for execution. If major U.S. firms handling significant order flow participated in the project, the project could collect and distribute data that covered a large proportion of liquidity in U.S. equities.

The Commission recognizes that the depth-of-book order data for a particular exchange may offer advantages over the alternatives for assessing market depth. The relevant issue, however, is whether the availability of these alternatives imposes significant competitive restraints on an exchange in setting the terms, particularly the fees, for distributing its depth-of-book order data. For example, Nasdaq has a substantial trading share in Nasdaq-listed stocks, yet only 19,000 professional users purchase Nasdaq's depth-of-book data product and 420,000 professional users purchase core data in Nasdaq-listed stocks.[233] A reasonable conclusion to draw from this disparity in the number of professional users of consolidated core data and Nasdaq's non-core data is that the great majority of professional users either believe they do not need Nasdaq's depth-of-book order data or simply do not think it is worth $76 per month to them (approximately $3.50 per trading day) compared to other sources of information on market depth in Nasdaq-listed stocks. The fact that 95% of the professional users of core data choose not to purchase the depth-of-book order data of a major exchange strongly suggests that no exchange has monopoly pricing power for its depth-of-book order data.[234]

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on an exchange in setting fees for its depth-of-book order data. The Commission believes that the availability of these alternatives, as well as NYSE Arca's compelling need to attract order flow, imposed significant competitive pressure on NYSE Arca to act equitably, fairly, and reasonably in setting the terms of the Proposal.

3. Response to Commenters on Competition Issues

Some commenters suggested that exchanges are not constrained by competitive forces in distributing their order data because Exchange Act rules require broker-dealers to provide their orders to an exchange, and that exchanges therefore enjoy a regulatory monopoly.[235] As discussed above, however, exchanges face fierce competition in their efforts to attract order flow. For the great majority of orders, Exchange Act rules do not require that they be routed to an exchange.[236] These include all marketable orders and most non-marketable orders. With respect to certain types of non-marketable orders, two Exchange Act rules can require broker-dealers to provide such orders to an exchange in certain circumstances, but only when the broker-dealer chooses to do business on the exchange. Rule 602 of Regulation NMS[237] requires certain broker-dealers, once they have chosen to communicate quotations on an exchange, to provide their *best* quotations to the exchange.[238] Rule 604

Arca holds in reserve, which means that NYSE Arca will not include the undisplayed portion of the order as part of the Arca Book display''); Michael Scotti, ''The Dark Likes Nasdaq,'' *Traders Magazine* (May 1, 2007) (quoting statement of Nasdaq's executive vice president that 15 to 18 percent of Nasdaq's executed liquidity is non-displayed).

[230] *See, e.g., http://www.advancedtrading.com/directories/dark-algorithms* (descriptions of product offerings for ''dark algorithms'' that seek undisplayed liquidity at multiple trading venues); EdgeTrade, Inc., ''EdgeTrade issues white paper on market fragmentation and unprecedented liquidity opportunities through smart order execution'' (September 10, 2007) (available at *http://www.edgetrade.com*) (''EdgeTrade's smart order execution strategy * * * simultaneously sprays aggregated dark pools and public markets, and then continuously moves an order in line with shifting liquidity until best execution is fulfilled.'').

[231] *See* Nasdaq Letter at 3 (''Proprietary optional data may be offered by a single broker-dealer, a group of broker-dealers, a national securities exchange, or a combination of broker-dealers or exchanges, unlike consolidated data which is only available through a consortium of SROs.'').

[232] The project—currently named ''Markit BOAT''—distributes both quotes and trades and is described at *http://www.markit.com/information/boat/boat-data.html*. It currently charges fees of 120 euros per month per user for its quote and trade data. *See* Nasdaq Letter at 9 (noting the potential for firms to export Project BOAT technology to the United States).

[233] Nasdaq Letter at 6.

[234] *See id.* (''Empirical sales data for Nasdaq TotalView, Nasdaq's proprietary depth-of-book data, demonstrate that broker-dealers do not consider TotalView to be required for compliance with Regulation NMS or any other regulation. * * * [O]f the 735 broker-dealer members that trade Nasdaq securities, only 20 or 2.7 percent spend more than $7,000 per month on TotalView users. Nasdaq understands that firms with more than 100 TotalView professional users generally provide TotalView to only a small fraction of their total user populations.'').

[235] *See, e.g.,* Bloomberg Letter at 4; Financial Services Roundtable Letter at 1; NetCoalition III at 6. Some commenters suggested that broker-dealers were required to provide their data to exchanges for free and then buy that data back from the exchanges. NSX Letter at 1; SIFMA III at 12. A broker-dealer, however, has no need to buy back its own data, with which it is already familiar. Rather, broker-dealers need to see data submitted by *other* broker-dealers and market participants. This need is served by the core function of a securities exchange, which is to provide a central point for bringing buy and sell orders together, thereby enabling the resulting market data to be distributed to all market participants. *See, e.g.,* Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1) (''exchange'' defined as, among other things, ''facilities for bringing together purchasers and sellers of securities'').

[236] For example, a broker-dealer commenter asserted that exchanges enjoy a ''government-protected monopoly'' as exclusive processors of their market information. Schwab Letter at 6; *see also* SIFMA IV at 7 (''Normal market forces cannot be relied upon here because of the unique structure of the market for data that the exchanges compile from their captive broker-dealer customers and then sell back to them.''). As noted in Table 1 above, non-exchange trading venues now execute more volume in U.S.-listed equities than any single exchange.

[237] 17 CFR 242.602 (previously designated as Rule 11Ac1–1).

[238] Only broker-dealers that choose to participate on an exchange as ''responsible broker-dealers'' are required to provide their best bid and best offer to such exchange. Rule 602(b) and Rule 600(b)(65)(i) of Regulation NMS. Broker-dealers that participate only in the over-the-counter (*i.e.,* non-exchange)

Continued

of Regulation NMS [239] requires market makers and specialists to reflect their displayable customer limit orders in their quotations in certain circumstances, but provides an exception if the order is delivered for display through an exchange or FINRA, or to a non-exchange ECN that delivers the order for display through an exchange or FINRA. Most significantly, while these rules can require certain orders to be displayed through *an* exchange or FINRA, broker-dealers have a great deal of flexibility in deciding *which* exchange or FINRA. As discussed above, exchanges compete vigorously to display the non-marketable orders handled by broker-dealers. No particular exchange has a regulatory monopoly to display these orders.[240]

Some commenters asserted that exchanges act as monopolies in distributing depth-of-book order data because they are the exclusive processors of such data, as defined in section 3(a)(22)(B) of the Exchange Act. Many businesses, however, are the exclusive sources of their own products, but this exclusivity does not mean that a business has monopoly pricing power when selling its product and is impervious to competitive pressures. The particular circumstances of the business and its product must be examined. As discussed above, the U.S. exchanges are subject to significant competitive forces in setting the terms for their depth-of-book order products, including the need to attract order flow and the availability of alternatives to their depth-of-book order products. Consequently, NYSE Arca does not have monopoly pricing power for ArcaBook data merely because it meets the statutory definition of an exclusive processor of the data.[241]

Commenters cited a decision of the U.K. competition authorities concerning proposed acquisitions of the London Stock Exchange plc (''LSE'') for the proposition that an exchange is a monopolist of its proprietary market information.[242] Their reliance on this decision is misplaced for two important reasons. First, unlike the U.S. where the core data feeds provide an essential source of information for every exchange's most valuable data—its best quoted prices and last sale information—the LSE's proprietary data is the sole source of information for trading on the LSE. As a result, market participants have few, if any, useful alternatives for LSE proprietary data. In the U.S., in contrast, the availability of an exchange's essential trading information in the core data feeds, as well as other valuable alternatives, discussed above, for assessing market depth beyond the best quoted prices, precludes the U.S. exchanges from exerting monopoly power over the distribution of their non-core data. Second, there historically has been very little effective competition among markets for order flow in the U.K. The U.K. Competition Commission, for example, found that the most important competitive constraint on the LSE was not the existence of other trading venues with significant trading volume in LSE-listed stocks, but rather ''primarily, the *threat* that [other exchanges, including foreign exchanges such as the NYSE and Nasdaq] will expand their services and compete directly with LSE.'' [243] In contrast, the U.S. has a national market system for trading equities in which competition is provided not merely by the threat of other markets attempting to trade an exchange's listed products, but by the on-the-ground existence of multiple markets with a significant share of trading in such products. These competitors also distribute depth-of-book order products with substantial liquidity in the same stocks included in an exchange's depth-of-book product. In sum, the competitive forces facing NYSE Arca in its distribution of ArcaBook data were entirely inapplicable to the LSE in its distribution of proprietary data in 2005.

In addition, the existence of significant competitive forces applicable to NYSE Arca renders inapposite the citations of commenters to statements in Exchange Act legislative history and Commission releases regarding monopoly data distribution. Such statements were made in the context of the central processors of core data for the Networks, which in fact have monopoly pricing power for such mandated data. Central processors of core data therefore are in a very different economic and legal position than NYSE Arca as exclusive processor for its depth-of-book order data.[244]

For example, commenters cited a passage from the legislative history of the 1975 amendments to the Exchange Act for the proposition that any exclusive processor must be considered a monopoly, but this passage applies only to the central processors of consolidated core data that Rule 603(b) requires to be consolidated:

> Despite the diversity of views with respect to the practical details of a national market system, all current proposals appear to assume there will be an exclusive processor or service bureau *to which the exchanges and the NASD will transmit data and which in turn will make transactions and quotation information available to vendors of such information*. Under the composite tape ''plan'' declared effective by the Commission, SIAC would serve as this exclusive

market as responsible broker-dealers are required to provide their quotations to FINRA, a not-for-profit membership organization of broker-dealers. Rule 602(b) and Rule 600(b)(65)(ii) of Regulation NMS.

[239] 17 CFR 242.604 (previously designated as Rule 11Ac1–4).

[240] One commenter asserted that ''exchanges have government-granted exclusive access to market data for securities listed in their respective markets.'' SIFMA I at 12. In fact, a listing exchange does not have any particular privileges over other exchanges in attracting quotation and trade data in its listed stocks. Rather, other exchanges are free to trade such stocks pursuant to unlisted trading privileges, and the listing exchange must compete with those exchanges for order flow. If the listing exchange is unable to attract order flow, it will not have quotations or trades to distribute.

[241] A straightforward example may help illustrate this point. Table 1 shows that there are several exchanges with a very small share of trading volume. Such an exchange would meet the statutory definition of an exclusive processor, but clearly would be unable to exert monopoly pricing power if it attempted to sell its depth-of-book order data at an unreasonably high price. Accordingly, the relevant issue is not whether an exchange falls within the statutory definition of an exclusive processor, but whether it is subject to significant competitive forces in setting the terms for distribution of its depth-of-book data.

[242] NetCoalition IV at 9; SIFMA V at 8.

[243] U.K. Competition Commission, A Report on the Proposed Acquisition of London Stock Exchange plc by Deutsche Borse AG or Euronext NV (November 2005), at 57 (emphasis added). The intensity of competition among markets trading the same products in Europe could increase substantially in the wake of the implementation of MiFID in November 2007.

[244] One commenter cited two papers for the claim that exchanges have government-conferred monopolies over the collection and distribution of trading data. NetCoalition IV at 9–10 (*citing* Wilkie Farr & Gallagher, counsel to Bloomberg L.P., ''Discussion Paper: Competition, Transparency, and Equal Access to Financial Market Data'' (September 24, 2002) (submitted by Bloomberg L.P. in consultation with George A. Hay and Erik R. Sirri); Erik R. Sirri, ''What glory price? Institutional form and the changing nature of equity trading'' (Federal Reserve Bank of Atlanta 2000 Financial Markets Conference on e-Finance, October 15–17). Dr. Sirri currently is Director of the Commission's Division of Trading and Markets. The papers were prepared when he was not a member of the Commission's staff. As discussed at length above, the commenter's claim that exchanges have a monopoly over the collection and distribution of trading data confuses core data, which Commission rules require to be collected by a central processor pursuant to the joint-industry Plans, and non-core data, which the individual exchanges must compete to attract from market participants. Indeed, the major shifts in order flow among exchanges and other trading venues in the years since the papers were written in 2000 and 2002 amply demonstrate that no exchange has a monopoly over the collection of orders displayed in the exchanges' depth-of-book data feeds. As noted above (text accompanying note 207), for example, the NYSE's market share in its listed stocks has declined from 79.1% in January 2005 to 30.6% in June 2008. For these reasons and those explained in the text, the two papers are outdated. Neither the NYSE, nor any other exchange, currently has a monopoly over the collection and distribution of depth-of-book order data in its listed stocks.

processor. The Committee believes that if such a *central* facility is to be utilized, the importance of the manner of its regulation cannot be overestimated. * * * The Committee believes that if economics and sound regulation dictate the establishment of an exclusive *central* processor for the *composite* tape or any other element of the national market system, provision must be made to insure that this *central* processor is not under the control or domination of any particular market center. Any exclusive processor is, in effect, a public utility, and thus it must function in a manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms. Although the existence of a monopolistic processing facility would not necessarily raise antitrust problems, serious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade or its charges were not reasonable.[245]

These Congressional concerns apply to a central processor that has no competitors in the distribution of data that must be consolidated from all the markets. They do not apply to the independent distribution of non-core data by an individual exchange that is subject to significant competitive forces.

Commenters on the Draft Order questioned whether its reliance on competitive forces is consistent with Exchange Act legal standards.[246] Their discussion, however, appears to conflate: (1) The factual issue of whether competitive forces significantly constrain the exchanges in setting the terms for their non-core data; with (2) the legal issue of whether, if such competitive forces exist, the Commission is authorized to consider those forces in determining whether an exchange proposal meets the applicable Exchange Act standards. If an exchange could, in fact, exert monopoly power over its pricing of non-core data, it obviously would be inappropriate for the Commission to rely on non-existent competitive forces as a basis for approving an exchange proposal. If significant competitive forces do apply to an exchange, the Commission believes that considering them in its review is fully consistent with its regulatory responsibilities.

For example, the Commission does not agree with commenters' argument that the phrase ''fair and reasonable'' in the Exchange Act requires the Commission always to undertake a cost-based review of proposed exchange fees because it uses such an approach when applying the fair and reasonable standard in other circumstances.[247] Applying the abstract standard ''fair and reasonable'' to a specific proposal necessitates the use of factors that are appropriate to the circumstances. In assessing the fairness and reasonableness of a price, courts have emphasized that the existence of competitive forces is a particularly appropriate factor.[248]

In addition, commenters on the Draft Order asserted that it improperly relied on competition to the exclusion of all others factors.[249] In fact, the Commission considered several factors. The first step of the market-based approach to non-core data proposals examines competitive factors to determine whether there is a substantial basis to believe that a proposed fee meets the applicable Exchange Act standards. In the second step, the Commission will evaluate whether there nevertheless is a substantial countervailing basis to find that a proposal is inconsistent with the Exchange Act, including the unfair discrimination concerns raised by a commenter.[250]

Commenters also cited a passage from the Commission's Market Information Concept Release for the proposition that an exchange must submit cost data to justify a proposed fee for the exchange's depth-of-book order data.[251] The Release stated that ''the total amount of market information revenues should remain reasonably related to the cost of market information.''[252] The Market Information Concept Release, however, was published in 1999, prior to the start of decimal trading and to the increased usefulness of non-core data distributed outside the Networks. The Market Information Concept Release in general, and the cited statement in particular, solely addressed a *central* exclusive processor that has no competitors in distributing consolidated core data to the public pursuant to the Plans.[253]

Moreover, the Commission did not propose, much less adopt, a ''strictly cost-of-service (or 'ratemaking') approach to its review of market information fees in every case,'' noting that ''[s]uch an inflexible standard, although unavoidable in some contexts, can entail severe practical difficulties.''[254] Rather, the Commission

[245] Senate Report at 11–12 (emphasis added).

[246] NetCoalition V at 7–18; SIFMA IX at 8–20.

[247] NetCoalition V at 15–18; SIFMA IX at 12–13.

[248] *See, e.g., Morgan Stanley Capital Group, Inc.* v. *Public Utility Dist. No. 1,* 554 U.S. __, 128 S.Ct. 2733, 2738 (2008) (''The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions. We have repeatedly emphasized that the Commission is not bound to any one ratemaking formula.'') (citations omitted); *Elizabethtown Gas Co.* v. *FERC,* 10 F.3d 866, 870 (D.C. Cir. 1993) (''[T]he Supreme Court 'has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula * * *,'' and we have indicated that when there is a competitive market FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result.'') (citations omitted).

[249] NetCoalition V at 8–9; SIFMA IX at 10–11.

[250] SIFMA IX at 11.

[251] *See* section III.A.2 above. As noted in section III.A.7 above, commenters recommended a variety of market data regulatory solutions, in addition to a cost-based justification of fees. One was a regulatory mandate that exchanges place their market data operations in separate subsidiaries and provide their data to third parties on the same terms they make the data available to the subsidiary. Given its determination that NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal, the Commission does not believe this regulatory mandate is necessary or appropriate. It also notes that the recommendation alone would not address the potential problem of an exchange's unreasonably high fees under the per device fee structure that is used throughout the exchange industry. For example, the proposed fees for ArcaBook data would be levied based on the number of professional and non-professional subscribers who receive the data on their devices. Regardless of whether subscribers obtained their data from an exchange subsidiary or another competing vendor, the exchange would receive the same total amount of fees based on the total number of subscribers who chose to receive the data. From the standpoint of maximizing its revenues from per device fees, the exchange likely would be indifferent to whether subscribers purchased through its subsidiary or elsewhere. It therefore would be willing to make the data available to its subsidiary for the same per device fees that it made the data available to third parties. Moreover, to the extent that an exchange would want to benefit a subsidiary that it was required to create to act as a vendor of market data, that requirement need not cause the exchange to charge lower fees. Instead, it could create conflicts of interest under which the exchange would have incentives to favor the subsidiary over other vendors in ways that might be difficult to monitor effectively. Under its proposal, NYSE Arca will make the ArcaBook data available to vendors on a non-discriminatory basis. For the same reason that NYSE Arca's proposed fees for the ArcaBook data are not unreasonably high—the competitiveness of the market for that data—other potential problems cited by commenters as arising in a non-competitive environment are not an obstacle to approval of the NYSE Arca proposal under the relevant Exchange Act provisions and rules.

[252] 64 FR at 70627.

[253] *See, e.g.,* 64 FR at 70615 (''These [joint-SRO] plans govern all aspects of the arrangements for disseminating market information. * * * The plans also govern two of the most important rights of ownership of the information—the fees that can be charged and the distribution of revenues derived from those fees. As a consequence, no single market can be said to fully 'own' the stream of consolidated information that is made available to the public. Although markets and others may assert a proprietary interest in the information that they contribute to the stream, the practical effect of comprehensive federal regulation of market information is that proprietary interests in this information are subordinated to the Exchange Act's objectives for a national market system.'')

[254] 64 FR at 70619. In the Market Information Concept Release, the Commission discussed the one context in which it had previously adopted a strict cost-of-service standard for market data fees—a denial of access proceeding involving the NASD and Instinet. *See supra,* note 47. It emphasized, however, that the scope of its decision was limited

Continued

concluded that ''Congress, consistent with its approach to the national market system in general, granted the Commission some flexibility in evaluating the fairness and reasonableness of market information fees.'' [255]

Some commenters suggested that depth-of-book order data has become so important since the initiation of decimal trading that broker-dealers now are effectively required to purchase the exchanges' depth-of-book data products.[256] No regulatory requirement, however, compels broker-dealers to purchase an exchange's depth-of-book order data. As discussed above, only core data is necessary for broker-dealers to comply with the consolidated display requirements of Rule 603(c) of Regulation NMS.[257] In addition, only core data is necessary to comply with the trade-through requirements of Rule 611 of Regulation NMS.[258]

Commenters also asserted that an exchange's depth-of-book order data may be necessary for a broker-dealer to meet its duty of best execution to its customers.[259] The Commission believes, however, that broker-dealers are *not* required to obtain depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution. For example, a broker-dealer can satisfy this duty ''to seek the most favorable terms reasonably available under the circumstances for a customer's transaction'' [260] by, among other things, reviewing executions obtained from routing orders to a market. Under established principles of best execution, a broker-dealer is entitled to consider the cost and difficulty of trading in a particular market, including the costs and difficulty of assessing the liquidity available in that market, in determining whether the prices or other benefits offered by that market are reasonably available.[261] Although the Commission has urged broker-dealers to ''evaluate carefully'' the different options for execution, we have acknowledged that cost considerations are legitimate constraints on what a broker-dealer must do to obtain best execution.[262] In order to ''evaluate carefully'' execution options, a broker-dealer need not purchase all available market data. The Commission does not view obtaining depth-of-book data as a necessary prerequisite to broker-dealers' satisfying the duty of best execution.[263]

Commenters on the Draft Order questioned whether it lowered the standard of best execution and whether its reasoning would be accepted in other legal contexts,[264] but the commenters cited no legal authority to support their concerns. Moreover, contrary to the claim that ''ascertaining the total price of an average retail trade *requires* depth of book data,'' [265] the inferior prices in depth-of-book data provide a poor basis to assess the quality of execution of retail orders. As discussed below, the availability of substantial undisplayed liquidity enables such orders to be executed on average at prices better than even the best displayed quotes in core data.[266] In sum, the Commission has not lowered the standard of best execution by recognizing that there are reasonable tools other than depth-of-book data to obtain high-quality executions of customer orders.

4. Response to Economic Assessments of the Draft Order

Three commenters submitted economic assessments (with supplements) of the Draft Order. The Ordover/Bamberger Statement agreed with the Draft Order's conclusion that NYSE Arca was subject to significant competitive forces that constrained its pricing of the ArcaBook data. It noted that ''if competition is effective, regulation is not only not needed, but can distort the operations of the market and lead to unforeseen and unintended consequences that can harm the trading public.'' [267]

In contrast, the SLCG Study and the Evans Report disputed the Draft Order's conclusion that NYSE Arca was subject to significant competitive forces. As discussed below, the Commission has reviewed their data and analysis and does not find them persuasive for three broad reasons:

(1) Although the two assessments purport to accept that exchanges must compete to attract order flow, their theoretical attempts to wall off this order flow competition from data

to the ''particular competitive situation presented in the proceedings.'' 64 FR at 70622–70623. Specifically, the NASD essentially had sought to charge a retail rate for a wholesale product that would have severely curtailed the opportunity for a data vendor like Instinet to compete with the NASD in the retail market. The practical difficulties of implementing the strict cost-of-service approach were amply demonstrated by the long and difficult history of the attempt to determine the NASD's cost of producing the data. *See* 64 FR at 70623.

[255] *Id.* at 70619. Commenters also pointed to Commission and staff statements about costs in the context of the entry of an exchange as a new participant in one of the Plans. NetCoalition IV at 12–14; SIFMA V at 9–10. Again, competitive forces are not operative in this context because Rule 603(b) requires an exchange to join the Plans and disseminate its best quotations and trades through a central processor in the core data feeds. A cost-based analysis is necessary in this context, not because it is universally required by the Exchange Act to determine fair and reasonable fees, but because the absence of competitive forces impels the use of a regulatory alternative.

[256] *See* section III.A.4 above. Commenters cited a passage from the Regulation NMS Release for the proposition that exchanges could exert market power when distributing non-core data. NetCoalition III at 6; SIFMA V at 11–12. The concern mentioned in the Regulation NMS Release, however, explicitly applied only to the ''best quotations and trades'' of an SRO—*i.e.*, an SRO's core data—and not to non-core data.

[257] Note 183 above and accompanying text. Rule 603(c) requires broker-dealers and vendors, in certain trading and order-routing contexts, to provide a consolidated display of the national best bid and offer and the most recent last sale report. All of this information is included in the core data feeds.

[258] Note 185 above and accompanying text. When it adopted RegulationNMS, the Commission declined to adopt a proposal that would have extended trade-through protection to depth-of-book quotations if the market displaying such quotations voluntarily disseminated them in the consolidated core quotation stream. Regulation NMS Release, 70 FR at 37529.

[259] *See* note 60 above and accompanying text.

[260] *See* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996) (''Order Handling Rules Release'').

[261] *See* Order Handling Rules Release, 61 FR at 48323 (acknowledging that, consistent with best execution, broker-dealers may take into account cost and feasibility of accessing markets and their price information); Regulation NMS Release, 70 FR at 37538 n. 341 (noting that the ''cost and difficulty of executing an order in particular market'' is a relevant factor in making a best execution determination). NYSE Arca and Nasdaq also stated their view that depth-of-book order products are not required for best execution purposes. NYSE Arca Response III at 18; Nasdaq Letter at 5–6.

[262] Order Execution Obligations, Proposing Release, Securities ExchangeAct Release No. 36310 (Sept. 29, 1995), 60 FR 52792 at 52794 (Oct. 10, 1995) (''While not all markets and trading systems are equally accessible to large and small broker-dealers, and not all order handling technologies are equally affordable to all broker-dealers, when efficient and cost-effective systems are readily accessible, broker-dealers must evaluate carefully whether they can be used in fulfilling their duty of best execution.'').

[263] Some broker-dealers may conclude that, as a business matter to attractcustomers and generate commissions, they should obtain depth-of-book order data from one or more exchanges to inform their order-routing and pricing decisions. As with any other business decision, if the costs of obtaining the market data outweigh the benefits, broker-dealers will not buy it. This will put pressure on the exchange selling the data to lower the price that it charges. If, however, such firms believed that an exchange's depth-of-book order product is overpriced for certain business purposes, they could limit their use of the product to other contexts, such as ''black-box'' order routing systems and a block trading desk, where the depth-of-book data feed is most directly used to assess market depth. The firm would not display the data widely throughout the firm as a means to minimize the fees that must be paid for the data. This limited use of the data would drastically reduce the revenues that an exchange might have sought to obtain by charging a high fee and therefore be self-defeating for the exchange. In sum, exchanges will be subject to competitive pressures to price their depth-of-book order data in a way that will promote wider distribution and greater total revenues.

[264] NetCoalition V at 7; SIFMA IX at 19–20.

[265] NetCoalition V at 7 (emphasis in original).

[266] The execution quality of retail orders is discussed below at notes 306–308 and accompanying text.

[267] Ordover/Bamberger Statement at 2.

competition are unconvincing—the two market forces are integrally linked in the real world of exchange competition;

(2) In rejecting all potential substitutes for an exchange's depth-of-book data, the two economic assessments focus narrowly on whether alternatives replicate the exchange's specific data and thereby miss the critically important bigger picture of whether such data is in fact necessary for traders effectively to assess the available liquidity in a stock; and

(3) The two economic assessments fail to recognize the important ways in which the Exchange Act regulatory structure effectively promotes market data competition, yet suggest regulatory alternatives that would be costly and difficult to implement and still would offer less reason to expect an efficient outcome than relying primarily on the current level of competitive forces.

a. Order Flow and Market Data Competition

Both economic assessments purport to accept the existence of competition for order flow among exchanges and other trading venues.[268] They take different approaches, however, in attempting to explain why this competition for order flow does not impose significant constraints on the exchanges in setting the terms for their depth-of-book data.

In its analysis of the ''supply-side conditions'' of market data, the SLCG Study says that it will explain ''why fierce competition among exchanges is not likely to result in competitively priced exclusive data when significant 'network externalities'' are present in the market for order flow.'' [269] Its analysis is unpersuasive for two primary reasons. First, if network externalities are truly operative in the market for order flow, they should impede competition for order flow. For example, the SLCG Study notes that ''[a]t the individual security level, the order flow externality makes it highly likely that a dominant liquidity-providing market center will emerge.'' [270] The SLCG Study does not explain, however, how network externalities could operate in the market for order flow, impede competition for market data, but *not* impede fierce competition for order flow. If there is competition for order flow, there necessarily will be competition for the supply of market data because order flow creates the very data to be supplied, and vice versa. The defect of the SLCG analysis highlights the difficulty of separating two aspects of exchange competition that are integrally linked.

Second, the SLCG Study attempts to show that NYSE Euronext and Nasdaq dominate trading in, respectively, NYSE-listed stocks and Nasdaq-listed stocks by offering Herfindahl Index statistics on market concentration. Based on these statistics, the SLCG Study concludes that ''trading is highly concentrated and that the listing exchange is the dominant exchange.'' [271]

This conclusion badly misuses the Herfindahl Index. In particular, a ''concentrated'' market as measured by the Herfindahl Index does not mean there is an absence of competition in the market. Rather, the U.S. Department of Justice (''DOJ'') uses the Index to assess whether the existing competition in a market would be substantially lessened by a proposed merger.[272] In this case, the SLCG Study's misuse of the Herfindahl Index is quite apparent, given that the DOJ specifically found that the U.S. equity markets were competitive in November 2005 when it investigated the merger of NYSE and Archipelago Holdings and the merger of Nasdaq and Instinet Group Inc.[273] The DOJ concluded that neither merger would be ''likely to reduce competition substantially'' because the ''planned and likely entry of several firms * * * should result in additional viable alternatives to the two merged firms sufficient to ensure that the markets remain competitive.'' [274]

Level of concentration alone does not reliably indicate the level of competition in an industry. It is only one of a series of indicators that may be used when analyzing competition and is a more appropriate metric in some industries than others. In particular, industry concentration is a more relevant measure of competitiveness in markets where barriers to entry enable large firms to increase equilibrium prices by restricting the quantity supplied.[275] As the last three years have shown, new competitors in the U.S. equity markets have captured significant trading volume and have imposed strong competitive pressure on the primary listing exchanges. Indeed, the NYSE—the exchange with the highest market share in its listed stocks in November 2005—has seen its share of trading in those stocks drop from 79.1% to 30.6%.[276] This is hardly evidence of network externalities that ''are such powerful forces that listing exchanges are able to survive as natural monopolies.'' [277]

The U.S. equity markets are characterized by other key features that contribute to a competitive outcome regardless of concentration levels. One is the ability of firms quickly to expand their order and trade processing capacity. As a result, capacity constraints play at best a minor role in the way that firms compete for order flow, and competition is driven primarily by pricing strategies rather than quantity choice. A well established principle of industrial organization literature is that industries in which price is the main strategic choice show more competitive outcomes.[278] Another characteristic of the U.S. equity markets that promotes competition is low

[268] SLCG Study at 2; Evans Report at 2.

[269] SLCG Study at 2.

[270] SLCG Study at 3.

[271] SLCG Study at 10.

[272] DOJ Merger Guidelines § 0.1 (''The Guidelines aredesigned primarily to articulate the analytical framework the Agency applies in determining whether a merger is likely substantially to lessen competition, not to describe how the Agency will conduct the litigation of cases that it decides to bring.'').

[273] U.S. Department of Justice, Press Release No. 05–616, ''Department of Justice Antitrust Division Statement on the Closings of Its Two Stock Exchange Investigations'' (Nov. 16, 2005) (available at *http://www.usdoj.gov/opa/pr/2005/November/05_at_616.html*).

[274] *See also* Comments of the United States Department of Justice, Review of the Regulatory Structure Associated with Financial Institutions, Section III.C. (Jan. 31, 2008) (available at *http://www.usdoj.gov/atr/public/comments/229911.htm*) (''This structure [of the equity markets]—and its regulatory overlay—permits multiple exchanges and electronic trading venues to offer the same or equivalent instruments. There is significant competition among multiple equity trading venues, with low execution fees, narrow spreads, and widespread system innovation—all to the benefit of consumers.''); Nasdaq III at 3.

[275] *See, e.g.,* Jean Tirole, T*he Theory of IndustrialOrganization* 209–221 (1998).

[276] *See* note 207 above and accompanying text. The SLCG Study and Evans Report asserted that the Draft Order failed to consider the effect of competition at the individual stock level, noting, for example, that Nasdaq's market share in Nasdaq-listed stocks is higher than for other stocks. SLCG Study at 11; Evans Report at 7. The Draft Order did, in fact, consider the market share of NYSE Arca in various categories of stocks, as well as the NYSE in NYSE-listed stocks. *See* 73 FR at 32673. Moreover, as noted in Table 1 above, no exchange (or even NYSE and NYSE Arca combined) currently executes more than 45% of the volume in its listed stocks. The relatively small variations in market share across different stocks are consistent with the Commission's finding that the exchanges are subject to significant competitive forces, particularly given the ready portability of order flow from one exchange to another (as well evidenced by the decline in the NYSE's market share in its listed stocks). Any attempt by an exchange to capitalize on its market share in one stock or group of stocks by acting unreasonably with respect to its customers is likely to drive that order flow away and soon end whatever ''dominance'' the exchange once had.

[277] SLCG Study at 19. *See* Ordover/Bamberger Statement at 15 (''HHI analysis can be unreliable when the shares of firms in the market can change rapidly (i.e., competition can be vigorous and intense even in markets in which measured HHI is high if firms can rapidly gain or lose share.'').

[278] *See, e.g.,* Tirole, note 275 above, at 307–314.

switching costs.[279] Market participants can easily switch their order flow from one market to another. Indeed, they can participate in many markets at the same time and simultaneously offer and take liquidity from multiple limit order books. Finally, promoting competition is an integral element of the regulatory structure of the U.S. equity markets. The Commission has adopted numerous regulations over the past decade, including Regulation ATS, the Order Handling Rules, and Regulation NMS, that have enabled smaller markets to compete with larger markets and made it much more difficult for large exchanges to retain market share should they attempt to exert market power. In sum, the U.S. equity markets have the hallmarks of an industry in which concentration is not a very informative measure of the level of competition.

The calculations in the SLCG Study also grossly overstate the level of concentration in the U.S. equity markets. First, for Nasdaq, the SLCG Study combines the volume of trades actually executed by Nasdaq—its ''matched'' volume—with volume that is executed by non-exchange trading venues and merely reported to the joint FINRA/Nasdaq TRF. The non-exchange trades do not reflect liquidity in Nasdaq or in its depth-of-book data. In June 2008, for example, Nasdaq reported 42.7% matched volume in Nasdaq-listed stocks, while the Nasdaq/FINRA TRF reported 23.3% volume in Nasdaq-listed stocks.[280] The SLCG Study thereby erroneously inflated Nasdaq's market share by more than 50%.

Second, the SLCG statistics combine volume for NYSE and NYSE Arca, even though they operate separate liquidity pools. As discussed below,[281] the Exchange Act precludes anti-competitive tying of the liquidity pools of separately registered national securities exchanges even if they are under common control. Accordingly, their separate liquidity pools eliminate any network externalities between NYSE and NYSE Arca and undercut much of the SLCG analysis of market concentration. The SLCG Study does not address how network externalities could apply across separate, untied, liquidity pools.

Even if the reported market shares of NYSE and NYSE Arca are combined, however, it would not change the Commission's conclusion that NYSE Arca faced significant competitive forces in setting the terms for the ArcaBook data. The combined market share of NYSE and NYSE Arca in NYSE-listed stocks in June 2008 was 44.6%, down from 53.6% in December 2007, and comparable to the 42.7% market share of Nasdaq in Nasdaq-listed stocks in June 2008.[282]

The third problem with the SLCG Study's calculation of market concentration is that it fails to examine the quotes of venues other than NYSE, NYSE Arca, and Nasdaq when measuring displayed liquidity—particularly the quotes of BATS and Direct Edge, which are the fourth and fifth largest equity trading centers in the U.S. Both ECNs display their best quotes in the core data feeds through either the International Securities Exchange (''ISE'') or National Stock Exchange (''NSX'') and offer their depth-of-book data directly to customers without charge. BATS also makes depth-of-book data available to the public without charge on its Internet Web site.

The displayed liquidity of venues other than the primary listing exchanges is quite substantial, resulting in displayed liquidity concentration that is much less than reported trading volume concentration. For example, on July 31, 2008, the best displayed quotations in the core data feeds for the six stocks analyzed in the SLCG Report were as follows:[283]

TABLE 2—EXCHANGE QUOTATION COMPARISON SHARE SIZE

[Percent of time at NBBO]

| | NYSE | NYSE Arca | Nasdaq | ISE | NSX |
|---|---|---|---|---|---|
| C | 2,199 (81%) | 5,933 (89%) | 8,069 (93%) | 4,821 (88%) | 3,948 (72%) |
| GE | 2,848 (87%) | 5,728 (92%) | 8,594 (95%) | 4,829 (91%) | 3,199 (85%) |
| XOM | 883 (49%) | 606 (77%) | 941 (75%) | 470 (63%) | 576 (22%) |
| AAPL | NA | 250 (52%) | 307 (57%) | 473 (0.4%) | 332 (63%) |
| GOOG | NA | 212 (46%) | 194 (48%) | 127 (0.1%) | 202 (49%) |
| MSFT | NA | 8,149 (95%) | 18,311 (97%) | 3,848 (8%) | 10,822 (95%) |

The liquidity offered by the ECNs also is substantial at their depth-of-book prices outside the best prices that are included in the core data feeds. For example, snapshots of BATS depth-of-book data on July 31, 2008 reflect the following liquidity available at its best prices and within four cents away from its best prices:[284]

TABLE 3—BATS ORDER BOOK LIQUIDITY, JULY 31, 2008

| | Shares at best prices | Shares within four cents |
|---|---|---|
| C | 12,950 | 39,036 |
| GE | 8,438 | 37,176 |
| XOM | 800 | 1,500 |
| AAPL | 400 | 2,100 |
| GOOG | 300 | 0 |
| MSFT | 16,200 | 60,876 |

The SLCG Study erroneously calculated the concentration of displayed liquidity by extrapolating from the reported trading volume of BATS and Direct Edge rather than directly examining their quoted liquidity.[285] It thereby missed an

[279] *See, e.g.,* Paul Klemperer, ''Markets withConsumer Switching Costs,'' *Q.J. Econ.* 375–394 (1987).

[280] Source: *http://www.nasdaqtrader.com. See also* Nasdaq III at 1–2. SLCG II notes that Nasdaq itself defines ''total market share'' to include TRF trades. SLCG II at 4. Nasdaq's Form 10–K, however, specifically distinguishes between ''matched market share'' and ''total market share'' and defines matched market share to include only transactions that are executed on Nasdaq's systems. *See* Nasdaq, Form 10–K for period ending December 31, 2007 (filed February 25, 2008), at 44–45. Transactions executed by entities other than Nasdaq and merely reported to the joint FINRA/Nasdaq TRF are irrelevant when assessing Nasdaq's share of liquidity.

[281] Note 309 below and accompanying text.

[282] *See* Table 1, note 210 above and accompanying text.

[283] Source: ArcaVision (available at *http://www.arcavision.com*). The data combines bids and offers to determine size and percentage of time at the NBBO. For example, if an exchange always quoted at both the national best bid and the national best offer for 500 shares, its size would be 1000 shares and its percentage would be 100.

[284] *Source:* BATS (snapshots taken from *http://www.batstrading.com* at approximately 11:53 a.m. on July 31, 2008).

[285] SLCG Study at 46. The SLCG Study also measured all liquidity between the reported high

essential aspect of assessing liquidity in the current equity markets.

For its part, the Evans Report recognizes the exceptionally strong competition for order flow that characterizes the U.S. equities markets. Indeed, it describes the ongoing price war in transaction fees and rebates among equity trading centers in their efforts to attract order flow. The Evans Report concludes, however, that exchanges are impervious to their compelling need to attract order flow when it comes to setting the terms for their depth-of-book order data. It finds that the relationship between order flow competition and depth-of-book data ''is neither strong nor direct.'' [286]

To support this conclusion, the Evans Report asserts that transaction fees and rebates are directly related to order flow competition, while data fees are not.[287] As noted in the Draft Order, however, the Exchange Act precludes exchanges from adopting terms for data distribution that unfairly discriminate by favoring participants in an exchange's market or penalizing participants in other markets.[288] Accordingly, the fact that exchanges do not directly link their data fees to order flow providers sheds no light on whether order flow and market data competition are related.

The direct connection between order flow and data competition is based on ''but-for'' causation—if an exchange does not compete successfully for order flow from its customers (in part with market data), it will not generate transactions (or transaction fees) and will have no market data to sell. The two types of competition therefore are integrally connected in the dynamic process of operating a securities exchange. This connection pressures exchanges not to take any action with respect to market data that might jeopardize its position in the competition for order flow. To do otherwise would jeopardize the exchange's own lifeline.

Charging unreasonably high fees for depth-of-book data would jeopardize an exchange's order flow in two respects. First, wide dissemination of an exchange's data is an important tool to attract order flow.[289] The Draft Order cited the instructive real-world example when Island ECN stopped displaying its order book and promptly lost 50% of its market share.[290] The Evans Report concedes that ''a viable trading venue must make some of its market data available,'' [291] but nevertheless asserts that this competitive force does not affect the terms on which an exchange must make data available to its customers. An exchange competing to attract customers is unlikely to be as sanguine about the effects of an attempt to charge these customers unreasonably high fees for its data.[292]

Second, as noted in the Draft Order,[293] the exchange must market its data products to many of the same customers to which it must appeal for order flow. This integral connection between order flow and data competition is strikingly highlighted by the language of the Evans Report itself: ''[A]n exchange with substantial liquidity maintains significant leverage over the consumers of its depth-of-book data. That dynamic—significant leverage over market data customers and little or no leverage over providers and takers of liquidity—results in prices for market data that reflect significant market power and prices for order flow that reflect competitive conditions.'' [294] This is a purely theoretical distinction between customers that does not exist in the real world in which exchanges must compete. Exchanges must grapple with the competitive pressures of marketing their data services to many of the same customers to whom they are marketing their transaction services.

b. Substitutes for Depth-of-Book Data

The two economic assessments conclude that none of the alternatives for an exchange's depth-of-book data noted in the Draft Order—core data, depth-of-book data from other trading centers, pinging for liquidity, and the threat of independent distribution of non-core data by broker-dealers—significantly constrain the pricing of the exchange's depth-of-book data. The Evans Report, for example, focuses on the unique nature of a particular exchange's data and asks whether there are any substitutes that replicate the exchange's ''unique'' data.[295] This focus is too narrow, however, and fails capture the bigger picture of what traders need when they assess liquidity in a stock and of where an exchange's depth-of-book data fits into this picture.[296]

The starting point in assessing the value of liquidity information is to recognize that price matters a great deal to traders. The more aggressive the price of a bid or offer at a particular size, the more valuable the information is to traders. Conversely, the less aggressive the price of a bid or offer, the less valuable the information is to traders. An exchange's depth-of-book data reflects displayed liquidity at prices *inferior* to the quoted NBBO. The value

and low price for the trading day (*id.* at 43), which at any particular time will include liquidity far away from the inside prices that is of little value to traders.

[286] Evans Report at 13. One commenter asserted that exchanges do not have an incentive to keep market data fees low because they rebate market data fees to attract order flow. STA Letter at 3; *see also* Evans II at 12. Exchange rebates of market data fees, however, relate to core data fees, not to the non-core data fees that are the subject of this filing. Moreover, the exchange rebates of core data fees apply primarily to trades that are reported to one of the trade reporting facilities jointly operated by FINRA and different exchanges. These trades are executed in the OTC market, not on the exchanges. The exchanges compete to attract reports of these trades by rebating core market data revenues to the entity that actually executed the trade. Consequently, the market data fee rebates result in revenues flowing through the exchanges to the OTC entities that provided the price discovery.

[287] Evans Report at 15–16.

[288] 73 FR at 32762, 32768. *See also* Ordover/Bamberger Statement at 17 (''The Commission's proscription of 'discriminatory' fees for market data would constrain any attempt by NYSE Arca or Nasdaq to price discriminate between different types of customers (*i.e.*, charge higher prices to customers with relatively inelastic demand for non-core data.'').

[289] *See* Thomson Reuters Letter at 3 (''Given the competitive market for order flow and trade execution, we agree that 'an exchange generally will have strong competitive reasons to price its depth-of-book order data so that it will be distributed widely to those most likely to use it to trade.' '') (quoting Draft Order).

[290] 73 FR at 32764.

[291] Evans Report at 19. Evans II also states that it ''does not assume that no relationship whatsoever exists between the pricing of depth-of-book data and the volume of order flow.'' Evans II at 11. n. 28. For the reasons discussed in this Order, the Commission agrees that there is such a relationship. The Evans analysis appears to disagree primarily about the strength of that relationship and the extent to which it significantly constrains the exchanges in pricing their depth-of-book data.

[292] *See* Ordover/Bamberger Statement at 9 (''large shifts in trading volume indicate that traders can, and do, quickly move their orders from one exchange to another'').

[293] 73 FR at 32764.

[294] Evans Report at 17–18.

[295] Evans Report at 6–7. Evans II repeats this analysis. Evans II at 6. The relevant issue, however, is not whether the content of one exchange's data is a perfect substitute for another exchange's data. The issue is whether, given all of the available sources of information for assessing liquidity and trading in today's highly automated and competitive market structure (which includes both quoting markets and many dark pools), an exchange's depth-of-book data is so critically important that the exchange is not significantly constrained by competitive forces in pricing that data. For the reasons discussed in this Order, the Commission finds that NYSE Arca was significantly constrained by competitive forces when it priced its depth-of-book data at approximately $1.50 per trading day for market professionals.

[296] *See* Ordover/Bamberger Statement at 7 (''[T]he amount of available liquidity in depth-of-book data at prices different from the current [NBBO] is only a fraction of the liquidity that would be available at any particular price if the market-clearing price changed. For this reason, the percentage of trading in one or more stocks accounted for by any particular exchange overstates the relative importance of depth-of-book market data from that exchange for identifying liquidity that would be available at prices other than the current NBBO.'').

of the exchange's depth-of-book data therefore does not include: (1) Undisplayed liquidity at prices better than the NBBO (available at exchanges, ECNs, non-exchange liquidity pools, and OTC market makers), which can be accessed by pinging orders and can be tracked (and thereby usefully predicted) by comparing an exchange's trade reports with its best quotes, both of which are found in core data; (2) displayed liquidity at the NBBO, which is provided by the best quotes in core data; (3) undisplayed liquidity at the NBBO, which, as with undisplayed liquidity inside the NBBO, can be accessed by pinging orders and usefully predicted with core data.

The reason why these alternative sources of liquidity information are so valuable is that traders in today's markets almost always prefer to trade at the current NBBO or better, rather than accepting the inferior prices reflected in an exchange's depth-of-book data. Because traders naturally prefer to trade at these better prices, an overwhelming majority of trades on an exchange are executed at prices superior to the prices available in the exchange's depth-of-book data. For example, the exchanges' public reports on order execution quality under Rule 605 show that the following percentages of executed share volume of marketable orders were at prices equal to or better than the NBBO in May 2008: Nasdaq—97%, NYSE Arca—92%, and NYSE—90%.[297] Notably, these percentages remain steady even as order sizes increase from 100 shares to 9999 shares. Stated another way, more than 90% of the time, traders do not access the liquidity displayed in an exchange's depth-of-book order data, even for large orders.

Given the inferiority of depth-of-book prices, the competitive constraints faced by an exchange in marketing its depth-of-book data to professional traders becomes more understandable. The data is useful primarily as background information on liquidity outside the best prices, but professional traders are able to use core data and pinging orders to assess liquidity and trade effectively at better prices. Moreover, an exchange that attempted to charge unreasonably high fees for its depth-of-book data also would have to consider the actions that many data users might take to avoid paying the exchange's high fees. One potential alternative would be for firms to ''piggyback'' on the services of another firm that had purchased the data, rather than paying the data fee themselves. For example, buy-side institutions could use the algorithmic order routing services of a broker that had purchased an exchange's depth-of-book data, rather than buying the exchange's data and routing orders themselves. The availability of such alternatives increases the elasticity of demand for an exchange's depth-of-book data.

The information preferences of securities professionals are strongly evidenced by the data they currently choose to purchase. As noted in the Draft Order, Nasdaq offers its depth-of-book data product for all U.S.-listed stocks for $76 per month, or approximately $3.50 per trading day. Of the 420,000 professional users who purchase core data in Nasdaq-listed stocks, only 19,000 professional users purchase Nasdaq's depth-of-book data product. The Evans Report attempts to dismiss this fact by claiming that Nasdaq is a ''monopolist'' that has ''set prices above competitive levels so that only those that value its product highly will purchase the product.'' [298] Yet Nasdaq has priced its depth-of-book product at a level that is not much more than the price of a cup of coffee per trading day. Nasdaq's pricing decision is much more consistent with the view that Nasdaq faces significant competitive pressures in attempting to market its depth-of-book data product to the approximately 400,000 securities professionals that currently purchase only core data, than the Evans Report view that Nasdaq is a monopolist coercing the 19,000 securities professionals who are willing to pay $3.50 for Nasdaq's ''unique'' data.[299]

In sum, depth-of-book data is most accurately characterized as useful, but not essential, for professional traders. NYSE Arca has priced the ArcaBook data for all U.S.-listed stocks at approximately $1.50 per trading day for professional users. The Commission believes that this pricing decision cannot reasonably be interpreted as that of a monopolist able to take advantage of its market power over a small group of professionals who value the data highly, but rather that of an exchange facing significant competitive pressures in attempting to sell its data to a large number of professionals.

The Draft Order also noted the opportunity for new entrants to the market for non-core data, specifically noting a comparable initiative in Europe by a number of major securities firms.[300] The Evans Report asserts a myriad of theoretical obstacles to securities firms sponsoring a non-core data initiative in the U.S.[301] As noted above, however, securities firms already have sponsored new equity trading entrants in the U.S., and DOJ—one of the U.S. antitrust authorities—cited the existence of these new entrants as support for its finding that the equity exchange markets are competitive.[302] If securities firms truly believe that exchanges are attempting to charge unreasonably high prices for

[297] *Source:* Rule 605 reports for May 2008 of NYSE and NYSE Arca (available at *http://www.nyse.com*) and Nasdaq (available at *http://www.nasdaqtrader.com*). Rule 605 reports cover orders with sizes up to 9999 shares. The average trade size for U.S-listed stocks currently is less than 300 shares.

[298] Evans Report at 8 n. 24. The Evans Report also incorrectly cites revenue figures from Nasdaq's 2007 Form 10–K for the proposition that Nasdaq ''was able to extract more than 50% of its 2007 market data revenue from its sale of unconsolidated data.'' *Id.* at 17. This analysis overlooks that Nasdaq separately reports its consolidated data revenues from non-Nasdaq-listed stocks (known as Network A and Network B stocks) under a heading called ''Execution and trade reporting revenues.'' Nasdaq did not disclose the specific amount of its consolidated data revenues from Network A and Network B stocks in 2007, but they were substantial. For example, the total core data revenues allocated to SROs in 2004 were $155 million for Network A stocks and $100 million in Network B stocks (Regulation NMS Release, 70 FR at 37558). As shown in Table 1 above, Nasdaq currently has a 23.9% share of trading in Network A stocks, and its share of trading in Network B stocks is higher.

[299] Nasdaq has priced its depth-of-book data for NYSE-listed stocks at $6 per month, or approximately 27 cents per trading day. The SLCG uses this exceptionally low fee as a basis to assert that Nasdaq's $3.50 fee for Nasdaq-listed stocks is ''1,100 higher'' and evidence of pricing power for Nasdaq-listed stocks. SLCG Study at 31. Yet Nasdaq's share of trading in NYSE-listed stocks is a very substantial 23%. Rather than directly reflecting the value of the data, Nasdaq's extremely low fee for NYSE-listed stocks more likely evidences Nasdaq's intense efforts to compete for order flow in NYSE-listed stocks.

[300] 73 FR at 32765. SIFMA X repeatedly claims that the proposed NYSE Arca fees are ''excessive,'' yet also notes that the London Stock Exchange fee for depth-of-book data is £157.5 per month for non-members. SIFMA X at 9. This fee is many times higher than the proposed NYSE Arca fees that would total $30 per month for both members and non-members (based on a pound/dollar conversion ratio of 1.502 on November 25, 2008, the London Stock Exchange fee converts to $236.74 per month). Indeed, the London Stock Exchange fee is much higher than the fee for any exchange depth-of-book data product in the U.S., despite the much greater trading volume and market capitalization of U.S.-listed stocks. The lower data fees charged by U.S. exchanges is yet one more fact evidencing the significant competitive forces faced by U.S. exchanges in setting fees for their depth-of-book data products.

[301] Evans Study at 10–12. SIFMA asserted that the European example is not applicable in the U.S. because European firms are not required to give their data to exchanges for free. SIFMA IX at 21 n. 69. As discussed in the Draft Order (73 FR at 32766), however, U.S. firms are not required to provide the great majority of their orders to any exchange and, for the balance, have a choice among exchanges and FINRA. Moreover, if U.S. firms provided their non-core data without charge to a new data enterprise, it is not clear why the new enterprise would operate at a competitive disadvantage to the exchanges in distributing an alternative data product.

[302] *See* note 274 above and accompanying text.

their depth-of-book data, participating in an initiative to offer a competing source of data is a live option. Indeed, Thomson Reuters noted in its comment on the Draft Order that the ability of broker-dealers to distribute their own data ''is an undeveloped but important potential source of market data'' and that it is ''prepared to work with the broker-dealer community to explore opportunities in the area.'' [303]

Finally, with respect to retail investors, the SLCG Study asserts that almost 40% of their orders are for sizes greater than the displayed size at the NBBO when presented.[304] It then presumes, without discussion, that these orders are executed at prices inferior to the NBBO and that retail investors need depth-of-book data to ''see the price they are likely to receive for almost 40% of their orders.'' [305] This analysis evidences a profound misunderstanding of how retail orders are handled in today's equity markets. In particular, the SLCG Study fails to consider the very substantial availability of undisplayed liquidity for executing retail orders at non-exchange venues, particularly OTC market makers and liquidity pools sponsored by broker-dealers. This undisplayed liquidity enables retail investors to receive executions for most of their orders at prices equal to or better than the NBBO, regardless of the displayed size at the NBBO.[306]

For example, Schwab's public disclosures concerning its order routing practices and order execution quality provide an instructive picture of how a broker-dealer with a substantial number of retail customers handles their orders in today's equity markets.[307] Schwab's Rule 606 report on order routing for the quarter ending June 30, 2008 reveals that 93% of its customer orders in U.S.-listed equities were ''non-directed''—that is, the customer relied on Schwab to determine where to route the order. Schwab routed 94% of these customer orders to non-exchange trading venues, rendering it unlikely that either Schwab or its customers relied on any exchange's depth-of-book data in making the routing determination for these orders.[308] In addition, Schwab represents that 57.2% of shares in listed stocks and 61.3% of shares in Nasdaq stocks receive price improvement (an execution price *better* than the NBBO), and that the ratio of effective spreads to quoted spreads for customer orders is 96.5% in listed stocks and 94.7% in Nasdaq stocks (that is, customers receive prices on average that are *better* than the NBBO). In sum, undisplayed liquidity at non-exchange trading centers enabled Schwab customers to receive executions for their orders at much superior prices than would be indicated by any exchange's depth-of-book data. The inferior prices reflected in such data would provide a very poor basis indeed to assess whether these retail orders received best execution.

c. Efficacy of Regulatory Alternatives

A third weakness in the SLCG Study and the Evans Report is their failure to acknowledge the extent to which the current Exchange Act regulatory structure effectively promotes competition among the U.S. equity markets. They nevertheless suggest regulatory approaches that would be extraordinarily costly and difficult to implement and that would offer little chance of achieving a more efficient outcome than the market-based approach set forth in the Draft Order.

For example, both the SLCG Study and the Evans Report assert that the market shares of NYSE and NYSE Arca should be combined for purposes of analyzing market power over depth-of-book data, even though they are separately registered as national securities exchanges and operate separate liquidity pools with separate data products and fees. The two economic assessments note that, because NYSE and NYSE Arca are under common control, they will have an incentive to coordinate their pricing and not compete with one another.

Exchanges under common control clearly have incentives to avoid competing with each other. Each national securities exchange, however, is subject to a comprehensive regulatory structure that is designed to address anti-competitive practices. This regulatory structure limits the potential for related exchanges to act jointly in ways that would inappropriately inhibit competition by other exchanges and trading centers with each related exchange. Section 6 of the Exchange Act requires that the rules of a national securities exchange be designed to promote a free and open market. Moreover, it prohibits a national securities exchange from adopting rules that are designed to permit unfair discrimination among its customers or that would impose an unnecessary or inappropriate burden on competition. All of these requirements are applied at the level of the individual registered securities exchange, not at the group level of exchanges that are under common control. In particular, a proposed exchange rule must stand or fall based, among other things, on the interests of customers, issuers, broker-dealers, and other persons using the facilities of that exchange. In sum, an economic analysis of jointly-controlled corporate behavior that might apply to other less regulated industries is inapplicable to equity exchanges that are subject to the pro-competitive Exchange Act regulatory structure.

For example, section 6 and Exchange Act Rule 603(a) require NYSE Arca to distribute the ArcaBook data on terms that are not tied to other products in a way that is unfairly discriminatory or anticompetitive. Apparently unaware of these regulatory requirements, the SLCG Study claims that the Commission ''does not consider the prospect of the NYSE exercising monopoly pricing power through tying arrangements'' and notes that ''the NYSE has the clear incentive to force users of a product in which an exchange has monopoly pricing power to also pay for a product in which the exchange does not have monopoly pricing power.'' [309] The SLCG concerns may be applicable to firms that operate in unregulated markets, but are inapplicable to U.S. equity exchanges.

The effect of the U.S. regulatory structure is apparent when examining the respective fees for ArcaBook data and NYSE OpenBook data for NYSE-listed stocks. The Evans Report asserts that these products should not be considered as alternatives for one another, but does not address why this conclusion is valid from the standpoint of individual users of data when their use of the two products is not tied in any way. Customers are free to purchase both, either, or neither. Each product must stand or fall on its own merits. The Evans Report asserts that the revenues of both products will be retained by the same corporate entity, yet this point is irrelevant from the standpoint of customers who might be looking for data alternatives. Indeed, if customers decide that ArcaBook is a better bargain

[303] Thomson Reuters Letter at 3. SIFMA X asserts that broker-dealers would be unable to create a competitive depth-of-book data product in the U.S. because, it claims, they are required to provide their data to the exchanges. SIFMA X at 9. As discussed above (text accompanying notes 236–240), the great majority of a broker-dealer's orders need not be provided to any SRO (whether an exchange or FINRA), and the small subset of a broker-dealer's displayable customer orders that must be provided to an SRO can be provided to FINRA, rather than an exchange.

[304] SLCG Study at 20–21.

[305] SLCG Study at 21.

[306] 73 FR at 32770.

[307] Schwab's disclosures are available at *http://www.schwab.com*.

[308] *See* Nasdaq III at 4 (''Rule 606 data from the second quarter of 2008 shows that a sample of major broker-dealers routed just 15% of retail orders in NASDAQ-listed stocks to an exchange.'').

[309] SLCG Study at 32.

than OpenBook, a shift between the two products would lead to a $45 per month per customer reduction in revenues for NYSE Euronext. If customers believe that ArcaBook data is overpriced at $15, they can purchase OpenBook alone and NYSE Euronext will have foregone an opportunity to earn greater revenues by setting a lower fee for ArcaBook data.

Although the SLCG Study and Evans Report fail to acknowledge the pro-competitive aspects of the Exchange Act regulatory structure, they nevertheless suggest alternative regulatory approaches that would be extraordinarily intrusive on competitive forces, as well as quite costly and difficult to apply in practice. For example, the Evans Report criticizes the Draft Order for not addressing whether an exchange could profitably increase the price of its depth-of-book data by 5–10 percent above a ''competitive'' level,[310] but offers no practical guidance for determining this hypothetical competitive level. Elsewhere, its author has noted that ''it seems obvious that the ability of competition authorities and courts (or indeed of any economist) to distinguish between efficient (fair) and inefficient (unfair) prices in practice is very low.'' [311]

For its part, the SLCG Study notes that ''obtaining accurate and precise data on the marginal costs of producing a particular good or service (*e.g.*, securities market data) is extremely difficult,'' but nevertheless asserts that ''there are reasonable alternatives for assessing levels and trends of marginal costs.'' [312] This statement ignores a whole host of difficulties in calculating the direct costs and common costs of market data—an endeavor that the Commission discussed at length in 1999 and will not repeat here.[313] Moreover, the SLCG Study assumes, without discussion, that marginal costs would be the efficiency-enhancing standard to assess fees for depth-of-book data. Elsewhere, however, the author of the Evans Report has noted that in ''dynamic industries, where typically fixed costs are high and incremental costs are low, the 'competitive' price is not given by marginal costs'' and that ''it is impossible to define 'competitive' prices using only information costs.'' [314] The exchange industry is highly dynamic, and exchanges are dependent on their ability to deploy cutting edge technologies. Moreover, the marginal costs of expanding the capacity of trading systems are extraordinarily low—for the most part, a trading center need only add servers and communications lines to its existing hardware and software systems.[315]

In fulfilling its Exchange Act regulatory responsibilities, the Commission is faced with the pragmatic challenge of determining whether non-core market data fees are fair and reasonable. It strongly believes that the current level of competition in the U.S. equity markets provides a much more useful basis to make this determination than a regulatory attempt to measure market data costs. Although the market for distributing depth-of-book data may not meet all of the conditions for theoretically perfect competition, there clearly are significant competitive forces operating in the real world that constrain the exchanges in setting the terms for their data. The Commission therefore has concluded that the market-based approach outlined in the Draft Order is the most appropriate means to meet its regulatory mandate when reviewing non-core data fees.

*C. Review of Terms of the Proposal*

As discussed in the preceding section, NYSE Arca was subject to significant competitive forces in setting the terms of the Proposal. The Commission therefore will approve the Proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.[316] An analysis of the Proposal and of the views of commenters does not provide such a basis.

First, the proposed fees for ArcaBook data will apply equally to all professional subscribers and equally to all non-professional subscribers (subject only to the maximum monthly payment for device fees paid by any broker-dealer for non-professional subscribers). The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.

Second, the proposed fees for the ArcaBook data are substantially less than those charged by other exchanges for depth-of-book order data. For example, the NYSE charges a $60 per month terminal fee for depth-of-book order data in NYSE-listed stocks. Similarly, Nasdaq charges a $76 per month device fee for professional subscribers to depth-of-book order data on all NMS stocks. By comparison, the NYSE Arca fee is 75% less than the NYSE fee for data in NYSE-listed stocks, and more than 60% less than the Nasdaq fee for data in all NMS stocks. It is reasonable to conclude that competitive pressures led NYSE Arca to set a substantially lower fee for its depth-of-book order data than the fees charged by other markets. If, in contrast, NYSE Arca were a monopoly data provider impervious to competitive pressures, there would be little reason for it to set significantly lower fees than other exchanges.[317]

Third, NYSE Arca projects that the total revenues generated by the fee for ArcaBook data initially will amount to less than $8 million per year,[318] and that its market data revenue as a percentage of total revenue is likely to remain close to the 2005 figure, which was approximately 17%.[319] Viewed in

[310] Evans Report at 4.

[311] David S. Evans & A. Jorge Padilla, ''Excessive Prices: Using Economics to Define Administrable Legal Rules, 1 *J. Competition L. & Econ*. 97, 118 (March 2005) (''Evans Article''); *see also id*. at 99 (''no pricing rule or benchmark can be used to distinguish effectively (*i.e.*, without error) between competitive and excessive prices in practice'').

[312] SLCG Study at 26. SIFMA X asserts that there are numerous choices for reviewing market data fees other than a strict cost-based analysis, but then outlines an approach that would require specialized teams of staff members and administrative hearings to adjudicate an unspecified ''relationship'' of a proposed fee to exchange costs. SIFMA X at 11.

[313] Market Data Release, 64 FR at 70627–70630. *See* Ordover/Bamberger Statement at 3 n. 4 (''It is widely accepted that there is no meaningful way to allocate 'common costs' across different joint products. For this reason, 'cost-based' regulation of the price of market data would require inherently arbitrary cost allocations.'').

[314] Evans Article at 101; *see also id*. at 99 (''Unfortunately, it is unclear what the appropriate competitive benchmark is in most real-life circumstances and, particularly, in dynamic industries where investment and innovation play a paramount role. Moreover, even if an appropriate benchmark could be defined, it would still remain unclear how one could, on the basis of the information typically available to policy makers and industry analysts, determine with precision whether prices are above, at, or below the competitive benchmark in practice.'').

[315] *See* Nasdaq III at 4 (''The business of operating a market is typified by low marginal cost for additional volume and markets operating with significant excess capacity'').

[316] The Exchange Act requirements are addressed in the text accompanying notes 171–175 above.

[317] *See* Table 1, note 210 above and accompanying text.

[318] NYSE Arca Response III at 12 n. 28. The reasonableness of this projection is supported by referring to the number of data users that have subscribed to Nasdaq's proprietary depth-of-book product for Nasdaq-listed stocks. Nasdaq reports 19,000 professional users and 12,000 non-professional users as of April 30, 2007. Nasdaq Letter at 6. If the same number of users purchased ArcaBook data for all stocks, the total revenue for NYSE Arca would be $8,280,000 per year. As noted in Table 1, NYSE Arca has a smaller market share than Nasdaq and therefore may not attract as many subscribers to its depth-of-book product. On the other hand, NYSE Arca is charging substantially less for its data and may attract more users. In the final analysis, market forces will determine the actual revenues generated by NYSE Arca's pricing decision.

[319] NYSE Arca Response III at 12 nn. 28–29. One commenter noted that the market data revenues of the NYSE Group, which includes both NYSE and NYSE Arca, had grown by 33.7% from the third

the context of NYSE Arca's overall funding, therefore, the fees for ArcaBook data are projected to represent a small portion of NYSE Arca's market data revenues and an even smaller portion of NYSE Arca's total revenues (using NYSE Arca's $8 million estimate, the fees will amount to less than 12.9% of NYSE Arca's 2005 market data revenues and less than 1.6% of NYSE Arca's 2005 total revenues). In addition, NYSE Arca generated approximately $415.4 million in revenue from equity securities transaction fees in 2005.[320] These transaction fees are paid by those who voluntarily choose to submit orders to NYSE Arca for execution. The fees therefore are subject to intense competitive pressure because of NYSE Arca's need to attract order flow. In comparison, the $8 million in projected annual fees for ArcaBook data do not appear to be inequitable, unfair, or unreasonable.

One commenter, although agreeing that exchange transaction fees are subject to intense competitive pressure, asserted that such ''intermarket competition does not constrain the exchanges' pricing of market data, but it actually creates an incentive for the exchanges to increase their prices for data.'' [321] If, however, NYSE Arca were truly able to exercise monopoly power in pricing its non-core data, it likely would not choose a fee that generates only a small fraction of the transaction fees that admittedly are subject to fierce competitive forces. As discussed above, NYSE Arca was indeed subject to significant competitive forces in pricing the ArcaBook data.

Several commenters expressed concern that the Proposal would adversely affect market transparency.[322] They noted that NYSE Arca previously had distributed the ArcaBook data without charge and asserted that the new fees could substantially limit the availability of the data. The Petition, for example, stated that ''the cumulative impact of [the Proposal] and other pending and recently approved market data proposals threaten to place critical data, which should be available to the general public, altogether beyond the reach of the average retail investor.'' [323]

Assuring the wide availability of quotation and trade information is a primary objective of the national market system.[324] With respect to non-professional users, and particularly individual retail investors, the Commission long has sought to assure that retail investors have ready access to the data they need to participate effectively in the equity markets. Indeed, the Commission's 1999 review of market information was prompted by a concern that retail investors should have ready access to affordable market data through their on-line accounts with broker-dealers. The Concept Release on Market Information noted that, in the course of the 1999 review, the Networks had reduced by up to 80% the fees for non-professional subscribers to obtain core data with the best-priced quotations and most recent last sale prices.[325] It also emphasized the importance of such affordable data for retail investors:

> One of the most important functions that the Commission can perform for retail investors is to ensure that they have access to the information they need to protect and further their own interests. Communications technology now has progressed to the point that broad access to real-time market information should be an affordable option for most retail investors, as it long has been for professional investors. This information could greatly expand the ability of retail investors to monitor and control their own securities transactions, including the quality of execution of their transactions by broker-dealers. The Commission intends to assure that market information fees applicable to retail investors do not restrict their access to market information, in terms of both number of subscribers and quality of service. In addition, such fees must not be unreasonably discriminatory when compared with the fees charged to professional users of market information.[326]

The Commission appreciates the efforts of the Petitioner and other commenters in advocating the particular needs of users of advertiser-supported Internet Web sites, a great many of whom are likely to be individual retail investors. The Commission believes that the exchanges and other entities that distribute securities market information will find business-justified ways to attend to the needs of individual investors and, as markets evolve, develop innovative products that meet the needs of these users and are affordable in light of the users' economic circumstances. In this respect, it recognizes the exchange initiatives to distribute new types of data products specifically designed to meet the needs of Internet users for reference data on equity prices.[327]

The Commission does not believe, however, that the Proposal will significantly detract from transparency in the equity markets. Of course, any increase in fees can lower the marginal demand for a product. To assess an effect on transparency, however, the relevant question is whether the fees for a particular product deter a significant number of market participants from obtaining the market data they need because the fees are not affordable given their economic circumstances.[328] Market transparency does not require that the same products be made available to all users on the same terms and conditions. Such a one-size-fits-all approach would ignore the important differences among data users in terms of both their needs and their economic circumstances. Most importantly, such an approach would fail to address the particular needs of individual retail investors.

With respect to professional data users (*i.e.*, those who earn their living through the markets), the Commission believes that competitive forces, combined with the heightened ability of professional users to advance their own interests, will produce an appropriate level of availability of non-core data. With respect to non-professional users, as well, the Commission believes that the ArcaBook fees will not materially affect their access to the information they need to participate effectively in the equity markets.[329] The ArcaBook data likely is both too narrow and too broad to meet the needs of most retail

quarter of 2005 to the third quarter of 2006. *See* section III.A.6 above. Although correct, this figure does not demonstrate any growth in market data revenues because the 2005 figure only included the market data revenues of NYSE, while the 2006 figure included the market data revenues of both the NYSE and NYSE Arca. Using an ''apples-to-apples'' comparison that includes both exchanges for both time periods, their combined market data revenues declined slightly from 2005 to 2006. NYSE Arca Response III at 20.

[320] NYSE Group, Inc., Form 10–K for period ending December 31, 2005 (filed March 31, 2006), at 19.

[321] SIFMA V at 14–15.

[322] Financial Services Roundtable Letter at 3; Schwab Letter at 5.

[323] Petition at 3.

[324] Section 11A(a)(1)(C)(iii) of the Exchange Act.

[325] Market Information Concept Release, 64 FR at 70614. Since 1999, the Network data fees applicable to retail investors have either remained the same or been further reduced. Currently, nonprofessional investors can obtain unlimited amounts of core data for no more than $1 per month each for Network A, B, and C stocks. *See* SIFMA III, Appendix A.

[326] Market Information Concept Release, 64 FR at 70614.

[327] *See* note 19 above (NYSE Real-Time Reference Prices and Nasdaq Last Sale Data Feeds).

[328] *See* Market Information Concept Release, 64 FR at 70630 (''[T]he relevant Exchange Act question is whether the fees for particular classes of subscribers, given their economic circumstances and their need for and use of real-time information, are at a sufficiently high level that a significant number of users are deterred from obtaining the information or that the quality of their information services is reduced.'')

[329] *See* NYSE Arca Response III at 18 (''The overwhelming majority of retail investors are unaffected by the inter-market competition over proprietary depth-of-book products. For them, the consolidated top-of-book data that the markets make available under the NMS Plans provides adequate information on which they can base trading decisions.'').

investors. It likely is too narrow for most retail investors when they make their trading and order-routing decisions. The best prices quoted for a stock in the ArcaBook data reflect only the NYSE Arca market. Other markets may be offering substantially better prices. It is for this reason that Rule 603(c) of Regulation NMS requires broker-dealers and vendors to provide their customers with a consolidated display of core data in the context of trading and order-routing decisions. A consolidated display includes the national best bid and offer for a stock, as well as the most recent last sale for such stock reported at any market. This consolidated display thereby gives retail investors a valuable tool for ascertaining the best prices for a stock.

Two commenters stated that the average retail order is 1000 or more shares and is larger than the size typically reflected in the consolidated quotation in core data.[330] This issue was raised, however, when the Commission was formulating its approach to non-core data in 2005. It noted that the average execution price for small market orders (the order type typically used by retail investors) is very close to, if not better than, the NBBO.[331] In addition, a study by the Commission's Office of Economic Analysis of quoting in 2003 in 3,429 Nasdaq stocks found that the average displayed depth of quotations at the NBBO was 1,833 shares—greater than the size of the average order cited by commenters.[332]

Some commenters suggested that the core data provided by the Networks disadvantaged retail investors because it was not distributed as fast as the depth-of-book order data obtained directly from an exchange.[333] The central processors of core data must first obtain data from each SRO and then consolidate it into a single data feed for distribution to the public. While exchanges are prohibited from providing their data to direct recipients any sooner than they provide it to the Network central processor,[334] the additional step of transmitting data to the central processor inevitably means that a direct data feed can be distributed faster to users than the Network data feed. The size of this time latency, however, is extremely small in absolute terms. For example, a technology upgrade by the central processor for Network A and Network B has reduced the latency of the core data feed to approximately 3/100ths of a second.[335] The Commission does not believe that such a small latency under current market conditions disadvantages retail investors in their use of core data, but rather would be most likely relevant only to the most sophisticated and active professional traders with state-of-the-art systems.

Moreover, outside of trading contexts, the ArcaBook data will be far broader than individual investors typically need. The ArcaBook data encompasses all quotations for a stock at many prices that are well away from the current best prices. For retail investors that are not trading but simply need a useful reference price to track the value of their portfolio and monitor the market, the enormous volume of data regarding trading interest outside the best prices is not needed.[336]

Some commenters asserted that the Proposal failed to satisfy the requirements of Exchange Act Rule 19b–4 and Form 19b–4.[337] Form 19b–4 requires, among other things, that SROs provide a statement of the purpose of the proposed rule change and its basis under the Exchange Act. The statement must be sufficiently detailed and specific to support a finding that the proposed rule change meets the requirements of the Exchange Act, including that the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The NYSE Arca Proposal met these requirements. Among other things, the Proposal noted that the proposed fees compared favorably to the fees that other competing markets charge for similar products, including those of other exchanges that previously had been approved by the Commission.[338]

One commenter argued that NYSE Arca should have addressed a number of specific points that it raised in opposition to the Proposal, such as including a statement of costs to produce the ArcaBook data.[339] The purpose of Form 19b–4, however, is to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules thereunder.[340] The Proposal met these objectives. Although Form 19b–4 requires that a proposed rule change be accurate, consistent, and complete, including the information necessary for the Commission's review, the Form does not require SROs to anticipate and respond in advance to each of the points that commenters may raise in opposition to a proposed rule change. With this Order, the Commission has determined that the points raised by the commenter do not provide a basis to decline to approve the Proposal.

Finally, commenters raised concerns regarding the contract terms that will govern the distribution of ArcaBook data.[341] In particular, one notes that NYSE Arca has not filed its vendor distribution agreement with the Commission for public notice and comment and Commission approval.[342]

NYSE Arca has stated, however, that it plans to use the vendor and subscriber agreements used by CTA and CQ Plan Participants (the ''CTA/CQ Vendor and Subscriber Agreements'') to govern the distribution of NYSE Arca Data. According to the Exchange, the CTA/CQ Vendor and Subscriber Agreements ''are drafted as generic one-size-fits-all agreements and explicitly apply to the receipt and use of certain market data that individual exchanges make available in the same way that they apply to data made available under the

[330] Schwab Letter at 1–2; SIFMA IV at 14.

[331] Regulation NMS Release, 70 FR at 37567. Most retail investors receive order executions at prices equal to or better than the NBBO that is disseminated in core data. *See also* Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS, 70 FR 37636 (estimating that between 98% and 99% of all trades did *not* trade through better-priced bids or offers).

[332] 70 FR at 37511 n. 108.

[333] Schwab Letter at 4; SIFMA III at 6 n. 11.

[334] Regulation NMS Release, 70 FR at 37567.

[335] NYSE Arca Response III at 21. The upgrade was completed in April 2007. *See* Securities Industry Automation Corporation, Notice to CTA Recipients, ''Reminder Notice—CQS Unix Activation—New Source IP Addresses'' (April 27, 2007) (available at *http://www.nysedata.com*). This major upgrade of the CTA data feed runs contrary to the concern of one commenter on the Draft Order that exchanges would have little incentive to maintain the quality of core data. NSX II at 5–6.

[336] *See* NYSE Arca Response II at 2 (''during the first ten months of 2005 the number of messages processed by the Exchange greatly increased from approximately 9,800 MPS [messages per second] to 14,100 MPS'').

[337] *See* section III.A.3 above. In their comments on the Draft Order, commenters claimed that it in effect would amend Rule 19b–4 without following required agency rulemaking procedures. NetCoalition V at 7; SIFMA IX at 20. Rule 19b–4, however, merely sets forth requirements for SROs to follow in preparing their proposed rule changes. It does not address the substantive nature of Commission review of proposed rule changes, which necessarily will vary widely depending on the particular issues raised by the SRO proposal.

[338] *See* Proposal, 71 FR at 33499.

[339] SIFMA III at 11–12.

[340] Section B of the General Instructions for Form 19b–4.

[341] *See* section III.A.7 above.

[342] SIFMA I at 7. In this regard, the commenter states that, procedurally, the Exchange ''is amending and adding to the CTA vendor agreement without first submitting its contractual changes through the CTA's processes, which are subject to industry input through the new Advisory Committee mandated by Regulation NMS.'' SIFMA I at 8.

CTA and CQ Plans,'' and the contracts need not be amended to cause them to govern the receipt and use of the Exchange's data.[343] The Exchange maintains that because ''the terms and conditions of the CTA/CQ contracts *do not* change in any way with the addition of the Exchange's market data * * * there are no changes for the industry or Commission to review.'' [344]

The Commission believes that the Exchange may use the CTA/CQ Vendor and Subscriber Agreements to govern the distribution of NYSE Arca Data.[345] It notes that the NYSE used the CTA Vendor Agreement to govern the distribution of its OpenBook and Liquidity Quote market data products.[346] Moreover, the Exchange represents that, following consultations with vendors and end-users, and in response to client demand:

> [The Exchange] chose to fold itself into an existing contract and administration system rather than to burden clients with another set of market data agreements and another market data reporting system, both of which would require clients to commit additional legal and technical resources to support the Exchange's data products.[347]

In addition, the Exchange has represented that it is ''not imposing restrictions on the use or display of its data beyond those set forth'' in the existing CTA/CQ Vendor and Subscriber Agreements.[348] The Commission therefore does not believe that the Exchange is amending or adding to such agreements.

A commenter also stated that the Exchange has not recognized the rights of a broker or dealer, established in Regulation NMS, to distribute its order information, subject to the condition that it does so on terms that are fair and reasonable and not unreasonably discriminatory.[349] In response, the Exchange states that the CTA/CQ Vendor and Subscriber Agreements do not prohibit a broker-dealer member of an SRO participant in a Plan from making available to the public information relating to the orders and transaction reports that it provides to the SRO participant.[350] Accordingly, the Commission believes that the Exchange has acknowledged the rights of a broker or dealer to distribute its market information, subject to the requirements of Rule 603(a) of Regulation NMS.

A commenter also stated that the Exchange has failed to consider the administrative burdens that the proposal would impose, including the need for broker-dealers to develop system controls to track ArcaBook access and usage.[351] In response, the Exchange represents that it has communicated with its customers to ensure system readiness and is using ''a long-standing, well-known, broadly-used administrative system'' to minimize the amount of development effort required to meet the administrative requirements associated with the proposal.[352] Accordingly, the Commission believes that NYSE Arca has reasonably addressed the administrative requirements associated with the Proposal.

## VII. Conclusion

It is therefore ordered that the earlier action taken by delegated authority, Securities Exchange Act Release No. 54597 (October 12, 2006) 71 FR 62029 (October 20, 2006), is set aside and, pursuant to section 19(b)(2) of the Exchange Act, the Proposal (SR–NYSEArca–2006–21) is approved.

By the Commission.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28908 Filed 12–8–08; 8:45 am]

BILLING CODE 8011–01–P

[343] NYSE Arca Response I at 3.

[344] NYSE Arca Response I at 3 (emphasis in original).

[345] The Commission is not approving the CTA/CQ Vendor and Subscriber Agreements, which the CTA and CQ Plan Participants filed with the Commission as amendments to the CTA and CQ Plans that were effective on filing with the Commission pursuant to Rule 608(b)(3)(iii) of Regulation NMS (previously designated as Exchange Act Rule 11Aa3–2(c)(3)(iii)). *See, e.g.*, Securities Exchange Act Release No. 28407 (September 6, 1990), 55 FR 37276 (September 10, 1990) (File No. 4–2811) (notice of filing and immediate effectiveness of amendments to the CTA Plan and the CQ Plan). Rule 608(b)(3)(iii) of Regulation NMS (previously designated as Exchange Act Rule 11Aa3–2(c)(3)(iii)) allows a proposed amendment to a national market system plan to be put into effect upon filing with the Commission if the plan sponsors designate the proposed amendment as involving solely technical or ministerial matters.

[346] Securities Exchange Act Release Nos. 53585 (March 31, 2006), 71 FR 17934 (April 7, 2006) (order approving File Nos. SR–NYSE–2004–43 and NYSE–2005–32) (relating to OpenBook); and 51438 (March 28, 2005), 70 FR 17137 (April 4, 2005) (order approving File No. SR–NYSE–2004–32) (relating to Liquidity Quote). For the both the OpenBook and Liquidity Quote products, the NYSE attached to the CTA Vendor Agreement an Exhibit C containing additional terms governing the distribution of those products, which the Commission specifically approved. NYSE Arca is not including additional contract terms in the Proposal.

[347] NYSE Arca Response I at 4.

[348] NYSE Arca Response I at 3.

[349] SIFMA I at 7.

[350] NYSE Arca Response I at 4.

[351] SIFMA I at 8.

[352] NYSE Arca Response I at 4–5.

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11514 and #11557]**

### Arkansas Disaster Number AR–00026

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Arkansas (FEMA–1804–DR), dated 10/22/2008.

*Incident:* Tropical Storm Ike.

*Incident Period:* 09/13/2008 through 09/23/2008.

**DATES:** *Effective Date:* 11/28/2008.

*Physical Loan Application Deadline Date:* 12/22/2008.

*Economic Injury (EIDL) Loan Application Deadline Date:* 07/22/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Arkansas, dated 10/22/2008, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Clark, Montgomery, Nevada, Pike.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–29115 Filed 12–8–08; 8:45 am]

BILLING CODE 8025–01–P

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11541 and #11542]**

### California Disaster Number CA–00132

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of California (FEMA–1810–DR), dated 11/18/2008.

*Incident:* Wildfires.

*Incident Period:* 11/13/2008 and continuing through 11/28/2008.

*Effective Date:* 11/28/2008.

*Physical Loan Application Deadline Date:* 01/21/2009.

*EIDL Loan Application Deadline Date:* 08/18/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for the State of California, dated 11/18/2008 is hereby amended to establish the incident period for this disaster as beginning 11/13/2008 and continuing through 11/28/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–29116 Filed 12–8–08; 8:45 am]

BILLING CODE 8025–01–P

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11525 and #11526]**

### Missouri Disaster Number MO–00033

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1809–DR), dated 11/13/2008.

*Incident:* Severe Storms, Flooding, and a Tornado.

*Incident Period:* 09/11/2008 through 09/24/2008.

**EFFECTIVE DATE:** 12/02/2008.

*Physical Loan Application Deadline Date:* 01/12/2009.

*EIDL Loan Application Deadline Date:* 08/13/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the Presidential disaster declaration for the State of Missouri, dated 11/13/2008 is hereby amended to include the following areas as adversely affected by the disaster:

*Primary Counties: (Physical Damage and Economic Injury Loans):* Howell, Jefferson

*Contiguous Counties:* (Economic Injury Loans Only):

Missouri: Oregon, Saint Francois, Sainte Genevieve, Washington

Arkansas: Fulton

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–29108 Filed 12–8–08; 8:45 am]

BILLING CODE 8025–01–P

## TENNESSEE VALLEY AUTHORITY

### Sunshine Act; (Meeting No. 08–06)

**TIME AND DATE:** 3 p.m. EST, December 11, 2008, TVA Chattanooga Office Complex, 1101 Market Street, Chattanooga, Tennessee.

**Agenda**

*Old Business*

Approval of minutes of October 30, 2008, Board meeting.

*New Business*

1. Report of the Finance, Strategy, Rates, and Administration Committee.

A. Approval of incentive goals.

B. Rate classification for data centers.

For more information: Please call TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. People who plan to attend the meeting and have special needs should call (865) 632–6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: December 4, 2008.

**Maureen H. Dunn,**

*General Counsel and Secretary.*

[FR Doc. E8–29294 Filed 12–5–08; 4:15 pm]

BILLING CODE 8120–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

### Sunshine Act Meeting; Unified Carrier Registration Plan Board of Directors

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**TIME AND DATE:** January 13, 2009, from 1 p.m. until 5 p.m., and January 14, 2009, from 8 a.m. until 12 Noon, Central Standard Time.

**PLACE:** This meeting will take place at the Hilton Garden Inn, 500 North Interstate 35, Austin, TX 78701.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

**FOR FURTHER INFORMATION CONTACT:** Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Plan Board of Directors at (505) 827–4565.

Dated: December 3, 2008.

**William A. Quade,**

*Associate Administrator for Enforcement and Program Delivery.*

[FR Doc. E8–29195 Filed 12–5–08; 4:15 pm]

BILLING CODE 4910–EX–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Special Approval of Alternate Standard

In accordance with Part 238.21 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for approval of an Alternate Standard of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**American Public Transit Association**

[Special Approval Petition Docket Number FRA–2005–20853]

The American Public Transit Association (APTA) seeks approval for use of an alternate standard required to be used in accordance with the Passenger Equipment Safety Standards, 49 CFR Part 238, Section 311, single car test of passenger equipment brakes.

Section 311(a) requires single car air brake tests on all passenger cars, except self-propelled passenger cars. Specifically, § 238.311(a) requires single car tests of all passenger cars and all unpowered vehicles used in passenger trains be performed in accordance with ''either APTA Standard SS–M–005–98, 'Code of Tests for Passenger Car Equipment Using Single Car Testing Device,' published March, 1998; or an alternative procedure approved by FRA pursuant to § 238.21.'' By letter dated August 17, 2005, FRA approved Revision 1 of the APTA Standard as an alternative standard of compliance (Revision 1 required a railroad to perform the single car test procedure at the same working pressure as the car being tested utilizes in revenue service. The Original Test Standard dated March 1998, required that the test be performed at 90 psi while some trains operate their brake systems at 110 psi.) APTA now requests that Revision 2 of the APTA Standard, dated May 18, 2007, be incorporated into the requirements of § 238.311(a). These revisions are editorial in nature to Revision 1.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–20853) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on December 1, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–29097 Filed 12–8–08; 8:45 am]

BILLING CODE 4910–06–P

---

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2008–0014]**

### Reports, Forms, and Recordkeeping Requirements

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** This notice solicits public comment on continuation of the requirements for the collection of information on safety standards. Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes a collection of information associated with 49 CFR Part 574, Tire Identification and Recordkeeping.

**DATES:** Comments must be received on or before January 8, 2009.

**ADDRESSES:** Comments must refer to the docket notice number cited at the beginning of this notice, and the OMB control number, 2127–0050, and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Desk Officer for NHTSA, 725 17th Street, NW., Washington, DC 20503. It is requested, but not required, that 2 copies of the comment be provided.

Commenters may also, but are not required to, submit their comments to the docket number identified in the heading of this document by any of the following methods:

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

You may call the Docket Management Facility at 202–366–9826.

Regardless of how you submit your comments, you should mention the docket number of this document.

**FOR FURTHER INFORMATION CONTACT:** Complete copies of each request for collection may be obtained from Mr. Jeff Woods, NVS–122, National Highway Traffic Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. Mr. Woods' telephone number is (202) 366–6206.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before a proposed collection of information is submitted to OMB for approval, Federal agencies must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* , permitting electronic submission of responses.

The agency published a Notice of Proposed Rulemaking (NPRM) on January 24, 2008 (73 FR 4157), in which we proposed revisions to the tire registration requirements in 49 CFR Part 574, Tire Identification and Recordkeeping, to allow electronic means for consumers, tire dealers, and tire manufacturers to register the first purchaser information of new tires. The notice also included the agency's announcement (at 4167) that it was preparing to submit a renewal request to OMB for a three-year extension of this previously-approved collection of information, and the agency provided a 60-day comment period for the public to submit comments on the renewal request and the agency's estimates of the burden associated with this collection of information.

The NPRM included the following proposed revisions to the Part 574 requirements to facilitate increased use of electronic means to collect tire registration information and to otherwise improve the rate of tire registration. Independent tire dealers could, in lieu of providing a paper registration form to consumers, voluntarily register the tires on behalf of the purchaser with the tire manufacturer using the internet or other electronic means as authorized by the tire manufacturer. Independent tire dealers could continue to provide paper registration forms to purchasers for them to mail to the tire manufacturer, or independent dealers would have the option of sending completed tire registration forms to the tire manufacturer on behalf of the purchaser. Figures 3a and 3b depicting the paper registration form for use by independent tire dealers were proposed to be deleted from Part 574, while the regulatory text would be amended to include all of the minimum requirements for the form in descriptive terms. The paper registration forms could also include tire registration Web site information, as authorized by the tire manufacturer, to enable purchasers to register their tires using the internet.

The NPRM also proposed amendments to Part 574 requirements for tire dealers that are owned or controlled by tire manufacturers by specifying that in addition to using to paper tire registration forms, these dealers may also use electronic means to transmit tire registration information to the tire manufacturer. Figure 4 depicting the paper registration form for use by company-controlled tire dealers was proposed to be deleted from Part 574, while the regulatory text would be amended to include all of the minimum requirements for the form in descriptive terms.

As described in the NPRM, prior interpretations of the Part 574 requirements issued by the agency had already provided allowances and guidance for tire dealers to use electronic means to register tires on behalf of consumers (for independent tire dealers) or as required by tire dealers under Part 574 (for company-controlled tire dealers). The revisions proposed in the NPRM would serve to codify in Part 574 the provisions for electronic means of tire registration by independent and company-controlled tire dealers. In addition, the proposed revisions to Part 574 would provide additional opportunities for tire purchasers (consumers) to register their tires using the internet, telephones, or other electronic means, as provided by tire manufacturers or their designees. Finally, the tire manufacturers would have additional flexibility in designing and printing the tire registration forms, as would tire dealers in providing their identifying information on the forms.

The proposed provisions in the NPRM for the electronic means of registering tires, including tire manufacturers providing tire registration Web sites, would be implemented on a voluntary basis by the tire manufacturers and tire dealers. There would be no obligation for independent tire dealers to register the tires on behalf of the purchaser and these dealers could still continue to provide the purchaser with a paper tire registration form. In addition, if the independent tire dealer were to register the tires on behalf of the purchaser by either returning the paper tire registration form to the tire manufacturer or by using electronic means to register the information, the agency proposed that this voluntary service would be provided at no cost to the purchaser.

The Paperwork Reduction Act analysis in the NPRM included burden estimates for the tire registration and recordkeeping collection of information requirements in Part 574. These were the same burden estimates that were included in the agency's March 21, 2007 30-day notice (72 FR 13344) during the previous renewal of this information collection with OMB. The analysis in the NPRM indicated that the tire registration rate may increase in the future because of increased availability of electronic means for purchasers to register their tires, or because independent tire dealers may elect to voluntarily register tires on behalf of the purchaser. However, for the purposes of estimating the current burden associated with this information collection, the agency believed that whether a purchaser registered their tires by filling out the paper tire registration form, or typed this information in on a tire registration Web site, the amount of time required to provide the purchaser's name and address would be very roughly the same. Therefore, the agency did not revise (increase or decrease) the burden estimate associated with this collection of information.

After considering the comments to the NPRM, the agency published a final rule on November 28, 2008. The rule substantially adopts the proposal.

The agency did not receive any comments regarding the agency's burden estimates for this collection of information, and therefore, these same estimates are included in this notice. The purpose of this notice is to provide notice of the agency's intent to request a renewal of this collection of information with OMB and to seek public comments on this request in accordance with requirements in 5 CFR Part 1320. As noted above, commenters responding to this notice shall provide their comments directly to OMB, although they may also submit a copy of their comments to the docket where they will be available for public viewing.

*Title:* 49 CFR Part 574, Tire Identification and Recordkeeping.

*OMB Control Number:* 2127–0050.

*Form Number:* None.

*Requested Expiration Date of Approval:* Three years from approval date.

*Type of Request:* Extension of a currently approved collection.

*Summary of the Collection of Information:* 49 U.S.C. 30117(b) requires each tire manufacturer to collect and maintain records of the first purchasers of new tires. To carry out this mandate, 49 CFR Part 574 requires tire dealers and distributors to record the names and addresses of retail purchasers of new tires and the identification number(s) of the tires sold. A specific form is provided to tire dealers and distributors by tire manufacturers for recording this information. The completed forms are returned to the tire manufacturers where they are retained for not less than five years. Part 574 requires independent tire dealers and distributors to provide a registration form to consumers with the tire identification number already recorded and information identifying

the dealer/distributor. The consumer can then record his/her name and address and return the form to the tire manufacturer. Additionally, motor vehicle manufacturers are required to record the names and addresses of the first purchasers (for purposes other than resale), together with the identification numbers of the tires on the new vehicles, and retain this information for not less than five years.

*Description of the Need for the Information and the Proposed Use of the Information:* The information is used by a tire manufacturer after it or the agency determines that some of its tires either fail to comply with an applicable safety standard or contain a safety related defect. With the information, the tire manufacturer can notify the first purchaser of the tire and provide them with any necessary information or instructions or remedy.

Without this information, efforts to identify the first purchaser of tires that have been determined to be defective or nonconforming pursuant to Sections 30118 and 30119 of Title 49 U.S.C. would be impeded. Further, the ability of the purchasers to take appropriate action in the interest of motor vehicle safety may be compromised.

*Description of the Likely Respondents (Including Estimated Number and Proposed Frequency of Response to the Collection of Information):* January 24, 2008 **Federal Register** Notice—In the 60-day notice announcing NHTSA's request for an extension to collect the tire registration and recordkeeping information, we estimated that the collection of information affects 10 million respondents annually. This group consists of approximately 20 tire manufacturers, 59,000 new tire dealers and distributors, and 10 million consumers who choose to register their tire purchases with tire manufacturers. A response is required by motor vehicle manufacturers upon each sale of a new vehicle and by non-independent tire dealers with each sale of a new tire. A consumer may elect to respond when purchasing a new tire from an independent dealer.

*Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information:* The estimated burden is as follows:

New tire dealers and distributors: 59,000.

Consumers: 10,000,000.

Total tire registrations (manually): 54,000,000.

Total tire registration hours (manual): 225,000 hours.

Recordkeeping hours (manual): 25,000 hours.

Total annual tire registration and recordkeeping hours: 250,000 hours.

**Authority:** 44 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50

Issued on: December 3, 2008.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

[FR Doc. E8–29052 Filed 12–8–08; 8:45 am]

BILLING CODE 4910–59–P

---

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Docket No. AB–167 (Sub-No. 1190X); STB Docket No. AB–55 (Sub-No. 690X); STB Docket No. AB–290 (Sub-No. 313X)]**

### Consolidated Rail Corporation—Abandonment Exemption–in Hudson County, NJ; CSX Transportation, Inc.—Discontinuance of Service Exemption–in Hudson County, NJ; Norfolk Southern Railway Company—Discontinuance of Service Exemption–in Hudson County, NJ

Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) (collectively, applicants) have jointly filed a verified notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances of Service* for Conrail to abandon, and for CSXT and NS to discontinue service over, a 2.27-mile portion of a line of railroad known as the Lehigh Valley Main Line, between railroad milepost 2.90± and railroad milepost 5.17±, in Jersey City, Hudson County, NJ. The line traverses United States Postal Service Zip Codes 07304 and 07305.

Applicants have certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic that has moved or could move over the line can be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of a complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to these exemptions, any employee adversely affected by the abandonment or discontinuances shall be protected under *Oregon Short Line R. Co.—Abandonment–Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on January 8, 2009, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 19, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by December 29, 2008, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to applicants' representative: John K. Enright, 1717 Arch Street, 32nd Floor, Philadelphia, PA 19103.

If the verified notice contains false or misleading information, the exemptions are void *ab initio*.

Applicants have filed a joint combined environmental and historic report, which addresses the effects, if any, of the abandonment and discontinuances on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 12, 2008. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking

---

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the abandonment exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Effective July 18, 2008, the filing fee for an OFA increased to $1,500. *See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services-2008 Update*, STB Ex Parte No. 542 (Sub-No. 15) (STB served June 18, 2008).

conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Conrail shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Conrail's filing of a notice of consummation by December 9, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: December 3, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Kulunie L. Cannon,**

*Clearance Clerk.*

[FR Doc. E8–29066 Filed 12–8–08; 8:45 am]

BILLING CODE 4915–01–P

## DEPARTMENT OF THE TREASURY

### Financial Crimes Enforcement Network; Bank Secrecy Act Advisory Group; Solicitation of Application for Membership

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.

**ACTION:** Notice and request for nominations.

**SUMMARY:** FinCEN is inviting the public to nominate financial institutions and trade groups for membership on the Bank Secrecy Act Advisory Group. New members will be selected for three-year membership terms.

**DATES:** Nominations must be received by January 8, 2009.

**ADDRESSES:** Applications may be mailed (not sent by facsimile) to Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, P.O. BOX 39, Vienna, VA 22183 or e-mailed to: *BSAAG@fincen.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jennifer White, Regulatory Outreach Specialist at 202–354–6400.

**SUPPLEMENTARY INFORMATION:** The Annunzio-Wylie Anti-Money Laundering Act of 1992 required the Secretary of the Treasury to establish a Bank Secrecy Act Advisory Group (BSAAG) consisting of representatives from federal regulatory and law enforcement agencies, financial institutions, and trade groups with members subject to the requirements of the Bank Secrecy Act, 31 CFR 103 *et seq.* or Section 6050I of the Internal Revenue Code of 1986. The BSAAG is the means by which the Secretary receives advice on the operations of the Bank Secrecy Act. As chair of the BSAAG, the Director of FinCEN is responsible for ensuring that relevant issues are placed before the BSAAG for review, analysis, and discussion. Ultimately, the BSAAG will make policy recommendations to the Secretary on issues considered. BSAAG membership is open to financial institutions and trade groups. New members will be selected to serve a three-year term. It is important to provide complete answers to the following items, as applications will be evaluated on the information provided through this application process. Applications should consist of:

- Name of the organization requesting membership.
- Point of contact, title, address, e-mail address, phone number.
- The BSAAG vacancy for which the organization is applying.
- Description of the financial institution or trade group and its involvement withthe Bank Secrecy Act, 31 CFR 103 *et seq.*
- Reasons why the organization's participation on the BSAAG will bring value to the group.

Based on current BSAAG position openings we encourage applications from the following sectors or types of organizations with experience working on the Bank Secrecy Act:

- Self-Regulatory Organizations (1 vacancy).
- State Governments (1 vacancy).
- Industry Trade Groups—Banking Sector (2 vacancies).
- Industry Trade Groups—Credit Unions (1 vacancy).
- Industry Trade Groups—Futures (1 vacancy).
- Industry Trade Groups—Gatekeepers (1 vacancy).
- Industry Trade Groups—Insurance (1 vacancy).
- Industry Trade Groups—International (1 vacancy).
- Industry Representatives—Insurance (1 vacancy).
- Industry Representatives—Operator of Credit Card Systems (1 vacancy).

Organizations may nominate themselves, but applications for individuals who are not representing an organization for a vacancy noted above will not be considered. Members must be able and willing to make the necessary time commitment to participate on sub-committees throughout the year by phone and attend biannual plenary meetings held in Washington DC the second Wednesday of May and October. Members will not be remunerated for their time, services, or travel. In making the selections, FinCEN will seek to complement current BSAAG members in terms of affiliation, industry, and geographic representation. The Director of FinCEN retains full discretion on all membership decisions. The Director may consider prior years' applications when making selections and does not limit consideration to institutions nominated by the public when making its selection.

Dated: December 2, 2008.

**James H. Freis, Jr.,**

*Director, Financial Crimes Enforcement Network.*

[FR Doc. E8–29026 Filed 12–8–08; 8:45 am]

BILLING CODE 4810–35–P

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### Surety Companies Acceptable on Federal Bonds: Allegheny Surety Company

**AGENCY:** Financial Management Service, Fiscal Service, Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** This is Supplement No. 5 to the Treasury Department Circular 570, 2008 Revision, published July 1, 2008, at 73 FR 37644.

**FOR FURTHER INFORMATION CONTACT:** Surety Bond Branch at (202) 874–6850.

**SUPPLEMENTARY INFORMATION:** A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company:

*Allegheny Surety Company (NAIC #34541). Business address:* 4217 Steubenville Pike, Pittsburgh, PA 15205. Phone: (412) 921–3077. Underwriting limitation b/: $204,000. Surety licenses c/: PA. Incorporated in: Pennsylvania.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 (''Circular''), 2008 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (see 31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570*.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: November 20, 2008.

**Vivian L. Cooper,**

*Director, Financial Accounting and Services Division.*

[FR Doc. E8–28890 Filed 12–8–08; 8:45 am]

BILLING CODE 4810–35–P

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

**[Docket ID OTS–2008–0020]**

### Mutual Savings Association Advisory Committee

**AGENCY:** Department of the Treasury, Office of Thrift Supervision.

**ACTION:** Notice of intent to establish; request for nominations.

**SUMMARY:** The Director of the Office of Thrift Supervision has determined that the establishment of the OTS Mutual Savings Association Advisory Committee is necessary and in the public interest in order to study the needs of and challenges facing mutual savings associations. OTS is seeking nominations of individuals to be considered for selection as Committee members and the names of professional and public interest groups that should be represented on the Committee.

**DATES:** Nominations must be received on or before January 8, 2009.

**ADDRESSES:** Nominations should be sent to *nominations@ots.treas.gov* or mailed to: Timothy T. Ward, Deputy Director, Examinations, Supervision and Consumer Protection, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**FOR FURTHER INFORMATION CONTACT:** Charlotte M. Bahin, Special Counsel (Special Projects), (202) 906–6452, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** The Director of the Office of Thrift Supervision (OTS) has determined that the establishment of the OTS Mutual Savings Association Advisory Committee is necessary and in the public interest. The Committee is established in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 1, § 9(c). The Committee will advise OTS on ways to meet the goals established by section 5(a) of the Home Owners Loan Act (HOLA), 12 U.S.C. 1464. The MSAAC shall advise the Director with regard to mutual associations on means to: (1) Provide for the organization, incorporation, examination, operation and regulation of associations to be known as federal savings associations (including federal savings banks); and (2) issue charters therefore, giving primary consideration of the best practices of thrift institutions in the United States. The Mutual Savings Association Advisory Committee will help meet those goals by providing OTS with informed advice and recommendations regarding the current and future circumstances and needs of mutual savings associations.

Nominations should describe and document the proposed member's qualifications for Committee membership. In addition to individual nominations, OTS is soliciting the names of professional and public interest groups that should have representatives participating on the Committee. Committee members are not compensated for their time, but are eligible for reimbursement of travel expenses in accordance with applicable Federal law and regulations.

Dated: December 3, 2008.

By the Office of Thrift Supervision.

**John E. Bowman,**

*Deputy Director and Chief Counsel.*

[FR Doc. E8–29039 Filed 12–8–08; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Tuesday,
December 9, 2008

# Part II

# Department of Education

## 34 CFR Part 99

## Family Educational Rights and Privacy; Final Rule

**DEPARTMENT OF EDUCATION**

**34 CFR Part 99**

**RIN 1855–AA05**

**[Docket ID ED–2008–OPEPD–0002]**

## Family Educational Rights and Privacy

**AGENCY:** Office of Planning, Evaluation, and Policy Development, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends our regulations implementing the Family Educational Rights and Privacy Act (FERPA), which is section 444 of the General Education Provisions Act. These amendments are needed to implement a provision of the USA Patriot Act and the Campus Sex Crimes Prevention Act, which added new exceptions permitting the disclosure of personally identifiable information from education records without consent. The amendments also implement two U.S. Supreme Court decisions interpreting FERPA, and make necessary changes identified as a result of the Department's experience administering FERPA and the current regulations.

These changes clarify permissible disclosures to parents of eligible students and conditions that apply to disclosures in health and safety emergencies; clarify permissible disclosures of student identifiers as *directory information;* allow disclosures to contractors and other outside parties in connection with the outsourcing of institutional services and functions; revise the definitions of *attendance, disclosure, education records, personally identifiable information*, and other key terms; clarify permissible redisclosures by State and Federal officials; and update investigation and enforcement provisions.

**DATES:** These regulations are effective January 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** Frances Moran, U.S. Department of Education, 400 Maryland Avenue, SW., room 6W243, Washington, DC 20202–8250. Telephone: (202) 260–3887.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** On March 24, 2008, the U.S. Department of Education (the Department or we) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (73 FR 15574). In the preamble to the NPRM, the Secretary discussed the major changes proposed in that document that are necessary to implement statutory changes made to FERPA, to implement two U.S. Supreme Court decisions, to respond to changes in information technology, and to address other issues identified through the Department's experience in administering FERPA.

We believe that the regulatory changes adopted in these final regulations provide clarification on many important issues that have arisen over time with regard to how FERPA affects decisions that school officials have to make on an everyday basis. Educational agencies and institutions face considerable challenges, especially with regard to maintaining safe campuses, protecting personally identifiable information in students' education records, and responding to requests for data on student progress. These final regulations, as well as the discussion on various provisions in the preamble, will assist school officials in addressing these challenges in a manner that complies with FERPA and protects the privacy of students' education records.

### Notice of Proposed Rulemaking

In the NPRM, we proposed regulations to implement section 507 of the USA Patriot Act (Pub. L. 107–56), enacted October 26, 2001, and the Campus Sex Crimes Prevention Act, section 1601(d) of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106–386), enacted October 28, 2000. Other major changes proposed in the NPRM included the following:

- Amending § 99.5 to clarify the conditions under which an educational agency or institution may disclose personally identifiable information from an eligible student's education records to a parent without the prior written consent of the eligible student;
- Amending § 99.31(a)(1) to authorize the disclosure of education records without consent to contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions;
- Amending § 99.31(a)(1) to ensure that teachers and other school officials only gain access to education records in which they have legitimate educational interests;
- Amending § 99.31(a)(2) to permit educational agencies and institutions to disclose education records, without consent, to another institution even after the student has enrolled or transferred so long as the disclosure is for purposes related to the student's enrollment or transfer;
- Amending § 99.31(a)(6) to require that an educational agency or institution may disclose personally identifiable information under this section only if it enters into a written agreement with the organization specifying the purposes of the study and the use and destruction of the data;
- Amending § 99.31 to include a new subsection to provide standards for the release of information from education records that has been de-identified;
- Amending § 99.35 to permit State and local educational authorities and Federal officials listed in § 99.31(a)(3) to make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution; and
- Amending § 99.36 to remove the language requiring strict construction of this exception and add a provision stating that if an educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individual, it may disclose the information to any person, including parents, whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

### Significant Changes From the NPRM

These final regulations contain several significant changes from the NPRM as follows:

- Amending the definition of *personally identifiable information* in § 99.3 to provide a definition of *biometric record;*
- Removing the proposed definition of *State auditor* in § 99.3 and provisions in § 99.35(a)(3) related to State auditors and audits;
- Revising § 99.31(a)(6) to clarify the specific types of information that must be contained in the written agreement between an educational agency or institution and an organization conducting a study for the agency or institution;
- Removing the statement from § 99.31(a)(16) that FERPA does not require or encourage agencies or institutions to collect or maintain information concerning registered sex offenders;
- Requiring a State or local educational authority or Federal official or agency that redisclosures personally identifiable information from education records to record that disclosure if the

educational agency or institution does not do so under § 99.32(b); and

- Revising § 99.32(b) to require an educational agency or institution that makes a disclosure in a health or safety emergency to record information concerning the circumstances of the emergency.

These changes are explained in greater detail in the following *Analysis of Comments and Changes.*

**Analysis of Comments and Changes**

In response to the Secretary's invitation in the NPRM, 121 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We group major issues according to subject, with applicable sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes, or suggested changes that the law does not authorize the Secretary to make. We also do not address comments pertaining to issues that were not within the scope of the NPRM.

**Definitions (§ 99.3)**

*(a) Attendance*

*Comment:* We received no comments objecting to the proposed changes to the definition of the term *attendance.* Three commenters expressed support for the changes because the availability and use of alternative instructional formats are not clearly addressed by the current regulations. One commenter suggested that the definition could avoid obsolescence by referring to the receipt of instruction leading to a diploma or certificate instead of listing the types of instructional formats.

*Discussion:* We proposed to revise the definition of *attendance* because we received inquiries from some educational agencies and institutions asking whether FERPA was applicable to the records of students receiving instruction through the use of new technology methods that do not require a physical presence in a classroom. Because the definition of *attendance* is key to determining when an individual's records at a school are education records protected by FERPA, it is essential that schools and institutions understand the scope of the term. To prevent the regulations from becoming out of date as new formats and methods are developed, the definition provides that attendance may also include ''other electronic information and telecommunications technologies.''

While most schools are aware of the various formats distance learning may take, we believe it is informative to list the different communications media that are currently used. Also, we believe that parents, eligible students, and other individuals and organizations that use the FERPA regulations may find the listing of formats useful.

We do not agree that the definition of *attendance* should be limited to receipt of instruction leading to a diploma or certificate, because this would improperly exclude many instructional formats.

*Changes:* None.

*(b) Directory Information (§§ 99.3 and 99.37)*

(1) Definition (§ 99.3)

*Comment:* We received a number of comments on our proposal to revise the definition of *directory information* to provide that an educational agency or institution may not designate as directory information a student's social security number (SSN) or other student identification (ID) number. The proposed definition also provided that a student's user ID or other unique identifier used by the student to access or communicate in electronic systems could be considered directory information but only if the electronic identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the student's identity.

All commenters agreed that student SSNs should not be disclosed as directory information. Several commenters strongly supported the definition of *directory information* as proposed, noting that failure to curtail the use of SSNs and student ID numbers as directory information could facilitate identity theft and other fraudulent activities.

One commenter said that the proposed regulations did not go far enough to prohibit the use of students' SSNs as a student ID number, placing SSNs on academic transcripts, and using SSNs to search an electronic database. Another commenter expressed concern that the proposed regulations could prohibit reporting needed to enforce students' financial obligations and other routine business practices. According to this commenter, restrictions on the use of SSNs in FERPA and elsewhere demonstrate the need for a single student identifier that can be tied to the SSN and other identifying information to use for grade transcripts, enrollment verification, default prevention, and other activities that depend on sharing student information. Another commenter stated that institutions should not be allowed to penalize students who opt out of directory information disclosures by denying them access to benefits, services, and required activities.

Several commenters said that the definition in the proposed regulations was confusing and unnecessarily restrictive because it treats a student ID number as the functional equivalent of an SSN. They explained that when providing access to records and services, many institutions no longer use an SSN or other single identifier that both identifies and authenticates identity. As a result, at many institutions, the condition specified in the regulations for treating electronic identifiers as directory information, *i.e.*, that the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, often applies to student ID numbers as well because they cannot be used to gain access to education records without a personal identification number (PIN), password, or some other factor to authenticate the user's identity. Some commenters suggested that our nomenclature is the problem and that regardless of what it is called, an identifier that does not allow access to education records without the use of authentication factors should be treated as directory information. According to one commenter, allowing institutions to treat student ID numbers as directory information in these circumstances would improve business practices and enhance student privacy by encouraging institutions to require additional authentication factors when using student ID numbers to provide access to education records.

One commenter strongly opposed allowing institutions to treat a student's electronic identifier as directory information if the identifier could be made available to parties outside the school system. This commenter noted that electronic identifiers may act as a key, offering direct access to the student's entire file, and that PINs and passwords alone do not provide adequate security for education records. Another commenter said that if electronic identifiers and ID numbers can be released as directory information, then password requirements need to be more stringent to guard against unauthorized access to information and identity theft.

Some commenters recommended establishing categories of directory information, with certain information

made available only within the educational community. One commenter expressed concern about Internet safety because the regulations allow publication of a student's e-mail address. Another said that FERPA should not prevent institutions from printing the student's ID number on an ID card or otherwise restrict its use on campus but that publication in a directory should not be allowed.

Two commenters asked the Department to confirm that the regulations allow institutions to post grades using a code known only by the teacher and the student.

*Discussion:* We share commenters' concerns about the use of students' SSNs. In general, however, there is no statutory authority under FERPA to prohibit an educational agency or institution from using SSNs as a student ID number, on academic transcripts, or to search an electronic database so long as the agency or institution does not disclose the SSN in violation of FERPA requirements. As discussed elsewhere in this preamble, FERPA does prohibit using a student's SSN, without consent, to search records in order to confirm directory information.

Some States prohibit the use of SSNs as a student ID number, and some institutions have voluntarily ceased using SSNs in this manner because of concerns about identity theft. Students are required to provide their SSNs in order to receive Federal financial aid, and the regulations do not prevent an agency or institution from using SSNs for this purpose. We note that FERPA does not address, and we do not believe that there is statutory authority under FERPA to require, creation of a single student identifier to replace the SSN. In any case, the Department encourages educational agencies and institutions, as well as State educational authorities, to follow best practices of the educational community with regard to protecting students' SSNs.

We agree that students should not be penalized for opting out of directory information disclosures. Indeed, an educational agency or institution may not require parents and students to waive their rights under FERPA, including the right to opt out of directory information disclosures. On the other hand, we do not interpret FERPA to require educational agencies and institutions to ensure that students can remain anonymous to others in the school community when using an institution's electronic communications systems. As a result, parents and students who opt out of directory information disclosures may not be able to use electronic communications systems that require the release of the student's name or electronic identifier within the school community. (As discussed later in this notice in our discussion of the comments on § 99.37(c), the right to opt out of directory information disclosures may not be used to allow a student to remain anonymous in class.)

The regulations allow an educational agency or institution to designate a student's user ID or other electronic identifier as directory information if the identifier functions essentially like the student's name, and therefore, disclosure would not be considered harmful or an invasion of privacy. That is, the identifier cannot be used to gain access to education records except when combined with one or more factors that authenticate the student's identity.

We have historically advised that student ID numbers may not be disclosed as directory information because they have traditionally been used like SSNs, *i.e.*, as both an identifier and authenticator of identity. We agree, however, that the proposed definition was confusing and unnecessarily restrictive because it failed to recognize that many institutions no longer use student ID numbers in this manner. If a student identifier cannot be used to access records or communicate electronically without one or more additional factors to authenticate the user's identity, then the educational agency or institution may treat it as directory information under FERPA regardless of what the identifier is called. We have revised the definition of *directory information* to provide this flexibility.

We share the commenters' concerns about the use of PINs and passwords. In the preamble to the NPRM, we explained that PINs or passwords, and single-factor authentication of any kind, may not be reasonable for protecting access to certain kinds of information (73 FR 15585). We also recognize that user IDs and other electronic identifiers may provide greater access and linking to information than does a person's name. Therefore, we remind educational agencies and institutions that disclose student ID numbers, user IDs, and other electronic identifiers as directory information to examine their recordkeeping and data sharing practices and ensure that, when these identifiers are used, the methods they select for authenticating identity provide adequate protection against the unauthorized disclosure of information in education records.

We also share the concern of commenters who stated that students' e-mail addresses and other identifiers should be disclosed as directory information only within the school system and should not be made available outside the institution. The disclosure of directory information is permissive under FERPA, and, therefore, an agency or institution is not required to designate and disclose any student identifier (or any other item) as directory information. Further, while FERPA does not expressly recognize different levels or categories of directory information, an agency or institution is not required to make student directories and other directory information available to the general public just because the information is shared within the institution. For example, under FERPA, an institution may decide to make students' electronic identifiers and e-mail addresses available within the institution but not release them to the general public as directory information. In fact, the preamble to the NPRM suggested that agencies and institutions should minimize the public release of student directories to mitigate the risk of re-identifying information that has been de-identified (73 FR 15584).

With regard to student ID numbers in particular, an agency or institution may print an ID number on a student's ID card whether or not the number is treated as directory information because under FERPA simply printing the ID number on a card, without more, is not a disclosure and, therefore, is not prohibited. *See* 20 U.S.C. 1232g(b)(2). If the student ID number is not designated as directory information, then the agency or institution may not disclose the card, or require the student to disclose the card, except in accordance with one of the exceptions to the consent requirement, such as to school officials with legitimate educational interests. If the student ID number is designated as directory information in accordance with these regulations, then it may be disclosed. However, the agency or institution may still decide against making a directory of student ID numbers available to the general public.

We discuss codes used by teachers to post grades in our discussion of the definition of *personally identifiable information* elsewhere in this preamble.

*Changes:* We have revised the definition of *directory information* in § 99.3 to provide that directory information includes a student ID number if it cannot be used to gain access to education records except when used with one or more other factors to authenticate the user's identity.

(2) Conditions for Disclosing Directory Information

(i) 99.37(b)

*Comment:* All comments on this provision supported our proposal to clarify that an educational agency or institution must continue to honor a valid request to opt out of directory information disclosures even after the student no longer attends the institution. One commenter stated that the proposed regulations appropriately provided former students with the continuing ability to control the release of directory information and remarked that this will benefit students and families. One commenter asked how long an opt out from directory information disclosures must be honored. Another commenter said that students may object if their former schools do not disclose directory information without their specific written consent because the school is unable to determine whether the student previously opted out. This could occur, for example, if a school declined to disclose that a student had received a degree to a prospective employer.

*Discussion:* The regulations clarify that once a parent or eligible student opts out of directory information disclosures, the educational agency or institution must continue to honor that election after the student is no longer in attendance. While this is not a new interpretation, school districts and postsecondary institutions have been unclear about its application and have not administered it consistently. The inclusion in the regulations of this longstanding interpretation is necessary to ensure that schools clearly understand their obligation to continue to honor a decision to opt out of the disclosure of directory information after a student stops attending the school, until the parent or eligible student rescinds it.

Educational agencies and institutions are not required under FERPA to disclose directory information to any party. Therefore, parents and students have no basis for objecting if an agency or institution does not disclose directory information because it is not certain whether the parent or student opted out. The regulations provide an educational agency or institution with the flexibility to determine the process it believes is best suited to serve its population as long as it honors prior elections to opt out of directory information disclosures.

*Changes:* None.

(ii) § 99.37(c)

*Comment:* We received two comments in support of our proposal to clarify in this section that parents and students may not use the right to opt out of directory information disclosures to prevent disclosure of the student's name or other identifier in the classroom.

*Discussion:* We appreciate the commenters' support.

*Changes:* None.

(iii) § 99.37(d)

*Comment:* Two commenters supported the prohibition on using a student's SSN to disclose or confirm directory information unless a parent or eligible student provides written consent. One of these commenters questioned the statutory basis for this interpretation.

Several commenters asked whether, under the proposed regulations, a school must deny a request for directory information if the requester supplies the student's SSN. One commenter asked whether a request for directory information that contains a student's SSN may be honored so long as the school does not use the SSN to locate the student's records. One commenter stated that the regulations could more effectively protect students' SSNs but was concerned that denying a request for directory information that contains an SSN may inadvertently confirm the SSN.

One commenter expressed concern that the prohibition on using a student's SSN to verify directory information would leave schools with large student populations unable to locate the appropriate record because they will need to rely solely on the student's name and other directory information, if any, provided by the requester, which may be duplicated in their databases. This commenter said that students would object if institutions were unable to respond quickly to requests by banks or landlords for confirmation of enrollment because the request contained the student's SSN.

One commenter suggested that the regulations require an educational agency or institution to notify a requester that the release or confirmation of directory information does not confirm the accuracy of the SSN or other non-directory information submitted with the request. Another commenter asked whether the regulations apply to confirmation of student enrollment and other directory information by outside service providers such as the National Student Clearinghouse.

*Discussion:* The provision in the proposed regulations prohibiting an educational agency or institution from using a student's SSN when disclosing or verifying directory information is based on the statutory prohibition on disclosing personally identifiable information from education records without consent in 20 U.S.C. 1232g(b). The prohibition applies also to any party outside the agency or institution providing degree, enrollment, or other confirmation services on behalf of an educational agency or institution, such as the National Student Clearinghouse.

A school is not required to deny a request for directory information about a student, such as confirmation whether a student is enrolled or has received a degree, if the requester supplies the student's SSN (or other non-directory information) along with the request. However, in releasing or confirming directory information about a student, the school may not use the student's SSN (or other non-directory information) supplied by the requester to identify the student or locate the student's records unless a parent or eligible student has provided written consent. This is because confirmation of information in education records is considered a disclosure under FERPA. See 20 U.S.C. 1232g(b). A school's use of a student's SSN (or other non-directory information) provided by the requester to confirm enrollment or other directory information implicitly confirms and, therefore, discloses, the student's SSN (or other non-directory information). This is true even if the requester also provides the school with the student's name, date of birth, or other directory information to help identify the student.

A school may choose to deny a request for directory information, whether or not it contains a student's SSN, because only a parent or eligible student has a right to obtain education records under FERPA. Denial of a request for directory information that contains a student's SSN is not an implicit confirmation or disclosure of the SSN.

These regulations will not adversely affect the ability of institutions to respond quickly to requests by parties such as banks and landlords for confirmation of enrollment that contain the student's SSN because students generally provide written consent for schools to disclose information to the inquiring party in order to obtain banking and housing services. We note, however, that if a school wishes to use the student's SSN to confirm enrollment or other directory information about the student, it must ensure that the written consent provided by the student includes consent for the school to

disclose the student's SSN to the requester.

There is no authority in FERPA to require a school to notify requesters that it is not confirming the student's SSN (or other non-directory information) when it discloses or confirms directory information. However, when a party submits a student's SSN along with a request for directory information, in order to avoid confusion, unless a parent or eligible student has provided written consent for the disclosure of the student's SSN, the school may indicate that it has not used the SSN (or other non-directory information) to locate the student's records and that its response may not and does not confirm the accuracy of the SSN (or other non-directory information) supplied with the request.

We recognize that with a large database of student information, there may be some loss of ability to identify students who have common names if SSNs are not used to help identify the individual. However, schools that do not use SSNs supplied by a party requesting directory information, either because the student has not provided written consent or because the school is not certain that the written consent includes consent for the school to disclose the student's SSN, generally may use the student's address, date of birth, school, class, year of graduation, and other directory information to identify the student or locate the student's records.

*Changes:* None.

*(c) Disclosure (§ 99.3)*

*Comment:* Two commenters said that the proposal to revise the definition of *disclosure* to exclude the return of a document to its source was too broad and could lead to improper release of highly sensitive documents, such as an individualized education program (IEP) contained in a student's special education records, to anyone claiming to be the creator of a record. One of the commenters stated that changing the definition was unnecessary, as schools already have a means of verifying documents by requesting additional copies from the source. Both commenters also expressed concern that, because recordation is not required, a parent or eligible student will not be aware that the verification occurred.

We also received comments of strong support for the proposed change to the definition of *disclosure*. The commenters stated that this change, targeted to permit the release of records back to the institution that presumably created them, will enhance an institution's ability to identify and investigate suspected fraudulent records in a timely manner.

*Discussion:* For several years now, school officials have advised us that problems related to fraudulent records typically involve a transcript or letter of recommendation that has been altered by someone other than the responsible school official. Under the current regulations, an educational agency or institution may ask for a copy of a record from the presumed source when it suspects fraudulent activity. However, simply asking for a copy of a record may not be adequate, for example, if the original record no longer exists at the sending institution. In these circumstances, an institution will need to return a record to its identified source to be able to verify its authenticity. The final regulations permit a targeted release of records back to the stated source for verification purposes in order to provide schools with the flexibility needed for this process while preserving a more general prohibition on the release of information from education records.

We do not agree that the term disclosure as proposed in the NPRM is too broad and could lead to the improper release of highly sensitive documents to anyone claiming to be the creator of the record. School officials have not advised us that they have had problems receiving IEP records and other highly sensitive materials from parties who did not in fact create or provide the record. Therefore, we do not believe that the proposed definition of disclosure is too broad.

The commenters are correct that the return of an education record to its source does not have to be recorded, because it is not a disclosure. We do not consider this problematic, however, because the information is merely being returned to the party identified as its source. This is similar to the situation in which a school is not required under the regulations to record disclosures of education records made to school officials with legitimate educational interests. As in that instance, there is no direct notice to a parent or student of either the disclosure of the record or the information in the record. We also believe that if a questionable document is deemed to be inauthentic by the source, the student will be informed of the results of the authentication process by means other than seeing a record of the disclosure in the student's file. There appears to be little value in notifying a parent or student that a document was suspected of being fraudulent if the document is found to be genuine and accurate.

Finally, we note that a transcript or other document does not lose its protection under FERPA, including the written consent requirements, when an educational agency or institution returns it to the source. The document and the information in it remains an ''education record'' under FERPA when it is returned to its source. As an education record, it may not be redisclosed except in accordance with FERPA requirements, including § 99.31(a)(1), which allows the source institution to disclose the information to teachers and other school officials with legitimate educational interests, such as persons who need to verify the accuracy or authenticity of the information. If the source institution makes any further disclosures of the record or information, it must record them.

*Changes:* None.

**Additional Changes to the Definition of Disclosure**

*Comment:* Several commenters requested additional changes to the definition of *disclosure*. One commenter requested that any transfer of education records to a State's longitudinal data system not be considered a disclosure. Several commenters requested that additional changes be made so that a school could provide current education records of students back to the students' former schools or districts. A commenter recommended excluding from the definition of *disclosure* statistical information that is personally identifiable because of small cell sizes when the recipient agrees to maintain the confidentiality of the information.

*Discussion:* The revised definition of *disclosure*, which excludes the return of a document to its stated source, clarifies that information provided by school districts or postsecondary institutions to State educational authorities, including information maintained in a consolidated student records system, may be provided back to the original district or institution without consent. There is no statutory authority, however, to exclude from the definition of *disclosure* a school district's or institution's release or transfer of personally identifiable information from education records to its State longitudinal data system. (We discuss the *disclosure* of education records in connection with the development of consolidated, longitudinal data systems in our response to comments on redisclosure and recordkeeping requirements elsewhere in this preamble.) Likewise, there is no statutory authority to exclude from the definition of disclosure the release of personally identifiable information from

education records to parties that agree to keep the information confidential. (See our discussion of personally identifiable information and de-identified records and information elsewhere in this preamble.)

The revised regulations do not authorize the disclosure of education records to third parties who are not identified as the provider or creator of the record. For example, a college may not send a student's current college records to a student's high school under the revised definition of *disclosure* because the high school is not the stated source of those records. (We discuss this issue elsewhere in the preamble under *Disclosure of Education Records to Students' Former Schools*.)

*Changes:* None.

*(d) Education Records*

(1) Paragraph (b)(5)

*Comment:* Several commenters supported our proposal to clarify the existing exclusion from the definition of *education records* for records that only contain information about an individual after he or she is no longer a student, which we referred to as ''alumni records'' in the NPRM, 73 FR 15576. One commenter suggested that the term ''directly related,'' which is used in the amended definition in reference to a student's attendance, is inconsistent with the use of the term ''personally identifiable'' in other sections of the regulations and could cause confusion.

One commenter asked whether a postsecondary school could provide a student's education records from the postsecondary school to a secondary school that the student attended previously.

Several commenters objected to the proposed regulations because, according to the commenters, the regulations would expand the records subject to FERPA's prohibition on disclosure of education records without consent. A journalist stated that the settlement agreement cited in the NPRM is an example of a record that should be excluded from the definition and that schools already are permitted to protect too broad a range of documents from public review because the documents are education records. The commenter stated that information from education records such as a settlement agreement is newsworthy, unlikely to contain confidential information, and that disclosure of such information provides a benefit to the public. Another commenter expressed concern that the regulations allow schools to collect negative information about a former student without giving the individual an opportunity to challenge the content because the information is not an education record under FERPA.

*Discussion:* It has long been the Department's interpretation that records created or received by an educational agency or institution on a former student that are directly related to the individual's attendance as a student are not excluded from the definition of *education records* under FERPA, and that records created or received on a former student that are not directly related to the individual's attendance as a student are excluded from the definition and, therefore, are not ''education records.'' The proposed regulations in paragraph (b)(5) were intended to clarify the use of this exclusion, not to change or expand its scope.

Our use of the phrase ''directly related to the individual's attendance as a student'' to describe records that do not fall under this exclusion from the definition of *education records* is not inconsistent with the term ''personally identifiable'' as used in other parts of the regulations and should not be confused. The term ''personally identifiable information'' is used in the statute and regulations to describe the kind of information from education records that may not be disclosed without consent. *See* 20 U.S.C. 1232g(b); 34 CFR 99.3, 99.30. While ''personally identifiable information'' maintained by an agency or institution is generally considered an ''education record'' under FERPA, personally identifiable information does not fall under this exclusion from the definition of education records if the information is not directly related to the student's attendance as a student. For example, personally identifiable information related solely to a student's activities as an alumnus of an institution is excluded from the definition of education records under this provision. We think that the term ''directly related'' is clear in this context and will not be confused with ''personally identifiable.''

A postsecondary institution may not disclose a student's postsecondary education records to the secondary school previously attended by the student under this provision because these records are directly related to the student's attendance as a student at the postsecondary institution. (We discuss this issue further under *Disclosure of Education Records to Students' Former Schools*.)

We do not agree that documents such as settlement agreements are unlikely to contain confidential information. Our experience has been that these documents often contain highly confidential information, such as special education diagnoses, educational supports, or mental or physical health and treatment information. Our changes to the definition were intended to clarify that schools may not disclose this information to the media or other parties, without consent, simply because a student is no longer in attendance at the school at the time the record was created or received. A parent or eligible student who wishes to share the student's own records with the media or other parties is free to do so.

Neither FERPA nor the regulations contains a provision for a parent or eligible student to challenge information that is not contained in an education record. FERPA does not prohibit a parent or student from using other venues to seek redress for collection and release of information in non-education records.

*Changes:* None.

(2) Paragraph (b)(6)

*Comment:* We received several comments supporting the proposed changes to the definition of *education records* that would exclude from the definition grades on peer-graded papers before they are collected and recorded by a teacher. These commenters expressed appreciation that this revision would be consistent with the U.S. Supreme Court's decision on peer-graded papers in *Owasso Independent School Dist. No. I–011* v. *Falvo*, 534 U.S. 426 (2002) (*Owasso*). Two commenters asked how the provision would be applied to the use of group projects and group grading within the classroom.

*Discussion:* The proposed changes to the definition of *education records* in paragraph (b)(6) are designed to implement the U.S. Supreme Court's 2002 decision in *Owasso*, which held that peer grading does not violate FERPA. As noted in the NPRM, 73 FR 15576, the Court held in *Owasso* that peer grading does not violate FERPA because ''the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book.'' 534 U.S. at 436.

As suggested by the Supreme Count in *Owasso*, 534 U.S. at 435, FERPA is not intended to interfere with a teacher's ability to carry out customary practices, such as group grading of team assignments within the classroom. Just as FERPA does not prevent teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though the grade may eventually become an education record,

FERPA does not prohibit the discussion of group or individual grades on classroom group projects, so long as those individual grades have not yet been recorded by the teacher. The process of assigning grades or grading papers falls outside the definition of *education records* in FERPA because the grades are not ''maintained'' by an educational agency or institution at least until the teacher has recorded the grades.

*Changes:* None.

*(e) Personally Identifiable Information*

Comments on the proposed definition of *personally identifiable information* are discussed elsewhere in this preamble under the heading *Personally Identifiable Information and De-identified Records and Information.*

*(f) State Auditors and Audits (§§ 99.3 and Proposed 99.35(a)(3))*

*Comment:* Several commenters supported the clarification in proposed § 99.35(a)(3) that State auditors may have access to education records, without consent, in connection with an ''audit'' of Federal or State supported education programs under the exception to the written consent requirement for authorized representatives of ''State and local educational authorities.'' All but one of the commenters, however, disagreed strongly with the proposed definition of *audit* in § 99.35(a)(3), which was limited to testing compliance with applicable laws, regulations, and standards and did not include the broader concept of evaluations.

In general, the commenters said that the proposed definition of *audit* was too narrow and would prevent State auditors from conducting performance audits and other services that they routinely provide in accordance with professional auditing standards, including the U.S. Comptroller's Government Auditing Standards. *See www.gao.gov/govaud/ybk01.htm.* A State legislative auditor noted, for example, that 45 State legislatures have established legislative program evaluation offices whose express purpose is to provide research and evaluation for legislative decision making, and that these offices regularly use personally identifiable information from education records for their work. Some of the commenters also questioned whether financial audits and attestation engagements would be excluded under the proposed definition.

One commenter said that the State auditor provisions in proposed §§ 99.3 and 99.35(a)(3) should be expanded to apply to other non-education State officials responsible for evaluating publicly funded programs. Another commenter recommended that the regulations include examination of education records by health department officials to improve compliance with mandated immunization schedules.

The majority of the comments we received with respect to the inclusion of local auditors in the proposed definition of *State auditor* in § 99.3 supported permitting local auditors to have access to personally identifiable information for purposes of auditing Federal or State supported education programs. One commenter said that local auditors should not be included in the definition, while another commenter stated that auditors for the city health department need access to FERPA-protected information to determine the accuracy of claims for payment and asked for further clarification on the issue.

*Discussion:* We explained in the preamble to the NPRM that the statute allows disclosure of personally identifiable information from education records without consent to authorized representatives of ''State educational authorities'' in connection with an audit or evaluation of Federal or State supported education programs. 73 FR 15577. Legislative history indicates that Congress amended the statute in 1979 to ''correct an anomaly'' in which the existing exception to the consent requirement in 20 U.S.C. 1232g(b)(3) was interpreted to preclude State auditors from obtaining access to education records for audit purposes. *See* H.R. Rep. No. 338, 96th Cong., 1st Sess. at 10 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 819, 824. However, because the amended statutory language in 20 U.S.C. 1232g(b)(5) refers only to ''State and local educational officials,'' the proposed regulations sought to clarify that this included ''State auditors'' or auditors with authority and responsibility under State law for conducting audits. Due to the breadth of this inclusion, however, the proposed regulations also sought to limit access to education records by State auditors by narrowing the definition of *audit.*

The Secretary has carefully reviewed the comments and, based upon further intradepartmental review, has decided to remove from the final regulations the provisions related to State auditors and audits in §§ 99.3 and 99.35(a)(3). We share the commenters' concerns about preventing State auditors from conducting activities that they routinely perform under applicable auditing standards. However, because our focus was on the narrow definition of *audit,* we proposed a very broad definition of *State auditor* in § 99.3 and did not examine which of the various types of officials, offices, committees, and staff in executive and legislative branches of State government should be included in the definition. We are concerned that without the narrow definition of *audit* as proposed in § 99.35(a)(3), the proposed definition of *State auditor* may allow non-consensual disclosures of education records to a variety of officials for purposes not supported by the statute. The Department will study the matter further and may issue new regulations or guidance, as appropriate. In the interim, the Department will provide guidance on a case-by-case basis.

*Changes:* We are not including the definition of *State auditor* in § 99.3 and the provisions related to State auditors and audits in § 99.35(a)(3) in these final regulations.

**Disclosures to Parents (§§ 99.5 and 99.36)**

*Comment:* A majority of commenters approved of the Secretary's efforts to clarify that, even after a student has become an eligible student, an educational agency or institution may disclose education records to the student's parents, without the consent of the student, if certain conditions are met. Those commenters stated that the clarification was especially helpful, particularly in light of issues that arose after the April 2007 shootings at the Virginia Polytechnic Institute and State University (Virginia Tech). A commenter stated that the clarification will assist emergency management officials on college and university campuses and help school officials know when they can properly share student information with parents and students. One commenter expressed support for the proposed regulations, because it has been her experience that colleges do not share information with parents on their children's financial aid or academic status.

Some commenters disagreed with the proposed changes. One stated that, due to varying family dynamics, disclosures should not be limited only to parents, but should also include other appropriate family members. Another commenter objected to the phrase in § 99.5(a)(2) that would permit disclosure to a parent without the student's consent if the disclosure meets ''any other provision in § 99.31(a).'' The commenter stated that this ''catch-all phrase'' exceeded statutory authority.

Noting the sensitivity of financial information included in income tax returns, a few commenters raised concerns about the discussion in the

NPRM in which we explained that an institution can determine that a parent claimed a student as a dependent by asking the parent to supply a copy of the parent's most recent Federal tax return. Another commenter stated that the NPRM did not go far enough and recommended specifically requiring an institution to rely on a copy of a parent's most recent Federal tax return to determine a student's dependent status, while another commenter recommended that we change the regulations to indicate that only the parent who has claimed the student as a dependent may have access to the student's education records.

A commenter noted that some States have high school students who are concurrently enrolled in secondary schools and postsecondary institutions as early as ninth grade and supported the clarification that postsecondary institutions may disclose information to parents of students who are tax dependents.

*Discussion:* Parents' rights under FERPA transfer to a student when the student reaches age 18 or enters a postsecondary institution. 20 U.S.C. 1232g(d). However, under § 99.31(a)(8), an educational agency or institution may disclose education records to an eligible student's parents if the student is a dependent as defined in section 152 of the Internal Revenue Code of 1986. Under § 99.31(a)(8), neither the age of a student nor the parent's status as custodial parent is relevant to the determination whether disclosure of information from an eligible student's education records to that parent without written consent is permissible under FERPA. If a student is claimed as a dependent for Federal income tax purposes by either parent, then under the regulations, either parent may have access to the student's education records without the student's consent.

The statutory exception to the consent requirement in FERPA for the disclosure of records of dependent students applies only to the parents of the student. 20 U.S.C. 1232g(b)(1)(H). Accordingly, the Secretary does not have statutory authority to apply § 99.31(a)(8) to any other family members. However, under § 99.30(b)(3), an eligible student may provide consent for the school to disclose information from his or her education records to another family member. In some situations, such as when there is no parent in the student's life or the student is married, a spouse or other family member may be considered an appropriate party to whom a disclosure may be made, without consent, in connection with a health or safety emergency under §§ 99.31(a)(10) and 99.36.

In most cases, when an educational agency or institution discloses education records to parents of an eligible student, we expect the disclosure to be made under the dependent student provision (§ 99.31(a)(8)), in connection with a health or safety emergency (§§ 99.31(a)(10) and 99.36), or if a student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance (§ 99.31(a)(15)). This is the reason we mention these provisions specifically in the regulations. However, inclusion of the phrase ''of any other provision in § 99.31(a)'' in § 99.5(a)(2) is necessary and within our statutory authority because there may be other exceptions to FERPA's general consent requirement under which an agency or institution might disclose education records to a parent of an eligible student, such as the directory information provision in § 99.31(a)(11) and the provision permitting disclosure in compliance with a court order or lawfully issued subpoena in § 99.31(a)(9).

As we explained in the NPRM, institutions can determine that a parent claims a student as a dependent by asking the parent to submit a copy of the parent's most recent Federal income tax return. However, we do not think it is appropriate to require an agency or institution to rely only on the most recent tax return to determine the student's dependent status because institutions should have flexibility in how to reach this determination. For instance, institutions may rely instead on a student's assertion that he or she is not a dependent unless the parent provides contrary evidence. We agree that financial information on a Federal tax return is sensitive information and, for that reason, in providing technical assistance and compliance training to school officials, we have advised that parents may redact all financial and other unnecessary information that appears on the form, as long as the tax return clearly shows the parent's or parents' names and the fact that the student is claimed as a dependent.

In addition, in the fall of 2007, we developed two model forms that appear on the Department's Family Policy Compliance Office (FPCO or the Office) Web site that institutions may adapt and provide to students at orientation to indicate whether they are a dependent and, if not, obtaining consent from the student for disclosure of information to parents: *http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html* and *http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html.*

With regard to the comment about high school students who are concurrently enrolled in postsecondary institutions as early as ninth grade, FERPA not only permits those postsecondary institutions to disclose information to parents of the high school students who are dependents for Federal income tax purposes, it also permits high schools and postsecondary institutions who have dually-enrolled students to share information. Where a student is enrolled in both a high school and a postsecondary institution, the two schools may share education records without the consent of either the parents or the student under § 99.34(b). If the student is under 18, the parents still retain the right under FERPA to inspect and review any education records maintained by the high school, including records that the college or university disclosed to the high school, even though the student is also attending the postsecondary institution.

*Changes:* None.

**Outsourcing (§ 99.31(a)(1)(i)(B))**

*(a) Outside Parties Who Qualify as School Officials*

*Comment:* A few commenters disagreed with the proposal to expand the ''school officials'' exception in § 99.31(a)(1)(i)(B) to include contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions it would otherwise use employees to perform. They believed that the modifications undermined the plain language of the statute and congressional intent. Several other commenters supported the proposed regulations, saying that it was helpful to include in the regulations what has historically been the Department's interpretation of the ''school officials'' exception. A majority of commenters, while not agreeing or disagreeing with the proposed changes in § 99.31(a)(1)(i)(B), raised a number of issues concerning the proposal.

Several commenters expressed concern that the requirement that an outside party must perform an institutional service or function for which the agency or institution would otherwise use employees is too restrictive and impractical. One commenter noted that some functions that a contractor performs could not be performed by a school official.

Some commenters said we should clarify the regulations to explain the

circumstances under which volunteers may serve as school officials and have access to personally identifiable information from education records in connection with their services or responsibilities to the school. One commenter noted that this clarification was needed especially for parent-volunteers working at a school attended by their own children where they are likely to know other students and their families.

Several commenters asked that we clarify in the regulations that § 99.31(a)(1) also applies to school transportation officials, school bus drivers, and school bus attendants who need access to education records in order to safely and efficiently transport students. Another commenter asked for clarification whether, under the proposed regulations, practicum students, fieldwork students, and unpaid interns in schools would be considered ''school officials.'' One commenter asked whether § 99.31(a)(1) permits outsourced medical providers to be considered ''school officials.''

One commenter asked how proposed § 99.31(a)(1) would apply to parties other than educational agencies and institutions. The commenter was concerned about permitting SEAs to disclose personally identifiable information to outside parties under § 99.31(a)(1)(i)(B) because SEAs are not subject to § 99.7, which requires educational agencies and institutions to annually notify parents and eligible students of their rights under FERPA, including a specific requirement in § 99.7(a)(3)(iii) that an educational agency or institution that has a policy of disclosing information under § 99.31(a)(1) must include in its annual notice a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. A number of commenters requested clarification about the applicability of § 99.31(a)(1)(i)(B) to State authorities that operate State longitudinal data systems that maintain records of local educational agencies (LEAs) or institutions and are responsible for certain reporting requirements under the No Child Left Behind Act. Some of these commenters believe that State authorities operating these systems are ''school officials'' under § 99.31(a)(1) who should be able to disclose education records for the purpose of outsourcing under § 99.31(a)(1)(i)(B).

One commenter recommended that the regulations permit the disclosure of education records to non-educational State agencies for evaluation purposes under § 99.31(a)(1). Another commenter asked that we revise the regulations to permit representatives of the Centers for Disease Control and Prevention to access education records for the purpose of public health surveillance under the ''school officials'' exception.

Another commenter requested further guidance on how § 99.31(a)(1) would apply to local law enforcement officers who work in collaboration with schools in various capacities and whether education records could be shared with these officers in order to ensure safe campuses.

*Discussion:* The Secretary does not agree that the proposed changes to § 99.31(a)(1) go beyond the plain reading of the statute and congressional intent. As we explained in the NPRM, FERPA's broad definition of *education records* includes records that are maintained by ''a person acting for'' an educational agency or institution. 20 U.S.C. 1232g(a)(4)(A)(ii); *see* 34 CFR 99.3. (In floor remarks describing the meaning of the definition of *education records,* Senators James Buckley and Claiborne Pell, principal sponsors of the December 1974 FERPA amendments, specifically referred to materials that are maintained by a school ''or by one of its agents.'' See ''Joint Statement in Explanation of Buckley/Pell Amendment'' (Joint Statement), 120 Cong. Rec. S21488 (Dec. 13, 1974).) Although the Secretary is concerned that educational agencies and institutions not misapply § 99.31(a)(1), the changes to the regulations are necessary to clarify the scope of the ''school officials'' exception in FERPA.

We disagree with commenters that the requirement in § 99.31(a)(1)(i)(B)(*1*) that the outside party must perform an institutional service or function for which the agency or institution would otherwise use employees is too restrictive or unworkable. The requirement serves to ensure that the ''school officials'' exception does not expand into a general exception to the consent requirement in FERPA that would allow disclosure any time a vendor or other outside party wants access to education records to provide a product or service to schools, parents, and students. As explained in the preceding paragraphs and in the NPRM, 73 FR 15578–15579, the statutory basis for expanding the ''school officials'' exception to outside service providers is that they are ''acting for'' the agency or institution, not selling products and services. This means, for example, that a school may not use the ''school officials'' exception to disclose personally identifiable information from a student's education record, such as the student's SSN or student ID number, without consent, to an insurance company that wishes to offer students a discount on auto insurance because the school is not outsourcing an institutional service or function for which it would otherwise use its own employees.

Further, the requirement that the outside party must be performing services or functions an employee would otherwise perform does not mean that a school employee must be able to perform the outsourced service in order for the outside party to be considered a school official under § 99.31(a)(1)(i)(B)(*1*). For example, many school districts outsource their legal services on an as-needed basis. Even though these school districts may have never hired an attorney as an employee, they may still disclose personally identifiable information from education records to outside legal counsel to whom they have outsourced their legal services. FERPA does not otherwise restrict whether a school may outsource institutional services and functions; it only addresses to whom and under what conditions personally identifiable information from students' education records may be disclosed.

Once a school has determined that an outside party is a ''school official'' with a ''legitimate educational interest'' in viewing certain education records, that party may have access to the education records, without consent, in order to perform the required institutional services and functions for the school. These outside parties may include parents and other volunteers who assist schools in various capacities, such as serving on official committees, serving as teachers' aides, and working in administrative offices, where they need access to students' education records to perform their duties.

The disclosure of education records under any of the conditions listed in § 99.31, including the ''school officials'' exception, is permissive and not required. (Only parents and eligible students have a right under FERPA to inspect and review their education records.) Therefore, schools should always use good judgment in determining the extent to which volunteers, as well as other school officials, need to have access to education records and to ensure that school officials, including volunteers, do not improperly disclose information from students' education records.

We decline to adopt commenters' suggestion that we include in § 99.31(a)(1)(i)(B) a list of the types of parties who may serve as school officials and receive personally identifiable information from education

records in connection with the institutional services and functions outsourced by the school. We think it would be impossible to provide a comprehensive listing and believe that agencies and institutions are in the best position to make these determinations. At the discretion of a school, school officials may include school transportation officials (including bus drivers), school nurses, practicum and fieldwork students, unpaid interns, consultants, contractors, volunteers, and other outside parties providing institutional services and performing institutional functions, provided that each of the requirements in § 99.31(a)(1)(i)(B) has been met.

Under § 99.31(a)(1), a university could outsource the practical training of students. The information disclosed to the hospital, clinic, or business conducting the practical training may only be used for the purposes for which it was disclosed. In the NPRM, we discuss in more detail the types of services and functions covered under § 99.31(a)(1)(i)(B). (73 FR 15578–15580.)

In response to the comment about the applicability of § 99.31(a)(1)(i)(B) to State educational authorities that operate State longitudinal data systems, such officials are not ''school officials'' under FERPA. Rather, these officials are generally considered authorized representatives of a State educational authority, and LEAs typically disclose information from students' education records to a longitudinal data system maintained by an SEA or other State educational authorities under the exception to the consent requirement for disclosures to authorized representatives of State and local educational authorities, § 99.31(a)(3)(iv)), not the ''school officials'' exception. This issue is explained in more detail elsewhere in this preamble under *Educational research (§§ 99.31(a)(6), 99.31(a)(3).* We also discuss disclosures to non-educational agencies, such as to public health agencies, in the section of this preamble entitled *Disclosure of Education Records to Non-Educational Agencies.*

Members of a school's *law enforcement unit,* as defined in § 99.8 of the regulations, who are employed by the agency or institution qualify as school officials under § 99.31(a)(1)(i)(A) if the school has complied with the notification requirements in § 99.7(a)(3)(iii). As school officials, they may be given access to personally identifiable information from those students' education records in which the school has determined they have legitimate educational interests. The school's law enforcement unit must protect the privacy of education records it receives and may disclose them only with consent or under one of the exceptions to consent listed in § 99.31. For that reason, it is advisable that officials of a law enforcement unit maintain education records separately from law enforcement unit records, which are not subject to FERPA requirements. As we explained in *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools,* investigative reports and other records created by an institution's law enforcement unit are excluded from the definition of *education records* under § 99.3 and, therefore, are not subject to FERPA requirements. Accordingly, schools may disclose information from law enforcement unit records to anyone, including local police and other outside law enforcement authorities, without consent. This brochure can be found on FPCO's ''Safe Schools & FERPA'' Web page: *http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html.*

Outside police officers or other non-employees to whom the school has outsourced its safety and security functions do not qualify as ''school officials'' under FERPA unless they meet each of the requirements of § 99.31(a)(1)(i)(B). If these police officers or other outside parties do not meet the requirements for being a school official under FERPA, they may not have access to students' education records without consent, unless there is a health or safety emergency, a lawfully issued subpoena or court order, or some other exception to FERPA's general consent requirement under which the disclosure falls.

With respect to our amendment to the ''school officials'' exception, we note that § 99.32(d) excludes from the recordation requirements disclosures of education records that educational agencies and institutions make to school officials. This exclusion from the recordation requirement will apply as well to disclosures to contractors, consultants, volunteers, and other outside parties to whom an agency or institution discloses education records under § 99.31(a)(1)(i)(B). The Department has long recognized that FERPA does not prevent schools from outsourcing institutional services and functions; to require schools to record disclosures to these outside parties serving as school officials would be overly burdensome and unworkable.

An educational agency or institution that complies with the notification requirements in § 99.7(a)(3)(iii) by specifying its policy regarding the disclosure of education records to contractors and other outside parties serving as school officials provides legally sufficient notice to parents and students regarding these disclosures. We have posted model notifications on our Web site, one for postsecondary institutions and one for LEAs. See *http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html* and *http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html.*

*Changes:* None.

*(b) Direct Control*

*Comment:* Some commenters asked the Department to clarify what the term ''direct control'' means as used in § 99.31(a)(1)(i)(B)(*2*). This section provides that in order to be considered a ''school official'' an outside party must be under the direct control of the agency or institution. Some commenters asked if this term means that the school must monitor the operations of the outside party, and how it affects an agency's or institution's relationship with subcontractors or third- or fourth-party database hosting companies. One commenter stated that the regulations should not distinguish between whether the education records are hosted in a vendor's offsite network or within the institution's local network servers, while another commenter asked for clarification of how § 99.31(a)(1)(i)(B) applies to outsourcing electronic mail (e-mail) services to third parties such as Microsoft or Google.

One commenter stated that institutions should be required to verify that parties to whom they outsource services have the necessary resources to safeguard education records provided to them.

A commenter suggested that, instead of the proposed ''direct control'' standard, the Department adopt language similar to the safeguarding standard found in the Gramm-Leach-Bliley Act (GLB) (Pub. L. 106–102, November 12, 1999). The commenter suggested that, as adapted in FERPA, the standard would require that for an outside party, acting on behalf of an educational institution, to be considered a ''school official,'' the institution would have to: (1) Take reasonable steps to select and retain contractors, consultants, volunteers, or other outside parties that are capable of maintaining appropriate safeguards with respect to education records; and (2) mandate by contract that the outside party implement and maintain such safeguards.

*Discussion:* The term ''direct control'' in § 99.31(a)(1)(i)(B)(*2*), is intended to

ensure that an educational agency or institution does not disclose education records to an outside service provider unless it can control that party's maintenance, use, and redisclosure of education records. This could mean, for example, requiring a contractor to maintain education records in a particular manner and to make them available to parents upon request. We are revising the regulations, however, to provide this clarification.

Neither the statute nor the FERPA regulations specifically requires that educational agencies and institutions verify that outside parties to whom schools outsource services have the necessary resources to safeguard education records provided to them. However, as discussed in the NPRM, educational agencies and institutions are responsible under FERPA for ensuring that they themselves do not have a policy or practice of releasing, permitting the release of, or providing access to personally identifiable information from education records, except in accordance with FERPA. This includes ensuring that outside parties that provide institutional services or functions as ''school officials'' under § 99.31(a)(1)(i)(B) do not maintain, use, or redisclose education records except as directed by the agency or institution that disclosed the information.

The ''direct control'' requirement is intended to apply only to the outside party's provision of specific institutional services or functions that have been outsourced and the education records provided to that outside party to perform the services or function. It is not intended to affect an outside service provider's status as an independent contractor or render that party an employee under State or Federal law.

We believe that the use of the ''direct control'' standard strikes an appropriate balance in identifying the necessary and proper relationship between the school and its outside parties that are serving as ''school officials.'' The recommendation that we adopt a standard more closely aligned with the GLB standard does not appear workable, especially with regard to requiring that schools enter into formal contracts with each outside party performing services, including parent-volunteers. However, one way in which schools can ensure that parties understand their responsibilities under FERPA with respect to education records is to clearly describe those responsibilities in a written agreement or contract.

Exercising direct control could prove more challenging in some situations than in others. Schools outsourcing information technology services, such as web-based and e-mail services, should make clear in their service agreements or contracts that the outside party may not use or allow access to personally identifiable information from education records, except in accordance with the requirements established by the educational agency or institution that discloses the information.

*Changes:* We have revised § 99.31(a)(1)(B)(*2*) to clarify that the outside party must be under the direct control of the agency or institution with respect to the use and maintenance of information from education records.

*(c) Protection of Records by Outside Parties Serving as School Officials*

*Comment:* We received several comments on proposed § 99.31(a)(1)(i)(B)(*3*), which provides that an outside party serving as a ''school official'' is subject to the requirement in § 99.33(a), regarding the use and redisclosure of personally identifiable information from education records. One commenter stated that, while he supported and welcomed this clarification, the proposed regulations did not go far enough to clarify that these outside third parties could not use education records of multiple institutions for which they serve as a contractor to engage in activities not associated with the service or function they were providing.

Some commenters suggested that the regulations should require all school officials who handle education records, including parties to whom institutional services and functions are outsourced, to participate in annual training and to undergo fingerprint and background investigations.

Another commenter stated that any disclosures associated with the outsourcing of institutional services and functions should include a record that will serve as an audit trail. The commenter noted that both the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act of 1974 require the maintenance of audit trails or an accounting of disclosures of records.

*Discussion:* An agency or institution must ensure that an outside party providing institutional services or functions does not use or allow access to education records except in strict accordance with the requirements established by the educational agency or institution that discloses the information. Section 99.33(a)(2) of the FERPA regulations applies to employees and outside service providers alike and prohibits the recipient from using education records for any purpose other than the purposes for which the disclosure was made. This includes ensuring that outside parties do not use education records in their possession for purposes other than those specified by the institution that disclosed the records.

FERPA does not specifically require that educational agencies and institutions provide annual training to school officials that handle education records, and we decline to establish such a requirement in these regulations. Educational agencies and institutions should have flexibility in determining the best way to ensure that school officials are made aware of the requirements of FERPA. However, for entities subject to the Individuals with Disabilities Education Act (IDEA), 34 CFR 300.623(c) provides that all persons collecting or using personally identifiable information must receive training or instruction regarding their State's policies and procedures under 34 CFR 300.123 (Confidentiality of personally identifiable information) and 34 CFR Part 99, the FERPA regulations. We note that while schools are certainly free to implement a policy requiring school officials and parties to whom services have been outsourced to undergo fingerprint and background investigations, there is no statutory authority in FERPA to include such a requirement in the regulations.

We note also that the Department routinely provides compliance training on FERPA for school officials. Typically, presentations are made throughout the year to national, regional, or State educational association conference workshops with numerous institutions in attendance. Training sessions are also scheduled for State departments of education and local school districts in the vicinity of any conference.

For a discussion of the comment that recommended that the regulations require that schools maintain an audit trail or an accounting of disclosures to school officials, including outside providers, see the discussion under the following section entitled *Control of Access to Education Records by School Officials*.

*Changes:* None.

**Control of Access to Education Records by School Officials (§ 99.31(a)(1)(ii))**

*Comment:* Many commenters supported proposed § 99.31(a)(1)(ii), which requires an educational agency or institution to use reasonable methods to ensure that school officials have access to only those education records in which the official has a legitimate educational interest. In this section, we also proposed that an educational

agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the ''legitimate educational interest'' requirement.

One commenter who supported the proposed regulations expressed concern that not all districts and institutions have the financial or technological resources to create or purchase an electronic system that provides fully automated access control and that an institution using only administrative controls would be required to demonstrate that each school official who accessed education records possessed a legitimate educational interest in the education records to which the official gained access. According to the commenter, the regulations seem to omit the ''reasonable methods'' concept for those schools that utilize administrative controls rather than physical or technological controls. The commenter was concerned that smaller schools that lack resources to create or purchase a system that fully monitors record access would be disadvantaged by having to meet a higher standard of ensuring a legitimate educational interest on the part of the school officials that access the records.

One commenter expressed concern that the standard in § 99.31(a)(1)(ii) is too restrictive and asked whether the Department would use flexibility and deference in taking into consideration an institution's efforts in compliance with the requirement.

Another commenter requested that we include in the regulations a requirement that contractors hosting data at offsite locations must institute effective access control measures. The commenter stated that many schools and contractors are uncertain as to whether the school or the contractor is responsible for ensuring that access controls are applied to data hosted by contractors.

One commenter stated that the regulations created an unnecessary burden, as school districts already do their best to comply with FERPA and an occasional mistake should be excused. The commenter, however, was pleased that the regulations do not require the use of technological controls. The commenter was concerned that schools are unable to pre-assign risk levels to categories of records in order to determine appropriate methods to mitigate improper access. The commenter supported the use of effective administrative controls as determined by a district to ensure that information is available only to those with a legitimate educational interest.

One commenter expressed concern that the requirement to use reasonable methods to ensure appropriate access was not sufficiently restrictive, because under the regulations, all volunteers would be designated as school officials. The commenter believed that the regulations would enable volunteers to gain access more easily to confidential and sensitive information in education records.

A commenter who is a parent of a special education student also expressed concern that the language in the regulations was not adequate. The commenter described a software package used by her district that permits all school officials unrestricted access to the IEPs of all special education students.

*Discussion:* Section 99.30 requires that a parent or eligible student provide written consent for a disclosure of personally identifiable information from education records unless the circumstances meet one of the exceptions to consent, such as the release of information to a school official with a legitimate educational interest. Thus, a district or institution that makes a disclosure solely on the basis that the individual is a school official violates FERPA if it does not also determine that the school official has a legitimate educational interest. The regulations in § 99.31(a)(1)(ii) are designed to clarify the responsibility of the educational agency or institution to ensure that access to education records by school officials is limited to circumstances in which the school official possesses a legitimate educational interest.

We believe that the standard of ''reasonable methods'' is sufficiently flexible to permit each educational agency or institution to select the proper balance of physical, technological, and administrative controls to effectively prevent unauthorized access to education records, based on their resources and needs. In order to establish a system driven by physical or technological access controls, a school would generally first determine when a school official has a legitimate educational interest in education records and then determine which physical or technological access controls are necessary to ensure that the official can access only those records. The regulations require a school that uses only administrative controls to ensure that its administrative policy for controlling access to education records is effective and that the school is in compliance with the legitimate educational interest requirement in § 99.31(a)(1)(i)(A). However, the ''reasonable methods'' standard applies whether the control is physical, technological, or administrative.

The regulations permit the use of a variety of methods to protect education records, in whatever format, from improper access. The Department expects that educational agencies and institutions will generally make appropriate choices in designing records access controls, but the Department reserves the right to evaluate the effectiveness of those efforts in meeting statutory and regulatory requirements.

The additional language that one commenter requested concerning outsourcing is already included in the regulations in § 99.31(a)(1). That section specifically provides that contractors are subject to the same conditions governing the access and use of records that apply to other school officials. As long as those conditions are met, the physical location in which the contractor provides the service is not relevant.

Because the regulations permit the use of a variety of methods to effectively reduce the risk of unauthorized access to education records, we do not believe the requirement to establish ''reasonable methods'' for controlling access is unduly burdensome. Schools have the flexibility to decide the method or methods best suited to their own circumstances. For the many schools, districts, and institutions that already meet the standard, no operational changes should be necessary.

The regulations do not designate all volunteers as school officials. Rather, the regulations clarify that schools may designate volunteers as school officials who may be provided access to education records only when the volunteer has a legitimate educational interest. Schools can and should carefully assess and limit access by any school official, including volunteers. This issue is discussed in more detail previously in this preamble under the section entitled *Outsourcing.*

With regard to the parent who expressed concern that the language in the regulations was not adequate to address the problem of software that permits all school officials to access the IEPs of all special education students, we believe that the language in § 99.31(a)(1)(ii) is sufficient. As previously noted, FERPA prohibits school officials from having access to education records unless they have a legitimate educational interest. The commenter's point illustrates the need for educational agencies and institutions to ensure that adequate controls are in

place to restrict access to education records only to a school official with a legitimate educational interest.

*Changes:* None.

**Transfer of Education Records to Student's New School (§§ 99.31(a)(2) and 99.34(a))**

*Comment:* All of the comments we received on proposed §§ 99.31(a)(2) and 99.34(a) supported the clarification that an educational agency or institution may disclose a student's education records to officials of another school, school system, or institution of postsecondary education not just when the student seeks or intends to enroll, but after the student is already enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. Some commenters noted that this clarification reduces legal uncertainty about how long a school may continue to send records or information to a student's new school; other commenters noted that this clarification will be helpful in serving students who are homeless or in foster care because these students are often already enrolled in a new school system while waiting for records from a previous enrollment.

A few commenters asked us to clarify the requirement that the disclosure must be for purposes related to the student's enrollment or transfer. The commenters asked whether this meant that only records specifically related to the new school's decision to admit the student or records related to the transfer of course credit could be disclosed, or whether the agency or institution could also disclose information about previously undisclosed disciplinary actions related to the student's ongoing attendance at the new institution. One commenter suggested that we remove the requirement that the disclosure must be for purposes of the student's enrollment or transfer because it was confusing and unnecessary. Some commenters asked the Department to provide guidance about the types of records that may be sent under the regulations to a student's new school, noting that the preamble to the NPRM stated that the regulations allow school officials to disclose any and all education records, including health and disciplinary records, to the new school (73 FR 15581).

One commenter asked us to clarify that any school, not just the school the student attended most recently, may disclose information from education records to the institution that the student currently attends. Another commenter asked whether the amended regulations would permit the disclosure of education records to an institution in which a student seeks information or services but not enrollment, such as when a charter school student requests an evaluation under the IDEA from the student's home school district.

Two commenters asked whether mental health and other treatment records of postsecondary students, which are excluded from the definition of *education records* under FERPA, could be disclosed to the new school. Other commenters asked whether FERPA places any limits on the transfer of information about student disciplinary actions to colleges and universities and what information a postsecondary institution may ask for and receive regarding a student's disciplinary actions. A few commenters asked us to address the relationship between these regulations and guidance issued by the Department's Office for Civil Rights (OCR) prohibiting the pre-admission release of information about a student's disability under section 504 of the Rehabilitation Act of 1973, as amended, and Title II of the Americans with Disabilities Act of 1990, as amended.

*Discussion:* The regulations are intended to eliminate uncertainty about whether, under § 99.31(a)(2), an educational agency or institution may send education records to a student's new school even after the student is already enrolled and attending the new school. The requirement that the disclosure must be for purposes related to the student's enrollment or transfer is not intended to limit the kind of records that may be disclosed under this exception. Instead, the regulations are intended to clarify that, after a student has already enrolled in a new school, the student's former school may disclose any records or information, including health records and information about disciplinary proceedings, that it could have disclosed when the student was seeking or intending to enroll in the new school.

These regulations apply to any school that a student previously attended, not just the school that the student attended most recently. For example, under § 99.31(a)(2), a student's high school may send education records directly to a graduate school in which the student seeks admission, or is already enrolled. Section 99.34(b), which explains the conditions that apply to the disclosure of information to officials of another school, school system, or postsecondary institution, allows a public charter school or other agency or institution to disclose the education records of one of its students in attendance to the student's home school district if the student receives or seeks to receive services from the home school district, including an evaluation under the IDEA. We note, however, that the confidentiality of information regulations under Part B of the IDEA contain additional consent requirements that may also apply in these circumstances.

Under section 444(a)(4)(B)(iv) of FERPA, 20 U.S.C. 1232g(a)(4)(B)(iv), medical and psychological treatment records of eligible students are excluded from the definition of *education records* if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment, including treatment providers at the student's new school. (While the comment concerned records of postsecondary students, we note that the treatment records exception to the definition of *education records* applies also to any student who is 18 years of age or older, including 18 year old high school students.) An educational agency or institution may disclose an eligible student's treatment records to the student's new school for purposes other than treatment provided that the records are disclosed under one of the exceptions to written consent under § 99.31(a), including § 99.31(a)(2), or with the student's written consent under § 99.30. If an educational agency or institution discloses an eligible student's treatment records for purposes other than treatment, the treatment records are no longer excluded from the definition of *education records* and are subject to all other FERPA requirements, including the right of the eligible student to inspect and review the records and to seek to have them amended under certain conditions. In practical terms, this means that an agency or institution may disclose an eligible student's treatment records to the student's new school either with the student's written consent, or under one of the exceptions in § 99.31(a), including § 99.31(a)(2), which permits disclosure to a school where a student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

FERPA does not contain any particular restrictions on the disclosure of a student's disciplinary records. Further, Congress has enacted legislation to ensure that schools transfer disciplinary records to a student's new school in certain circumstances. In particular, section 444(h) of the statute, 20 U.S.C. 1232g(h), and the implementing regulations in § 99.36(b) provide that nothing in FERPA prevents an educational agency

or institution from including in a student's records and disclosing to teachers and school officials, including those in other schools, appropriate information about disciplinary actions taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. This authority is in addition to any other authority in FERPA for the disclosure of education records without consent, including the authority under § 99.36(a) to disclose education records in connection with a health or safety emergency. In addition, section 4155 of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 7165, as amended by the No Child Left Behind Act of 2001 (NCLB), requires a State that receives funds under the ESEA to have a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by LEAs to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full-or part-time basis, in the school.

There are, however, other Federal laws, such as the IDEA, section 504 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and Title II of the Americans with Disabilities Act of 1990, as amended (ADA), with different requirements that may affect the release of student information. For example, educational agencies and institutions that are ''public agencies'' or ''participating agencies'' under the IDEA must comply with the requirements in the Part B confidentiality of information regulations. *See, e.g.,* 34 CFR 300.622(b)(2) and (3). By way of further illustration, because educational agencies and institutions receive Federal financial assistance, they must comply with the regulations implementing section 504 of the Rehabilitation Act, which generally prohibit postsecondary institutions from making pre-admission inquiries about an applicant's disability status. See 34 CFR 104.42(b)(4) and (c). However, after admission, in connection with an emergency and if necessary to protect the health or safety of a student or other persons as defined under FERPA and its implementing regulations, section 504 of the Rehabilitation Act and Title II of the ADA do not prohibit postsecondary institutions from obtaining information and education records concerning a current student, including those with disabilities, from any school previously attended by the student. See the discussion in the section entitled *Health or Safety Emergency (§ 99.36).*

*Changes:* None.

**Ex Parte Court Orders Under the USA Patriot Act (§ 99.31(a)(9))**

*Comment:* Two commenters expressed support for the proposed regulations, which incorporate statutory changes that allow an educational agency or institution to comply with an *ex parte* court order issued under the USA Patriot Act. One commenter said that it would be helpful to add to the regulations a statement from the preamble to the NPRM that an institution is not responsible for determining the relevance of the information sought or the merits of the underlying claim for the court order.

Several commenters opposed § 99.31(a)(9). One commenter said that the USA Patriot Act is unconstitutional and that its provisions will sunset in 2009. Another commenter said that the regulations harm its ability to preserve the confidentiality of education records, particularly those of foreign students. The commenter asked us to change the regulations to permit institutions to notify students when records are requested, unless the *ex parte* court order specifically states that the student should not be notified. Another commenter said that schools should be required to notify parents when records are requested and to record the disclosure.

*Discussion:* The USA Patriot Act amendments to FERPA have not been ruled unconstitutional, and its provisions relevant to FERPA do not sunset in 2009. Therefore, we are implementing these provisions in our regulations at this time.

Under the USA Patriot Act, the U.S. Attorney General, or a designee in a position not lower than an Assistant Attorney General, may apply for an *ex parte* court order to collect, retain, disseminate, and use certain education records in the possession of an educational agency or institution without regard to any other FERPA requirements, including in particular the recordkeeping requirements. 20 U.S.C. 1232g(j)(3) and (4). The USA Patriot Act amendments to FERPA also provide that an educational agency or institution that complies in good faith with the court order is not liable to any person for producing the information. Nothing in these amendments, including the ''good faith'' requirement, requires an educational agency or institution to evaluate the underlying merits or legal sufficiency of the court order before disclosing the requested information without consent. As with any court order or subpoena that forms the basis of a disclosure without consent under § 99.31(a)(9), the agency or institution must simply determine whether the *ex parte* court order is facially valid. We see no reason to include this general requirement in the regulations.

Section 99.31(a)(9)(ii) requires an agency or institution to make a reasonable effort to notify a parent or eligible student of a judicial order or lawfully issued subpoena in advance of compliance, except for certain law enforcement subpoenas if the court has ordered the agency or institution not to disclose the existence or contents of the subpoena or information disclosed. An *ex parte* order is by definition an order issued without notice to or argument from the other party, including the party whose education records are sought, and the USA Patriot Act amendments provide that the Attorney General may collect and use the records without regard to any FERPA requirements, including the recordation requirements. Under this statutory authority, the regulations properly provide that the agency or institution is not required to notify the parent or eligible student before complying with the order or to record the disclosure.

We do not agree with the commenter's request that we amend the regulations to allow agencies and institutions to notify parents and students and record these disclosures. We note that FERPA does not prohibit an educational agency or institution from notifying a parent or student or recording a disclosure made in compliance with an *ex parte* court order under the USA Patriot Act. However, an agency or institution that does so may violate the terms of the court order itself and may also fail to meet the good faith requirements in the USA Patriot Act for avoiding liability for the disclosure. We would also recommend that agencies and institutions consult with legal counsel before notifying a parent or student or recording a disclosure of education records made in compliance with an *ex parte* court order under the USA Patriot Act.

*Changes:* None.

**Registered Sex Offenders (§ 99.31(a)(16))**

*Comment:* One commenter asked for clarification whether the proposed regulations authorizing the disclosure of personally identifiable information from education records concerning registered sex offenders authorize only the disclosure of information that is received from local law enforcement officials, or whether disclosure could

also include other information from a student's education records, such as campus of attendance. A second commenter expressed appreciation that the regulations clarify that school districts are not required or encouraged to collect or maintain information on registered sex offenders and that these disclosures are permissible but not required.

*Discussion:* The Campus Sex Crimes Prevention Act (CSCPA) amendments to FERPA allow educational agencies and institutions to disclose any information concerning registered sex offenders provided to the agency or institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, commonly known as the Wetterling Act. Since publication of the NPRM, we have determined that the proposed regulations were confusing, because they limited these disclosures to information that was obtained and disclosed by an agency or institution in compliance with a State community notification program. In fact, the CSCPA amendments to FERPA cover any information provided to an educational agency or institution under the Wetterling Act, including not only information provided under general State community notification programs, which are required under subsection (e) of the Wetterling Act, 42 U.S.C. 14071(e), but also information provided under the more specific campus community notification programs for institutions of higher education, which are required under subsection (j), 42 U.S.C. 14071(j).

The Wetterling Act requires States to release relevant information about persons required to register as sex offenders that is necessary to protect the public, including specific State reporting requirements for law enforcement agencies having jurisdiction over institutions of higher education. The exception to the consent requirement in FERPA allows educational agencies and institutions to make available to the school community any information provided to it under the Wetterling Act. We interpret this to also include any additional information about the student that is relevant to the purpose for which the information was provided to the educational agency or institution—protecting the public. This could include, for example, the school or campus at which the student is enrolled.

The proposed regulations included a sentence stating that FERPA does not require or encourage agencies or institutions to collect or maintain information about registered sex offenders. We have determined through further review, however, that this sentence could be confusing and should be removed. Participating institutions are required under section 485(f)(1) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1092(f)(1), to advise the campus community where it may obtain law enforcement agency information provided by the State under 42 U.S.C. 14071(j) concerning registered sex offenders. Further, the Department does not wish to discourage educational agencies and institutions from disclosing relevant information about a registered sex offender in appropriate circumstances.

*Changes:* We have revised the regulations to remove the reference to the disclosure of information obtained by the educational agency or institution in compliance with a State community notification program. The regulations now simply allow disclosure without consent of any information concerning registered offenders provided to an educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines. We also have removed the sentence stating that neither FERPA nor the regulations requires or encourages agencies or institutions to collect or maintain information about registered sex offenders.

**Redisclosure of Education Records and Recordkeeping by State and Local Educational Authorities and Federal Officials and Agencies (§§ 99.31(a)(3); 99.32(b); 99.33(b); 99.35(a)(2); 99.35(b))**

*(a) Redisclosure*

*Comment:* We received a number of comments on the proposed changes in § 99.35(b) that would permit State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) to redisclose personally identifiable information from education records on behalf of educational agencies and institutions without parental consent under the existing redisclosure authority in § 99.33(b). (Section 99.33(b) allows an educational agency or institution to disclose personally identifiable information from education records with the understanding that the recipient may make further disclosures of the information on behalf of the agency or institution if the disclosure falls under one of the exceptions in § 99.31(a) and the agency or institution has complied with the recordation requirements in § 99.32(b).) Many commenters said that the proposed change would ease administrative burdens on State and local educational authorities, agencies, and institutions. For example, under the proposed regulations, a student's new school district or institution would be able to obtain the student's prior education records from a single State agency instead of contacting and waiting for records from separate districts or institutions. Commenters noted, however, that certain issues had not been addressed in the proposed regulations and that further clarification was required. Commenters also supported the new redisclosure authority to the extent that it facilitates the exchange of education records among State educational authorities, educational agencies and institutions, and educational researchers through consolidated, statewide systems or separate data sharing arrangements.

Two commenters expressed substantial concerns that the regulations inappropriately expanded the situations in which personally identifiable information could be redisclosed without parental or student consent. One commenter noted that the theoretical benefits of maintaining large, consolidated data systems, which allow users to track individual students over time, do not outweigh the need to protect individual privacy. Another commenter stated that the regulations should not allow State and local educational authorities and the Federal officials and agencies listed in § 99.31(a)(3) to set up and operate record systems containing personally identifiable information that parents and students have no right to review or amend, and may not even know about. Barring the withdrawal of these regulations, these commenters urged the Department to strengthen or at least preserve the safeguards and protections that accompany this new data sharing authority. One commenter asked us to require any State or Federal entity that maintains education records to provide parents and students with annual notification and the right to review and amend the students' records.

Many commenters indicated their strong support for allowing State educational authorities to respond to requests for information from education records and redisclose personally identifiable information, whether for data sharing systems, transferring records to a student's new school, or other purposes authorized under § 99.31(a), without involving school districts and postsecondary institutions. These commenters generally thought that State educational authorities and Federal officials listed in § 99.31(a)(3) should not be required to consult with educational agencies and institutions when redisclosing information from education records. One commenter

asked us to clarify the role of the SEA or other State educational authority as the custodian of education records and its authority to act for educational agencies and institutions. Several commenters urged us to revise the regulations to make clear that the redisclosing official is authorized to make further disclosures under § 99.31(a) without approval from, or further consultation with, the original source of the records and maintain the appropriate record related to the redisclosure.

One commenter said that the regulations must allow State educational authorities to transfer records on behalf of LEAs and postsecondary institutions. One commenter strongly supported the changes in § 99.35(b) because they would allow the State McKinney-Vento coordinator to control transfer of education records of abused and homeless students to their new schools and prevent potential abusers from locating the student.

Some commenters believed that current regulations impede the ability of States to establish and operate data sharing systems and that regulatory changes must allow all educational agencies, institutions, SEAs, and other State educational authorities to exchange data among themselves and work with researchers. One commenter recommended that we create a specific exception in § 99.31(a) that would allow data sharing across State educational authorities in order to establish and operate consolidated, longitudinal data systems.

Several commenters asked for clarification of the requirement in § 99.35(a)(2) that authority for an agency or official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by FERPA or the regulations and must be established under other Federal, State, or local law, including valid administrative regulations. One commenter supported data sharing among pre-school, K–12, and postsecondary institutions, provided that appropriate legal authority for the underlying audit, evaluation, or compliance and enforcement activity is established as required under § 99.35(a)(2). One commenter asked whether citation to a specific law or regulations will be required, or whether general State laws that provide joint authority to evaluate programs at all levels are sufficient for parties to enter into data sharing agreements under the regulations.

One commenter indicated that its State has no laws or regulations that specifically allow the State-level advisory council to audit or evaluate education programs, or that allow a K–12 school district to audit or evaluate the programs offered by postsecondary institutions, and vice versa, and the commenter asked whether general authority for these entities to act under State law would be sufficient. Two commenters whose States do not house their K–12 and postsecondary systems within the same agency expressed concern whether they will be able to develop consolidated databases under the regulations if their K–12 and postsecondary agencies do not have appropriate authority to audit or evaluate each other's programs.

*Discussion:* We continue to believe that State and local educational authorities and Federal officials that receive education records under §§ 99.31(a)(3) and 99.35 should be permitted to redisclose education records on behalf of educational agencies and institutions in accordance with the existing regulations governing the redisclosure of information in § 99.33(b). We agree with the commenters that this change will ease administrative burdens at all levels and facilitate the creation and operation of statewide data sharing systems that support the student achievement, program accountability, transfer of records, and other objectives of Federal and State education programs while protecting the privacy rights of parents and students in students' education records.

We respond first to commenters' concerns about the requirement in § 99.33(b) that any redisclosure of personally identifiable information from education records must be made on behalf of the educational agency or institution that disclosed the information to the receiving party, including any requirement for consulting with or obtaining approval from the educational agency or institution that disclosed the information. The statutory prohibitions on the redisclosure of education records apply to education records that SEAs, State higher educational authorities, the Department, and other Federal officials receive under an exception to the written consent requirement in FERPA, such as §§ 99.31(a)(3) and 99.35 (for audit, evaluation, compliance and enforcement purposes) and § 99.31(a)(4) (for financial aid purposes). As explained in the preamble to the NPRM, § 99.33(b) allows an educational agency or institution to disclose education records with the understanding that the recipient may make further disclosures on its behalf under one of the exceptions in § 99.31 (73 FR 15586–15587). In that case, the disclosing agency or institution must record the names of the additional parties to which the receiving party may redisclose the information on behalf of the educational agency or institution and their legitimate interests under § 99.31.

Under the regulatory framework for redisclosing education records in § 99.33(b), educational agencies and institutions retain primary responsibility for disclosing and authorizing redisclosure of their education records without consent. (We note again that the only disclosures of education records that are mandatory under FERPA are those made to parents and eligible students.) The purpose of § 99.33(b), which allows redisclosure of education records notwithstanding the general statutory restrictions, has always been to ease administrative burdens on educational agencies and institutions that disclose education records. The legal basis for this accommodation is that the recipient is acting ''on behalf of'' the agency or institution from which it received information from education records and making a further disclosure that the agency or institution would otherwise make itself under § 99.31(a). Section 99.33(b) does not confer on any recipient of education records independent authority to redisclose those records apart from acting ''on behalf of'' the disclosing educational agency or institution.

The Department recognizes that the State and local educational authorities and Federal officials that receive education records without consent under § 99.31(a)(3) are responsible for supervising and monitoring educational agencies and institutions and that many of them also maintain centralized data systems that constitute a valuable resource of information from education records. The proposed changes to § 99.35(b) would allow these State and Federal authorities and officials to redisclose information received under § 99.31(a)(3) under any of the exceptions in § 99.31(a), including transferring education records to a student's new school under § 99.31(a)(2), sharing information among other State and local educational authorities and Federal officials for audit or evaluation purposes under § 99.31(a)(3), and using researchers to conduct evaluations and studies under § 99.31(a)(3) or § 99.31(a)(6), without violating the statutory prohibitions on redisclosing education records provided certain conditions have been met. In the event that an educational agency or institution objects to the redisclosure of information it has provided, the State or

local educational authority or Federal official or agency may rely instead on any independent legal authority it has to further disclose the information.

We agree that current regulations were unclear about the ability of States to establish and operate data sharing systems with educational agencies and institutions, which is why we amended § 99.35(b). As explained in the NPRM (73 FR 15587), §§ 99.35(a)(2) and 99.35(b) allow SEAs, higher education authorities, and educational agencies and institutions, including local school districts and postsecondary institutions, to share education records in personally identifiable form with one another, provided that Federal, State, or local law authorizes the recipient to conduct the audit, evaluation, or compliance or enforcement activity in question. Accordingly, data sharing arrangements among State and local educational authorities and educational agencies and institutions generally must meet these requirements to be permissible under FERPA. (Data sharing with educational researchers is discussed below under *Educational research*.)

With respect to the comments recommending that we create a specific exception in § 99.31(a) to allow data sharing across State educational authorities in order to establish and operate consolidated, longitudinal data systems and other data sharing arrangements, there is no provision in FERPA that allows disclosure or redisclosure of education records, without consent, for the specific purpose of establishing and operating consolidated databases and data sharing systems, and, therefore, we are without authority to establish one in these regulations.

In response to the questions concerning the need for Federal, state, or local legal authority to disclose education records for audit or evaluation purposes, we note that, in general, FERPA allows educational agencies and institutions to disclose (and authorized recipients to redisclose) education records without consent in accordance with the exceptions listed in § 99.31(a), including for audit or evaluation purposes under §§ 99.31(a)(3) and 99.35. It does not, however, provide the underlying authority for individuals and organizations to conduct the various activities that may allow them to receive education records without consent under these exceptions. For example, § 99.31(a)(7) does not authorize an organization to accredit educational institutions; it allows educational institutions to disclose personally identifiable information from education records, without consent, to an organization to carry out its accrediting functions. If that organization is not, in fact, an accreditation authority for that particular institution, then disclosure under § 99.31(a)(7) is invalid and violates FERPA. Likewise, § 99.31(a)(9) does not authorize a court or Federal grand jury to issue an order or subpoena; it allows an educational agency or institution to comply with a facially valid order or subpoena, without consent.

We added the requirement in § 99.35(a)(2) that the recipient have authority under Federal, State, or local law to conduct the activity for which the disclosure was made because there was significant confusion in the educational community about who may receive education records without consent for audit and evaluation purposes under § 99.35. For example, in 2005 the Pennsylvania Department of Education (PDOE) asked the Department whether, in the absence of parental consent, a charter school LEA responsible under State law for providing a free appropriate public education to students with disabilities enrolled in the charter school could send the local school district of residence the IEP of each student with a disability. The school districts of residence claimed that they needed this information to substantiate the charter school's invoices for higher payments based on the student's special education status under the IDEA.

Our January 2006 response to PDOE explained that in order to meet the requirements for disclosure of education records under §§ 99.31(a)(3) and 99.35, Federal, State, or local law (including valid administrative regulations) must authorize the relevant State or local educational authority to conduct the audit, evaluation, or compliance or enforcement activity in question. In particular, we noted that charter schools in Pennsylvania could disclose the IEP cover sheet under §§ 99.31(a)(3) and 99.35 of the regulations if the State law in question authorized a local school district to ''audit or evaluate'' a charter school's request for payment of State funds at the special education rate and the school district needed personally identifiable information for that purpose, and that we would defer to the State Attorney General's interpretation of State law on the matter. We also explained that there appeared to be no legal authority that would allow charter schools in the State to disclose a student's entire IEP to the resident school district, as requested by the resident school districts.

The Department has always interpreted §§ 99.31(a)(3) and 99.35 to allow educational agencies and institutions to disclose personally identifiable information from education records to the SEA or State higher education board or commission responsible for their supervision based on the understanding that those entities are authorized to audit or evaluate (or enforce Federal legal requirements related to) the education programs provided by the agencies and institutions whose records are disclosed. Under this reasoning, a K–12 school district (LEA) may disclose personally identifiable information from education records to another LEA, or to a State higher education board or commission, without consent, if that LEA, board, or commission has legal authority to conduct the audit, evaluation, or compliance or enforcement activity with regard to the disclosing district's programs. States do not have to house their K–12 or P–12 and postsecondary systems within the same agency in order to take advantage of this provision. However, they may need to review and modify the supervisory and oversight responsibilities of various State and local educational authorities to ensure that there is valid legal authority for LEAs, postsecondary institutions, SEAs, and higher education authorities to disclose or redisclose personally identifiable information from education records to one another under § 99.35(a) before information is released.

It is not our intention in § 99.35(a)(2) to require educational agencies and institutions and other parties to identify specific statutory authority before they disclose or redisclose education records for audit or evaluation purposes but to ensure that some local, State, or Federal legal authority exists for the audit or evaluation, including for example an Executive Order or administrative regulation. The Department encourages State and local educational authorities and educational agencies and institutions to seek guidance from their State attorney general on their legal authority to conduct a particular audit or evaluation. The Department may also provide additional guidance, as appropriate.

*Changes:* None.

*(b) Recordation Requirements*

*Comment:* In the NPRM, 73 FR 15587, we invited public comment on whether an SEA, the Department, or other official or agency listed in § 99.31(a)(3) should be allowed to maintain the record of the redisclosures it makes on behalf of an educational agency or

institution as a means of relieving any administrative burdens associated with recording disclosures of education records. One commenter urged the Department not to delegate responsibility for recordkeeping to State and local educational authorities and Federal agencies and officials that redisclose education records under § 99.33(b). Another said that if a State or local educational authority or Federal agency or official rediscloses information ''on behalf of'' an educational agency or institution under § 99.35(b), these further disclosures should be included in the student's record at the educational agency or institution. All other comments on this issue supported revising the regulations to allow State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) to record any redisclosures they make under § 99.33(b).

Several commenters suggested that the recordation requirements in § 99.32(b) would place an undue burden on State and local officials when State educational authorities redisclose education records because the State authority would need to return to each original source of the records to record the redisclosure. Some commenters noted that compliance with § 99.32(b) is practically impossible if an LEA or postsecondary institution is required to record all authorized redisclosures at the time of the initial disclosure of information to the State or Federal authority. Two commenters suggested that we eliminate the recordation problem by redefining the term *disclosure* so that it does not include disclosing information under § 99.31(a)(3) for audit, evaluation, or compliance and enforcement purposes. Another commenter suggested that we define ''*educational agency* or *institution*'' to include State educational authorities so that disclosures to State educational authorities would not be considered a *disclosure* under FERPA.

One commenter said that the regulations should permit State educational authorities to record redisclosures as they are made and without having to identify each student by name. Another commenter asked for clarification whether the recordation requirements apply to redisclosures that SEAs make to education researchers and other parties that are not authorized to make any further disclosures, and what level of detail is required in the record regarding who accessed the data and what specific information was viewed.

One commenter stated that if State educational authorities and Federal officials are authorized to record their own redisclosures of information, then the educational agency or institution should be required to retrieve these records in response to a request to review education records by parents and eligible students who would otherwise not know about the redisclosures. Other commenters suggested that the State educational authority or Federal official could either make the redisclosure record available directly to parents and students or send it to the LEA or postsecondary institution for this purpose.

*Discussion:* We agree with commenters that in order to facilitate the operation of State data systems and ease administrative burdens on all parties, the regulations should allow State educational authorities and Federal officials and agencies to record further disclosures they make on behalf of educational agencies and institutions under § 99.33(b). We are revising the provisions of § 99.32 to address commenters' concerns and ensure that these changes will not expand the redisclosure authority of a State or local educational authority or Federal official or agency under § 99.35(b) and that parents and students will have notice of and access to any State or Federal record of further disclosures that is created.

In response to the commenter's suggestion that we define ''educational agency or institution'' and the term *disclosure* to address recordation issues associated with the new redisclosure authority in § 99.35(b), we note that an educational agency or institution is required by statute to maintain with each student's education records a record of each request for access to and each disclosure of personally identifiable information from the education records of the student, including the parties who have requested or received information and their legitimate interests in the information. 20 U.S.C. 1232g(b)(4)(A); 34 CFR 99.32(a). This includes each disclosure of personally identifiable information from education records that an educational agency or institution makes to an SEA or other State educational authority and to Federal officials and agencies, including the Department, for audit, evaluation, or compliance and enforcement purposes under §§ 99.31(a)(3) and 99.35, and under most other FERPA exceptions, such as the financial aid exception in § 99.31(a)(4). (Regulatory exceptions to the statutory recordation requirements, which are set forth in § 99.32(d), cover disclosures that a parent or eligible student would generally know about without the recordation or for which notice is prohibited under court order; the exceptions do not include disclosures made to parties outside the agency or institution for audit, evaluation, or compliance and enforcement purposes.)

An educational agency or institution is required under FERPA to record its disclosures of personally identifiable information from education records even when it discloses information to another educational agency or institution, such as occurs under § 99.31(a)(2) when a school district transfers education records to a student's new school. See 20 U.S.C. 1232g(b)(4)(A); 34 CFR 99.32(a). Therefore, even if a State educational authority were considered an ''educational agency or institution'' under § 99.1, a school district or postsecondary institution would still be required to record its own disclosures to that State educational authority; defining a State educational authority as an educational agency or institution would not eliminate this requirement. Therefore, a school district or postsecondary institution is required to record its disclosures to any State educational authority.

The term *disclosure* is defined in § 99.3 to mean to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means. This includes releasing or making a student's education records available to school officials within the agency or institution, for which an exception to the consent requirement exists under § 99.31(a)(1). We see no legal basis for redefining the term *disclosure* to exclude the release of personally identifiable information to third parties outside the educational agency or institution under the audit, evaluation, or compliance and enforcement exception to the consent requirement in §§ 99.31(a)(3) and 99.35.

With regard to the level of detail required in the record of redisclosures, current § 99.32(b) requires an educational agency or institution to record the ''names of the additional parties to which the receiving party may disclose the information'' on its behalf and their legitimate interests under § 99.31. This means the name of the individual (if an organization is not involved) or the organization and the exception under § 99.31(a) that would allow the redisclosure to be made without consent. Under current § 99.33(a)(2), the officers, employees, and agents of a party that receives

information from education records may use the information for the purposes for which the disclosure was made without violating the limitations on redisclosure in § 99.33(a)(1). Therefore, we interpret the recordation requirement in § 99.32(b) to mean that an educational agency or institution may record the name of an organization, including a research organization, to which a recipient may make further disclosures under § 99.33(b) and is not required to record the name of each individual within the organization who is authorized to use that information in accordance with § 99.33(a)(2).

We also recognize that sometimes an educational agency or institution does not know at the time of its disclosure of education records that the receiving party may wish to make further disclosures on its behalf. Therefore, we interpret § 99.32(b) to allow a receiving party to ask an educational agency or institution to record further disclosures made on its behalf after the initial receipt of the records or information.

These same policies apply to further disclosures made by State and local educational authorities and Federal officials listed in § 99.31(a)(3) that redisclose information on behalf of educational agencies and institutions under the new authority in § 99.35(b). Educational agencies and institutions that disclose education records under § 99.31(a)(3) with the understanding that the State or Federal authority or official may make further disclosures may continue to record those further disclosures as provided in § 99.32(b)(1). Like any other recipient of education records, a State or Federal authority or official may also ask an educational agency or institution to record further disclosures made on its behalf after the initial receipt of the records or information. It is incumbent upon a State or Federal authority or official that makes further disclosures on behalf of an educational agency or institution under § 99.33(b) to determine whether the educational agency or institution has recorded those further disclosures. If the educational agency or institution does not do so, then under the revisions to § 99.32(b)(2)(i) in the final regulations, the State and local educational authority or Federal official or agency that makes further disclosures must maintain the record of those disclosures.

We have also revised § 99.32(a) to ensure that educational agencies and institutions maintain a listing in each student's record of the State and local educational authorities and Federal officials and agencies that may make further disclosures of the student's education records without consent under § 99.33(b). This will help ensure that parents and students know that the record of disclosures maintained by an educational agency or institution as required under § 99.32(a) may not contain all further disclosures made on behalf of the agency or institution by a State or Federal authority or official and alert parents and students to the need to ask for access to this additional information. We have also revised § 99.32(a) to require an educational agency or institution to obtain a copy of the record of further disclosures maintained at the State or Federal level and make it available for parents and students to inspect and review upon request.

In response to commenters' suggestions, the regulations in new § 99.32(b)(2)(ii) allow a State or local educational authority or Federal official or agency to identify the redisclosure by the student's class, school, district, or other appropriate grouping rather than by the name of each student whose record was redisclosed. For example, an SEA may record that it disclosed to the State higher education authority the scores of each student in grades nine through 12 on the State mathematics assessment for a particular year. We believe that this procedure eases administrative burdens while ensuring that a parent or student may access information about the redisclosure.

We note that the recordation requirements under § 6401(c)(i)(IV) of the America COMPETES Act, Public Law 110–69, 20 U.S.C. 9871(c)(i)(IV), are more detailed and stringent than those required under FERPA. In particular, a State that receives a grant to establish a statewide P–16 education data system under § 6401(c)(2), 20 U.S.C. 9871(c)(2), is required to keep an accurate accounting of the date, nature, and purpose of each disclosure of personally identifiable information in the statewide P–16 education data system; a description of the information disclosed; and the name and address of the person, agency, institution, or entity to whom the disclosure is made. The State must also make this accounting available on request to parents of any student whose information has been disclosed. The Department will issue further guidance on these requirements if the program is funded and implemented.

*Changes:* We have made several changes to § 99.32, as follows:

- New § 99.32(b)(2)(i) provides that a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests under § 99.31 in the information if the information was received from an educational agency or institution that has not recorded the further disclosures itself or from another State or local official or Federal official or agency listed in § 99.31(a)(3).
- New § 99.32(b)(2)(ii) provides that a State or local educational authority or Federal official or agency that records further disclosures of information may maintain the record by the student's class, school, district or other appropriate grouping rather than by the name of the student.
- New § 99.32(b)(2)(iii) provides that upon request of an educational agency or institution, a State or local educational authority or Federal official or agency that maintains a record of further disclosures must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.
- Revised § 99.32(a)(1) requires educational agencies and institutions to list in each student's record of disclosures the names of the State and local educational authorities and Federal officials or agencies that may make further disclosures of the information on behalf of the educational agency or institution under § 99.33(b).
- New § 99.32(a)(4) requires an educational agency or institution to obtain a copy of the record of further disclosures maintained by a State or local educational authority or Federal official or agency and make it available in response to a parent's or student's request to review the student's record of disclosures.

**Educational Research (§§ 99.31(a)(6) and 99.31(a)(3))**

*Comment:* We received a number of comments on proposed § 99.31(a)(6)(ii). In this section, we proposed that an educational agency or institution that discloses personally identifiable information without consent to an organization conducting studies for, or on behalf of, the educational agency or institution must enter into a written agreement with the organization specifying the purposes of the study and containing certain other elements. This exception to the consent requirement is often referred to as the ''studies exception.'' While all of the comments on this provision generally supported the changes, many of the commenters raised concerns about the scope and

applicability of the studies exception and requested clarification on some of the proposed changes, particularly with regard to the provisions relating to written agreements.

*Discussion:* We address commenters' specific concerns about the key portions of these regulations in the following sections.

*Changes:* None.

*(a) Scope and Applicability of § 99.31(a)(6)*

*Comment:* Several commenters stated that the proposed regulations did not clearly indicate that the studies exception applies to State educational authorities. Some commenters, assuming that § 99.31(a)(6) applied to State educational authorities, noted that the proposed regulations did not provide clear authority for State educational authorities such as an SEA, or a State longitudinal data system using State generated data (such as State assessment results), to enter into research agreements on behalf of educational agencies and institutions. One commenter stated that § 99.31(a)(6) should not be interpreted to require that research agreements be entered into by individual schools or that any resulting redisclosures be recorded by the individual schools.

One commenter asked for clarification regarding whether § 99.31(a)(6) permitted a school to disclose a student's education records to his or her previous school for the purpose of evaluating Federal or State-supported education programs or for improving instruction.

Another commenter stated that the Department should further revise the regulations to provide that only individuals in the organization conducting the study who have a legitimate interest in the information disclosed be given access to the information. The commenter also stated that the Department should specifically limit § 99.31(a)(6) to bona fide research projects by prohibiting organizations conducting studies under this exception from using record-level data for other operational or commercial purposes. The commenter also expressed concern about the duration of research projects, noting that significantly more restrictive access should be required for studies that track personally identifiable information for long periods of time. The commenter stated further that the Department should consider imposing a time limit on how long information obtained through longitudinal studies can be retained.

*Discussion:* FERPA permits an educational agency or institution to disclose personally identifiable information from an education record of a student without consent if the disclosure is to an organization conducting studies for, or on behalf of, the educational agency or institution to (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. 20 U.S.C. 1232g(b)(1)(F); 34 CFR 99.31(a)(6). Disclosures made under the studies exception may only be used by the receiving party for the purposes for which the disclosure was made and for no other purpose or study. As such, § 99.31(a)(6) is not a general research exception to the consent requirement in FERPA but an exception for studies limited to the purposes specified in the statute and regulations.

We first note that it may not be necessary or even advantageous for State educational authorities to use the studies exception in order to conduct or authorize educational research because of the limitations in § 99.31(a)(6). In contrast, § 99.31(a)(3)(iv), under the conditions set forth in § 99.35, allows educational agencies and institutions, such as LEAs and postsecondary institutions, to disclose education records without consent to State educational authorities for audit and evaluation purposes, which can include a general range of research studies beyond the more limited group of studies specified under § 99.31(a)(6). Also, as explained more fully elsewhere in this preamble, while a State educational authority must have the underlying legal authority to audit or evaluate the records it receives from LEAs or postsecondary institutions under § 99.35, the LEA or postsecondary institution is not required to enter into a written agreement for the audit or evaluation as it is required to do under § 99.31(a)(6). (*See Redisclosure of Education Records and Recordkeeping by State and Local Educational Authorities and Federal Officials and Agencies.*) The absence of an explanation of the authorized representatives exception (§ 99.31(a)(3)) in the NPRM created confusion, especially with regard to how State departments of education may utilize education records for evaluation purposes. Therefore, we have included that explanation here.

The conditions for disclosing education records without consent under §§ 99.31(a)(3)(iv) and 99.35 are discussed in the Department's Memorandum from the Deputy Secretary of Education (January 30, 2003) available at *http://www.ed.gov/policy/gen/guid/secletter/030130.html.* The Deputy Secretary's memorandum explains that under this exception an ''authorized representative'' of a State educational authority is a party under the direct control of that authority, *e.g.*, an employee or a contractor.

In general, the Department has interpreted FERPA and implementing regulations to permit the disclosure of personally identifiable information from education records, without consent, in connection with the outsourcing of institutional services and functions. Accordingly, the term ''authorized representative'' in § 99.31(a)(3) includes contractors, consultants, volunteers, and other outside parties (*i.e.*, non-employees) used to conduct an audit, evaluation, or compliance or enforcement activities specified in § 99.35, or other institutional services or functions for which the official or agency would otherwise use its own employees. For example, a State educational authority may disclose personally identifiable information from education records, without consent, to an outside attorney retained to provide legal services or an outside computer consultant hired to develop and manage a data system for education records.

The term ''authorized representative'' also includes an outside researcher working as a contractor of a State educational authority or other official listed in § 99.31(a)(3) that has outsourced the evaluation of Federal or State supported education programs. An outside researcher may conduct independent research under this provision in the sense that the researcher may propose or initiate research projects for consideration and approval by the State educational authority or other official listed in § 99.31(a)(3) either before or after the parties have negotiated a research agreement. Likewise, the State educational authority or official does not have to agree with or endorse the researcher's results or conclusions. In so doing, an outside researcher retained to evaluate education programs by a State educational authority or other official listed in § 99.31(a)(3) as an ''authorized representative'' may be given access to personally identifiable information from education records, including statistical information with unmodified small data cells. However, the term ''authorized representative'' does not include independent researchers that are not contractors or other parties under the direct control of an official or agency listed in § 99.31(a)(3).

While an educational agency or institution may not disclose personally identifiable information from students' education records to independent researchers, nothing in FERPA prohibits

them from disclosing information that has been properly de-identified. Further discussion of this issue is provided in the following paragraphs and under the section entitled *Personally Identifiable Information and De-Identified Records and Information.*

An SEA or other State educational authority that has legal authority to enter into agreements for LEAs or postsecondary institutions under its jurisdiction may enter into an agreement with an organization conducting a study for the LEA or institution under the studies exception. If the SEA or other State educational authority does not have the legal authority to act for or on behalf of an LEA or institution, then it would not be permitted to enter into an agreement with the organization conducting the study under this exception. As previously mentioned, FERPA authorizes certain disclosures without consent; it does not provide an SEA or other State educational authority with the legal authority to act for or on behalf of an LEA or postsecondary institution.

With regard to the request for clarification whether § 99.31(a)(6) permits a school to disclose a student's education records to his or her previous school for evaluation purposes, the studies exception only allows disclosures to organizations conducting studies for, or on behalf of, the educational agency or institution that discloses its records. The ''for, or on behalf of'' language from the statute does not permit disclosures under this exception so that the receiving organization can conduct a study for itself or some other party. This issue is discussed in more detail under the section of this preamble entitled *Disclosure of Education Records to Student's Former Schools.*

We agree with the comment that the regulations should be revised to provide that only those individuals in the organization conducting the study that have a legitimate interest in the personally identifiable information from education records can have access to the records. The Secretary also shares the commenter's concerns about limiting § 99.31(a)(6) to bona fide research projects, prohibiting commercial utilization of education records, and limiting the duration of research projects. We address these issues in greater detail in the following section concerning written agreements.

*Changes:* None.

*(b) Written Agreements for Studies*

*Comment:* Several commenters expressed concern that § 99.31(a)(6) not be read so broadly as to erode parents' and students' privacy rights, and, therefore, supported the restrictions that the Secretary included in this provision. Specifically, they supported the new requirement that educational agencies and institutions must enter into a written agreement with the organization conducting the study that specifies: the purpose of the study, that the information from the education records disclosed be used only for the stated purpose, that individuals outside the organization may not have access to personally identifiable information about the students being studied, and that the information be destroyed or returned when it is no longer needed for the purpose of the study.

Several commenters said that the Department should clarify that the existence of a written agreement is not a rationale in and of itself for the disclosure of education records. They stated that the regulations should provide explicitly that a written agreement does not modify the protections under FERPA or justify the use of the records transferred other than as permitted by the statute and the regulations. Some of these commenters stated that the written agreement should include a description of the specific records to be disclosed for the study.

Several commenters agreed with the provision in the proposed regulations that specified that an educational agency or institution does not need to agree with or endorse the conclusions or results of the study. Other commenters asked that we include in the regulations the explanation provided in the preamble to the NPRM that the school also does not need to initiate the study.

One commenter suggested that we change the references from ''study'' to ''studies'' so that it is clear that an agency or institution and a research organization could enter into one agreement that would cover a variety of studies that support the State's or school district's educational objectives. One commenter suggested that the Department certify agreements between educational agencies and research organizations as meeting the requirements of FERPA.

There were several comments on the destruction of information requirements in FERPA. Some suggested that we include in the regulations the specific time period by which information disclosed to a researcher must be destroyed, while others stated that ongoing access to data is necessary and that researchers should be permitted to retain information indefinitely. Some commenters suggested that the required time period for the destruction or return of education records, as deemed necessary by the parties to support the purposes of the authorized study or studies, be established in the written agreement.

One commenter approved including the requirements regarding the use and destruction of data in the written agreement as a way of improving compliance with FERPA. However, the commenter questioned our explanation that the language in the statute providing that the study must be conducted ''for, or on behalf of'' the educational agency or institution means that the disclosing school must retain control over the information once it has been given to a third party conducting a study. The commenter believed that school districts will not be involved in how a study is performed and that the written agreement with the organization specifying the organization's obligations with regard to the use and destruction of data should be sufficient.

*Discussion:* The Secretary shares the concerns raised by commenters that § 99.31(a)(6) not be read so broadly as to erode parents' and students' privacy rights. Accordingly, we have revised § 99.31(a)(6) to address some of these concerns and believe that these changes will provide adequate protection of students' education records that may be disclosed under the studies exception.

In the NPRM, we proposed to remove current § 99.31(a)(6)(ii)(A) and (B) and included these requirements under the provisions for written agreements. These paragraphs provide that the study must be conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization and that the information be destroyed when no longer needed for the purposes for which the study was conducted. We are including § 99.31(a)(6)(ii)(A) and (B) in the final regulations. After reviewing comments on the proposed changes, we concluded that, by moving these two provisions into the new paragraph relating to written agreements, we would have weakened the statutory requirements concerning the studies exception. We believe this correction will alleviate commenters' concerns about weakening parents' and students' privacy rights under FERPA.

We agree with the comments that the existence of a written agreement is not a rationale in and of itself for the disclosure of education records. As a privacy statute, FERPA requires that parents and eligible students provide written consent before educational agencies and institutions disclose personally identifiable information from students' education records. There are

several statutory exceptions to FERPA's general consent rule, one of which is § 99.31(a)(6), an exception that permits disclosure of records for studies limited to the purposes specified in the statute and regulations. However, a written agreement, a memorandum of understanding, or a contract is not a justification for disclosure of education records. Rather, a disclosure must meet the requirements in § 99.31(a)(6) or the other permitted disclosures under § 99.31. If a disclosure meets the conditions of § 99.31(a)(6), the disclosure may be made, and the written agreement sets forth the requirements that must be followed when entering into such an agreement.

As noted in our earlier discussion of the scope and applicability of the studies exception, the Secretary concurs that the regulations should be revised to require that a written agreement expressly include the purpose, scope, and duration of the agreed upon study, as well as the information to be disclosed. We also agree with commenters that the regulations should specifically limit any disclosures of personally identifiable information from students' education records to those individuals in the organization conducting the study that have a legitimate interest in the information. This requirement is consistent with § 99.32(a)(3)(ii), which requires that an educational agency or institution record the ''legitimate interests'' the parties had in obtaining information under FERPA.

The Secretary strongly recommends that schools carefully limit the disclosure of students' personally identifiable information under this and the other exceptions in § 99.31 and reminds educational agencies and institutions that disclosures without consent are subject to § 99.33(a)(2), which states: ''The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.'' The recordation requirements in § 99.32 also apply to any disclosures of personally identifiable information made under the studies exception. (We note that a school does not have to record the disclosure of information that has been properly de-identified.)

Although FERPA permits schools to disclose personally identifiable information under § 99.31(a)(6) to organizations conducting studies for or on its behalf, the Secretary recommends that educational agencies and institutions release de-identified information whenever possible under this exception. Even when schools opt not to release de-identified information in these circumstances, we recommend that schools reduce the risk of unauthorized disclosure by removing direct identifiers, such as names and SSNs, from records that don't require them, even though these records may still contain some personally identifiable information. This is especially important when a school also discloses sensitive information about students, such as type of disability and special education services received by the students.

We agree with commenters that § 99.31(a)(6) should be revised to indicate that an educational agency or institution is not required to initiate a study. Additionally, we have revised § 99.31(a)(6) to include the word ''studies'' so that an educational agency or institution may utilize one written agreement for more than one study, so long as the requirements concerning information that must be in the agreement are met.

While we do not have the authority under FERPA to officially certify agreements between educational agencies and institutions and organizations conducting studies, FPCO does provide technical assistance to educational agencies or institutions on FERPA. As such, if school officials have questions about whether an agreement meets the requirements in § 99.31(a)(6), they may contact FPCO for assistance.

With regard to the comments that we include in the regulations a specific time period by which information provided under the studies exception must be destroyed, we believe that the parties entering into the agreement should decide when information has to be destroyed or returned to the educational agency or institution. As we have discussed, we have revised § 99.31(a)(6) to require that the written agreement include the duration of the study and the time period during which the organization must either destroy or return the information to the educational agency or institution.

With regard to the comment that a written agreement with the organization conducting the study should be sufficient for an educational agency or institution to retain control over information from education records once the information is given to an organization conducting a study, we agree that a written agreement required under the regulations will help ensure that the information is used only to meet the purposes of the study stated in the written agreement and that all applicable requirements are met. However, similar to the requirement that an outside service provider serving as a school official is subject to FERPA's restrictions on the use and redisclosure of personally identifiable information from education records, educational agencies and institutions must ensure that organizations with which they have entered into an agreement to conduct a study also comply with FERPA's restrictions on the use of personally identifiable information from education records. (See pages 15578–15580 of the NPRM.) That is, the school must retain control over the organization's access to and use of personally identifiable information from education records for purposes of the study or studies, including access by the organization's own employees and subcontractors, as well as any school officials whom the organization permits to have access to education records.

An educational agency or institution may need to determine that the organization conducting the study has reasonable controls in place to ensure that personally identifiable information from education records is protected. We note that it is common practice for some data sharing agreements to have a ''controls section'' that specifies required controls and how they will be verified (*e.g.*, surprise inspections). We recommend that the agreement required by § 99.31(a)(6) include a section that sets forth similar requirements. If a school is unable to verify that these controls are in place, then it should not disclose personally identifiable information from education records to an organization for the purpose of conducting a study.

In this regard, it should be noted that educational agencies and institutions are responsible for any failures by an organization conducting a study to comply with applicable FERPA requirements. FERPA states that if a third party outside the educational agency or institution fails to destroy information in violation of 20 U.S.C. 1232g(b)(1)(F), the studies exception in FERPA, the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years. See 20 U.S.C. 1232g(b)(4)(B).

*Changes:* We have revised § 99.31(a)(6) to: (1) Retain § 99.31(a)(6)(ii)(A) and (B); (2) amend § 99.31(a)(6)(ii)(A) to provide that the study must be conducted in a manner that does not permit personal identification of parents or students by anyone other than representatives of the organization that have legitimate interest in the information; (3) amend § 99.31(a)(6)(ii)(C) to require that the written agreement specify the purpose,

scope, and duration of the study and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; limit any disclosures of information to individuals in the organization conducting the study who have a legitimate interest in the information; and require the organization to destroy or return to the educational agency all personally identifiable information when the information is no longer needed for the purposes of the study and specify the time period during which the organization must either destroy or return the information to the educational agency or institution; and (4) amend § 99.31(a)(6) in new paragraph (iii) to provide that an educational agency or institution is not required to initiate a study.

**Disclosure of Education Records to Non-Educational State Agencies**

*Comment:* Several commenters stated that the proposed amendments did not specifically address whether an educational agency or institution is permitted to disclose education records to non-educational State agencies, such as State health or labor agencies, as part of an agreement with those agencies, without first obtaining consent. One commenter said that because the Department has taken the position that education records may be shared with State auditors who are not educational officials and who are not, by definition, under the control of a State educational authority, there is no legal basis to prohibit the disclosure of education records to other non-educational State and local agencies.

Some officials representing State health agencies commented that FERPA should be more closely aligned with the disclosure provisions of the HIPAA Privacy Rule. One commenter noted that there was a critical need for public health researchers to be able to access, without consent, personally identifiable information contained in student health records to allow for analyses, public health studies, and research that will benefit school-aged children, as well as the general population. One organization representing school nurses noted that public health officials need access to education records for the purposes of public health reporting, surveillance, and reimbursement.

Several commenters recommended that SEAs be authorized to share data from education records with State social services, health, juvenile, and employment agencies, to serve the needs of students, including special needs, low-income, and at-risk students. One SEA commented that it did not support extending access to student data to non-education State agencies, except to State auditors, as specified in proposed § 99.35(a)(3). This commenter asserted that access to and use of information from students' education records should be controlled by a limited number of education officials who are sensitive to the intent of FERPA and well acquainted with its safeguards.

*Discussion:* There is no specific exception to the written consent requirement in FERPA that permits the disclosure of personally identifiable information from students' education records to non-educational State agencies. Educational agencies and institutions may disclose personally identifiable information for audit or evaluation purposes under §§ 99.31(a)(3) and 99.35 only to authorized representatives of the officials or agencies listed in § 99.31(a)(3)(i) through (iv). Typically, LEAs and their constituent schools disclose education records to State educational authorities under § 99.31(a)(3)(iv), such as the SEA, for audit, evaluation, or compliance and enforcement purposes.

There are some exceptions that might authorize disclosures to non-educational State agencies for specified purposes. For example, disclosures may be made in a health or safety emergency (§§ 99.31(a)(10) and 99.36), in connection with financial aid (§ 99.31(a)(4)), or pursuant to a State statute under the juvenile justice system exception (§§ 99.31(a)(5) and 99.38), and any disclosures must meet the specific requirements of the particular exception. FERPA, however, does not contain any specific exceptions to permit disclosures of personally identifiable information without consent for public health or employment reporting purposes. That said, nothing in FERPA prohibits an educational agency or institution from importing information from another source to perform its own evaluations.

We believe that any further expansion of the list of officials and entities in FERPA that may receive education records without the consent of the parent or eligible student must be authorized by legislation enacted by Congress.

We explained in the NPRM on page 15577 that, with respect to State auditors, legislative history for the 1979 FERPA amendment indicates that Congress specifically intended that FERPA not preclude State auditors from obtaining personally identifiable information from education records in order to audit Federal and State supported education programs, notwithstanding that the statutory language in the amendment refers only to ''State and local educational officials.'' *See* 20 U.S.C. 1232g(b)(5); H.R. Rep. No. 338, 96th Cong., 1st Sess. at 10 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 819, 824. This legislative history provides a basis for drawing a distinction between State auditors and officials of other State agencies that also are not under the control of the State educational authority. (As explained more fully under *State auditors,* upon further review, we have removed from the final regulations the proposed regulations related to State auditors and audits.)

The 1979 amendment to FERPA does not apply to other State officials or agencies, and there is no other legislative history to indicate that Congress intended that FERPA be interpreted to permit educational agencies and institutions, or State and local educational authorities or Federal officials and agencies listed in § 99.31(a)(3), to share students' education records with non-educational State officials. In fact, Congress has, on numerous occasions, indicated otherwise.

As discussed elsewhere in this preamble under the heading *Health or Safety Emergency,* the HIPAA Privacy Rule specifically excludes from coverage health care information that is maintained as an ''education record'' under FERPA. 45 CFR 160.103, Protected health information. We understand that the HIPAA Privacy Rule allows covered entities to disclose identifiable health data without written consent to public health authorities. However, there is no comparable exception to the written consent requirement in FERPA.

As mentioned previously, in conducting an audit, evaluation, or compliance or enforcement activity, an educational authority may collaborate with other State agencies by importing data from those sources and conducting necessary matches. Any reports or other information created as a result of the data matches may only be released to those non-educational officials in non-personally identifiable form. Educational authorities may also release information on students to non-educational officials that has been properly de-identified, as described in § 99.31(b)(1).

Additionally, many agencies providing services to low income or at-risk families have parents sign a consent form authorizing disclosure of

information at intake time so that the agency can receive necessary information from schools. In 1993, we amended the FERPA regulations to help facilitate this practice. In final regulations published in the **Federal Register** on January 7, 1993 (58 FR 3188), we removed the previous requirement in the regulations that schools ''obtain'' consent from parents and eligible students so that parents and eligible students may ''provide'' a signed and dated consent to third parties in order for the school to disclose education records to those parties.

Therefore, parents can provide consent at intake time to State and local social services and other non-educational agencies serving the needs of students in order to permit their children's schools (or the SEA) to disclose education records to the agency. For example, parents routinely provide consent to the Medicaid agency that permits that agency to collect information from other agencies on the family being served. In many cases those consents are written in a manner that complies with the consent requirement in § 99.30, and the student's school may disclose information to the Medicaid agency necessary for reimbursement purposes for services provided the student.

*Changes:* None.

**Disclosure of Education Records to Student's Former Schools (§§ 99.31(a)(3), 99.31(a)(6), and 99.35(b))**

*Comment:* One commenter asked for clarification whether a school could disclose a student's education records to the student's previous school for the purpose of evaluating Federal or State supported education programs or for improving instruction. Several commenters said that there is a critical need for school districts to be able to access the records of their former students from the student's new district or postsecondary institution so that the previous institution can evaluate the effectiveness of its own education programs. Some commenters said that § 99.35(a) clearly allows a K–12 data system to use postsecondary records to evaluate its own programs, and that a K–12 system does not need to have legal authority to evaluate postsecondary programs for the disclosure to be valid under the audit or evaluation exception.

*Discussion:* Section 99.31(a)(2) allows an educational agency or institution to disclose personally identifiable information from education records, without consent, to a school where the student seeks or intends to enroll or is already enrolled if the disclosure relates to the student's enrollment or transfer. There is no specific authority in FERPA for an educational agency or institution, or a State or local educational authority, to disclose or redisclose personally identifiable information from education records to a student's former school without consent.

As discussed above, §§ 99.31(a)(3) and 99.35 allow educational agencies and institutions to disclose personally identifiable information from education records without consent to State and local educational authorities that are legally authorized to audit or evaluate the disclosing institution's programs or records. We encourage State and local authorities to take advantage of this exception and establish or modify State or local legal authority, as necessary, to allow K–12 and postsecondary educational authorities to audit or evaluate one another's programs. As noted above, the Department will generally defer to a State Attorney General's interpretation of State or local law on these matters.

Section 99.31(a)(6) allows an educational agency or institution to disclose personally identifiable information from education records without consent to an organization conducting a study for, or on behalf of, the agency or institution that discloses its records. The ''for, or on behalf of'' language from the statute and regulations, however, does not allow the educational agency or institution to disclose personally identifiable information from education records under this exception so that the receiving organization can conduct a study for itself or some other party. Further, the Secretary does not as a policy matter support expanding the studies exception to permit such a disclosure because it would result in a vast increase in the number of parties gaining access to and maintaining personally identifiable information on students. As discussed below, educational agencies and institution and other parties, including State educational authorities, may always release information from education records to a student's former school, without consent, if all personally identifiable information has been removed.

**Personally Identifiable Information and De-Identified Records and Information (§§ 99.3 and 99.31(b))**

*(a) Definition of Personally Identifiable Information*

*Comment:* We received a number of comments on proposed § 99.3 regarding changes to the definition of *personally identifiable information.* One commenter applauded the Department's recognition of the increasing ease of identifying individuals from redacted records and statistical information because of the large amount of detailed personal information that is maintained on most Americans by many different organizations. This commenter and others, however, stated that the proposed regulations did not go far enough to ensure that personally identifiable information about students would not be released.

One commenter expressed concern about our proposal to eliminate paragraphs (e) and (f) from the existing definition of *personally identifiable information,* which included a list of personal characteristics and other information that would make a student's identity easily traceable. The commenter said that this was a change to long-standing Department policy and represented an unwarranted invasion of privacy that exceeds statutory authority. This commenter also expressed concern that eliminating the ''easily traceable'' provisions for determining whether information was personally identifiable could prevent parents from accessing their children's education records and might allow school officials to circumvent FERPA requirements by using nicknames, initials, and other personal characteristics to refer to children.

In contrast, several commenters stated that the regulations would be unworkable or were too restrictive and would prevent or discourage the release of information from education records needed for school accountability and other public purposes. These commenters stated that paragraphs (f) and (g) in the proposed definition of *personally identifiable information,* which replaces the ''easily traceable'' provisions, would provide school officials too much discretion to conceal information the public deserves to have in order to debate public policy. Proposed paragraph (f) provided that personally identifiable information includes other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. Proposed paragraph (g) provided that personally identifiable information includes information requested by a person who the educational agency or institution reasonably believes has direct, personal knowledge of the identity of the student

to whom the education record relates, sometimes known as a ''targeted request.''

Several commenters expressed support for the provisions in paragraphs (f) and (g) of the definition of *personally identifiable information*. One of these commenters said that the ''school and community'' limitation and the ''reasonable person'' standard in paragraph (f) is sufficiently clear for implementation by parties that release de-identified records. Another commenter said that ambiguity in the terms ''reasonable person'' and ''reasonable certainty'' was necessary so that organizations can develop their own standards for addressing the problem of ensuring that information that is released is not personally identifiable. This commenter asked the Department to retain the flexibility in the proposed language and provide examples of policies that have been implemented that meet the requirements in paragraphs (f) and (g) of the definition. The commenter said that most school districts know when they are receiving a targeted request (paragraph (g)) but asked that the Department provide examples to help districts determine whether a non-targeted request will reveal personally identifiable information.

Journalism and writers' associations expressed concern about the ''reasonable person'' standard in paragraph (f) and our statement in the preamble to the NPRM (73 FR 15583) that an educational agency or institution may not be able to release redacted education records that concern students or incidents that are well-known in the school community, including when the parent or student who is the subject of the record contacts the media and causes the publicity that prevents the release of the record. These commenters stated that FERPA should not prevent schools from releasing records from which all direct and indirect identifiers, such as name, date of birth, address, unusual place of birth, mother's maiden name, and sibling information, have been removed without regard to any outside information, particularly after a student or parent has waived any pretense of confidentiality by contacting the media. They also said that the proposed definition of *personally identifiable information* does not acknowledge the public interest in school accountability.

One commenter said that the ''reasonable person in the school or its community'' standard in paragraph (f) was too narrow and inappropriate because it would allow individuals with even modest scientific and technological abilities to identify students based on supposedly de-identified information. Another commenter said that the reference in paragraph (f) to a ''reasonable person'' should be changed to ''ordinary person.'' A commenter said that if we retain the ''reasonable person'' standard, we should remove the references to the school or its community and personal knowledge of the circumstances and simply refer to a reasonable person. Several commenters said the ''school or its community'' standard is too vague and needs to be clarified, particularly in relation to the provision in paragraph (g) regarding targeted requests; these commenters said that school officials will choose to evaluate a request for information based on whether a reasonable person in the community, a broader standard than a reasonable person in the school, could identify the student and automatically find their own decisions to be reasonable. One commenter said that the phrase ''relevant circumstances'' in paragraph (f) is vague.

One commenter said that the standard in paragraph (f) about whether the information requested is ''linked or linkable'' to a specific student was too vague and overly broad and could be logically extended to cover almost any information about a student. This commenter said that the regulations should focus on preventing the release of records that in and of themselves contain unique personal descriptors that would make the student identifiable in the school community and not refer to outside information, including what members of the public might know independently of the records themselves.

Several commenters expressed concerns that the provision in paragraph (g) regarding targeted requests will make FERPA and the regulations administratively unwieldy and unnecessarily subjective. One of these commenters said that paragraph (g) is unclear and adds more confusion as opposed to providing clarity; this commenter said that paragraph (g) should be removed and that the requirements in paragraph (f) were sufficient. Another commenter said that the standard in paragraph (g) unfairly holds agencies and institutions responsible for ascertaining the requester's personal knowledge. One commenter said that we should delete the words ''direct, personal'' before ''knowledge'' because these terms are unclear. According to this commenter, if a school reasonably believes that the requester knows the student's identity, the school should not disclose the records, whether the knowledge is ''direct'' or ''personal.''

Other commenters expressed a more general concern that the standard for targeted requests in paragraph (g) places an undue burden on school officials to obtain information about the person requesting information and creates a potential conflict with State open records laws. According to these commenters, the regulations as proposed would encourage agencies and institutions to make illegitimate inquiries into a requester's motives for seeking information and what the requester intends to do with it, or require the agency or institution to read the mind of a party requesting information. According to the commenter, this would introduce a degree of subjective judgment that would invariably lead to abuse because the same record that could be considered a public record to one requester could be a confidential document to another. A large university that has decentralized administrative operations questioned how it could be expected to take institutional knowledge into account in evaluating whether a request for records is targeted and asked for confirmation that the Department will not substitute its judgment for that of the institution so long as there was a rational basis for the decision to release information.

We received a few comments on the example of a targeted request that we provided in the preamble to the NPRM (73 FR 15583–15584), in which rumors circulate that a candidate running for political office plagiarized other students' work, and a reporter asks the university for the redacted disciplinary records of all students who were disciplined for plagiarism for the year in which the candidate graduated. We explained that the university may not release the records in redacted form because the circumstances indicate that the requester had direct, personal knowledge of the subject of the case. Two commenters said that confirmation that one unnamed student was disciplined in 1978 for plagiarism does not identify that student or confirm that the candidate was that student, and our explanation of the standard with this example showed that the regulations would prevent parents and the media from discharging their vital oversight responsibilities.

One school district said that the targeted request provision could impair due process in some student discipline cases by limiting the release of redacted witness statements that concern more than one student. The commenter suggested that under its current

practice, if four students are involved in an altercation, the school redacts all personally identifiable information with regard to students 2 through 4 when releasing the statement without parental consent to student 1, but under the proposed regulations, student 1's request would violate the requirements in paragraph (g) because of the student's knowledge of the identity of the other students to whom the record relates. This commenter said that the regulations should not be adopted if they do not address these due process concerns.

Several commenters said they appreciated the addition of a student's date of birth and other indirect identifiers in the definition of *personally identifiable information*. Another commenter said that a comprehensive list of indirect identifiers would be helpful. One commenter asked us to define the concept of indirect identifiers. Another commenter asked us to clarify which personally identifiable data elements may be released without consent. A commenter asked us to define the term biometric record as used in the definition of *personally identifiable information*.

*Discussion:* The Joint Statement explains that the purpose of FERPA is two-fold: to assure that parents and eligible students can access the student's education records, and to protect their right to privacy by limiting the transferability of their education records without their consent. 120 Cong. Rec. 39862. As such, FERPA is not an open records statute or part of an open records system. The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office. Nonetheless, as explained in the preamble to the NPRM, 73 FR 15584–15585, we believe that the regulatory standard for defining and removing personally identifiable information from education records establishes an appropriate balance that facilitates school accountability and educational research while preserving the statutory privacy protections in FERPA.

The simple removal of nominal or direct identifiers, such as name and SSN (or other ID number), does not necessarily avoid the release of personally identifiable information. Other information, such as address, date and place of birth, race, ethnicity, gender, physical description, disability, activities and accomplishments, disciplinary actions, and so forth, can indirectly identify someone depending on the combination of factors and level of detail released. Similarly, and as noted in the preamble to the NPRM, 73 FR 15584, the existing professional literature makes clear that public directories and previously released information, including local publicity and even information that has been de-identified, is sometimes linked or linkable to an otherwise de-identified record or data set and renders the information personally identifiable. The regulations properly require parties that release information from education records to address these situations.

We removed the ''easily traceable'' standard from the definition of *personally identifiable information* because it lacked specificity and clarity. We were also concerned that the ''easily traceable'' standard suggested that a fairly low standard applied in protecting education records, *i.e.*, that information was considered personally identifiable only if it was easy to identify the student.

The removal of the ''easily traceable'' standard and adoption of the standards in paragraphs (f) and (g) will not affect a parent's right under FERPA to inspect and review his or her child's education records. Records that teachers and other school officials maintain on students that use only initials, nicknames, or personal descriptions to identify the student are education records under FERPA because they are directly related to the student.

Further, records that identify a student by initials, nicknames, or personal characteristics are personally identifiable information if, alone or combined with other information, the initials are linked or linkable to a specific student and would allow a reasonable person in the school community who does not have personal knowledge about the situation to identify the student with reasonable certainty. For example, if teachers and other individuals in the school community generally would not be able to identify a specific student based on the student's initials, nickname, or personal characteristics contained in the record, then the information is not considered personally identifiable and may be released without consent. Experience has shown, however, that initials, nicknames, and personal characteristics are often sufficiently unique in a school community that a reasonable person can identify the student from this kind of information even without access to any personal knowledge, such as a key that specifically links the initials, nickname, or personal characteristics to the student.

In contrast, if a teacher uses a special code known only by the teacher and the student (or parent) to identify a student, such as for posting grades, this code is not considered personally identifiable information under FERPA because the only reason the teacher can identify the student is because of the teacher's access to personal knowledge of the relevant circumstances, *i.e.*, the key that links the code to the student's name.

In response to the commenter who stated that a school should not be prevented from releasing information when the subject of the record has waived any pretense of confidentiality by contacting the media and making the incident well-known in the community, we have found that in limited circumstances a parent or student may impliedly waive their privacy rights under FERPA by disclosing information to parties in a special relationship with the institution, such as a licensing or accreditation organization. However, we have not found and do not believe that parents and students generally waive their privacy rights under FERPA by sharing information with the media or other members of the general public. The fact that information is a matter of general public interest does not give an educational agency or institution permission to release the same or related information from education records without consent.

The ''reasonableness'' standards in paragraphs (f) and (g) of the new definition, which replace the ''easily traceable'' standard, do not require the exercise of subjective judgment or inquiries into a requester's motives. Both provisions require the disclosing party to use legally recognized, objective standards by referring to identification not in the mind of the disclosing party or requester but by a reasonable person and with reasonable certainty, and by requiring the disclosing party to withhold information when it reasonably believes certain facts to be present. These are not subjective standards, and these changes will not diminish the privacy protections in FERPA.

The standard proposed in paragraph (f) regarding the knowledge of a reasonable person in the school or its community was not intended to describe the technological or scientific skill level of a person who would be capable of re-identifying statistical information or redacted records. Rather, it provided the standard an agency or

institution should use to determine whether statistical information or a redacted record will identify a student, even though certain identifiers have been removed, because of a well-publicized incident or some other factor known in the community. For example, as explained in the preamble to the NPRM, 73 FR 15583, a school may not release statistics on penalties imposed on students for cheating on a test where the local media have published identifiable information about the only student (or students) who received that penalty; that statistical information or redacted record is now personally identifiable to the student or students because of the local publicity.

Paragraph (f) in the proposed definition provided that the agency or institution must make a determination about whether information is personally identifiable information not with regard to what someone with personal knowledge of the relevant circumstances would know, such as the principal who imposed the penalty, but with regard to what a reasonable person in the school or its community would know, *i.e.*, based on local publicity, communications, and other ordinary conditions. We agree with the comment that the ''school or its community'' standard was confusing because it was not clear whether just the school itself or the larger community in which the school is located is the relevant group for determining what a reasonable person would know.

We are changing this standard in paragraph (f) to the ''school community'' and by this change we mean that an educational agency or institution may not select a broader ''community'' standard when the information to be released would be personally identifiable under the narrower ''school'' standard. For example, it might be well known among students, teachers, administrators, parents, coaches, volunteers, or others at the local high school that a student was caught bringing a gun to class last month but generally unknown in the town where the school is located. In these circumstances, a school district may not disclose that a high school student was suspended for bringing a gun to class last month, even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student. The student's privacy is further protected because a reasonable person in the school community is also presumed to have at least the knowledge of a reasonable person in the local community, the region or State, the United States, and the world in general. The ''school community'' standard, therefore, provides the maximum privacy protection for students.

We do not agree that the reference to ''reasonable person'' should be changed to ''ordinary person.'' ''Reasonable person'' is a legally recognized standard that represents a hypothetical, rational, prudent, average individual. It would be confusing and inappropriate to introduce a new term ''ordinary'' in this context.

The standard in paragraph (f) excludes from the ''reasonable person in the school community'' standard persons who have personal knowledge of the ''relevant circumstances,'' which one commenter considered vague. Under this standard, an agency or institution is not required to take into consideration when releasing redacted or statistical information that someone with special knowledge of the circumstances could identify the student. For example, if it is generally known in the school community that a particular student is HIV-positive, or that there is an HIV-positive student in the school, then the school could not reveal that the only HIV-positive student in the school was suspended. However, if it is not generally known or obvious that there is an HIV-positive student in school, then the same information could be released, even though someone with special knowledge of the student's status as HIV-positive would be able to identify the student and learn that he or she had been suspended.

The provisions in paragraph (g) regarding targeted requests do not require an educational agency or institution to ascertain or guess a requester's motives for seeking information from education records or what a requester intends to do with the information. This paragraph addresses a situation in which a requester seeks what might generally qualify as a properly redacted record but the facts indicate that redaction is a useless formality because the subject's identity is already known.

An educational agency or institution is not required under paragraph (g) to make any special inquiries or otherwise seek information about the person requesting information from education records. It must use information that is obvious on the face of the request or provided by the requester, such as when a requester asks for the redacted transcripts of a particular student. Paragraph (f) also requires an agency or institution to use information known to a reasonable person in the school community, such as when a requester asks for the redacted transcripts of all basketball players who were expelled for accepting bribes after the local newspaper published a story about the matter. Paragraphs (f) and (g) do not require an educational agency or institution to inquire whether a requester has special knowledge not available generally in the school community that would make the subject of the record identifiable. We disagree with the comment that paragraph (f) is sufficient and paragraph (g) should be removed. Paragraph (g) addresses the problem of targeted requests, which is not addressed under paragraph (f).

We agree with the comment that the provision in paragraph (g) under which an agency or institution must determine whether the information requested is personally identifiable information based on its reasonable belief that the requester has ''direct, personal'' knowledge of the identity of the student to whom the record relates is ambiguous and confusing, especially in relation to what might be considered indirect knowledge. Therefore, we have modified this provision so that an educational agency or institution must simply have a reasonable belief that the requester knows the identity of the student to whom the record relates.

In reviewing a complaint that an educational agency or institution disclosed personally identifiable information from an education record in response to a targeted request, the Department would examine the request itself, the facts on which the agency or institution based its decision to release the information, as well as any information known generally in the school community that the agency or institution failed to take into account. The Department would also counsel an agency or institution about the nature of the violation in connection with the Department's responsibility for seeking voluntary compliance with FERPA before initiating any enforcement action under § 99.67.

With regard to the comment that the standard in paragraph (g) will impair due process in student discipline cases, it is unclear what the commenter means by releasing redacted witness statements under its current practice. *Education records* are defined in FERPA as records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 20 U.S.C. 1232g(a)(4)(A); 34 CFR 99.3. Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement

contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.

For example, parents of both John and Michael would have a right to inspect and review the following information in a witness statement maintained by their school district because it is directly related to both students: ''John grabbed Michael's backpack and hit him over the head with it.'' Further, in this example, before allowing Michael's parents to inspect and review the statement, the district must also redact any information about John (or any other student) that is not directly related to Michael, such as: ''John also punched Steven in the stomach and took his gloves.'' Since Michael's parents likely know from their son about other students involved in the altercation, under paragraph (g) the district could not release any part of this sentence to Michael's parents. We note also that the sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student's conduct, except if a perpetrator has been ordered to stay away from a victim.

In order to provide maximum flexibility to educational agencies and institutions, we did not attempt to define or list all other ''indirect identifiers''. We believe that the examples listed in paragraph (3) of the definition of *personally identifiable information*—date of birth, place of birth, and mother's maiden name—indicate clearly the kind of information that could identify a student. Race and ethnicity, for example, could also be indirect identifiers. It is not possible, however, to list all the possible indirect identifiers and ways in which information might indirectly identify a student. Further, unlike the HIPAA Privacy Rule, these regulations do not attempt to provide a ''safe harbor'' by listing all the information that may be removed in order to satisfy the de-identification requirements in § 99.31(b). We have also added a definition of *biometric record* that is based on National Security Presidential Directive 59 and Homeland Security Presidential Directive 24.

*Changes:* We added a definition of *biometric record*, which provides that the term means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting.

We also have revised paragraph (f) in the definition of *personally identifiable information* to change the reference ''school or its community'' to ''school community.'' In paragraph (g) of the definition of *personally identifiable information*, we removed the requirement that the requester have ''direct, personal knowledge.'' As revised, paragraph (g) provides that personally identifiable information means information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the record relates.

*(b) De-Identified Records and Information*

*Comment:* We received a number of comments on § 99.31(b)(1), which would allow an educational agency or institution, or a party that has received personally identifiable information from education records, to release the records or information without parental consent after the removal of all personally identifiable information, provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable because of unique patterns of information about the student, whether through single or multiple releases, and taking into account other reasonably available information. In order to permit ongoing educational research with the same data, § 99.31(b)(2) allows an educational agency or institution or other party that releases de-identified, non-aggregated data (also known as ''microdata'') from education records to attach a code to each record, which may allow the recipient to match information received from the same source, under three conditions—(1) the educational agency or institution does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code; (2) the record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and (3) the record code is not based on a student's social security number or other personal information.

Several commenters supported these proposed regulations and said that they will help facilitate valuable educational research. One of these commenters said that the provisions for de-identification of education records create clear standards that will allow researchers to conduct necessary research without compromising student privacy. One commenter appreciated being able to attach a code or linking key to records to facilitate matching students across data sets while preserving student confidentiality.

One commenter stated that de-identified data do not support appropriate analytical research that will lead to improved educational outcomes. Further, according to this commenter, complete de-identification of systematic, longitudinal data on every student may not be possible.

Two commenters expressed concern that agencies and institutions redact too much information from education records and said that the Department should err on the side of disclosure of disaggregated data so that journalists and researchers can obtain accurate information about how students in every accountability subgroup are performing. These commenters said that the regulations should take into account the real track record of journalists and researchers in maintaining the confidentiality of information from education records.

One commenter said that many institutions and individuals have the ability to re-identify seemingly de-identified data and that it is generally much easier to do than most people realize because 87 percent of Americans can be identified uniquely from their date of birth, five-digit zip code, and gender. This commenter said that the regulations need to take into account that re-identification is a much greater risk for student data than other kinds of information because FERPA allows for the regular publication of student directories that contain a wealth of personal information, including address and date of birth, that can be used with existing tools and emerging technology to re-identify statistical data, even by non-experts.

Another commenter said that because the de-identification process is so resource-intensive, the regulations should allow the research entity to de-identify education records as a contractor under § 99.31(a)(1) of the regulations.

We explained in the preamble to the NPRM (73 FR 15585) that educational agencies and institutions should monitor releases of coded, de-identified microdata from education records to ensure that overlapping or successive releases do not result in data sets in which a student's personally identifiable information is disclosed. One commenter said that this monitoring requirement was too burdensome given the vast number of

data requests it receives and asked us to limit the monitoring requirement to single or multiple releases it makes to the same party. An SEA asked specifically for clarification in the regulations regarding what steps, if any, it must take to ensure that multiple releases of de-identified data to the same requester over time that the requester intends to use for a longitudinal study do not result in small data cells that may reveal the identity of the student. A school district said that the regulations should require the destruction of de-identified information from education records by the receiving party to avoid the problem of combining successive data releases to identify students.

Some commenters said that the regulations should provide objective standards for the de-identification of education records. One commenter asked the Department to prescribe a method for States to adopt to ensure that student confidentiality is protected. Two commenters asked specifically for guidance on what minimum cell size should be allowed when releasing statistical information. Several commenters said that SEAs and school districts need specific guidance regarding the release of student achievement data under the NCLB, including, in particular, reporting 100 percent achievement of certain performance levels on State assessments. One commenter who opposed restrictions on the release of de-identified data referred to instances in which some States have created minimum cell sizes of 100 for reporting disaggregated data under NCLB, which prevents the release of a great deal of important information. Another commenter said that our discussion of small cell sizes in the preamble to the NPRM, 73 FR 15584, reflected a misunderstanding of the problem.

One commenter said that § 99.31(b) is confusing because it is not clear how paragraph (b)(2), which is limited to educational research, relates to paragraph (b)(1), which is not so limited. This commenter also said that the regulations impose an unnecessary burden on the entity receiving a request for information and that the requirements of paragraph (f) in the definition of *personally identifiable information* are sufficient to de-identify education records. Another commenter said that the language in § 99.31(b)(1) that requires consideration of unique patterns of information about a student is confusing and creates ambiguity because the definition of *personally identifiable information* itself incorporates standards for de-identification that appear to differ from the standard in § 99.31(b).

*Discussion:* As explained in the preamble to the NPRM, 73 FR 15584–15585, we believe that the regulatory standard for de-identifying information from education records establishes an appropriate balance that facilitates the release of appropriate information for school accountability and educational research purposes while preserving the statutory privacy protections in FERPA. Unlike the HIPAA Privacy Rule, these regulations do not attempt to provide a ''safe harbor'' by listing all the direct and indirect identifiers that may be removed to satisfy the de-identification requirements in § 99.31(b). Rather, they are intended to provide standards under which information from education records may be released without consent because all personally identifiable information has been removed.

The Department recognizes that de-identified data may not be appropriate for all educational research purposes and that complete de-identification of longitudinal student data may not be possible without sacrificing essential content and usability. In these situations, and as discussed elsewhere in this preamble, FERPA allows the disclosure and redisclosure of personally identifiable information from education records, without consent, to researchers under the terms and conditions specified in §§ 99.31(a)(1), 99.31(a)(3), and 99.31(6). We note that a researcher who receives personally identifiable information under these provisions would, however, have to de-identify any report or other information in accordance with § 99.31(b) before releasing it to the public or other parties, including other researchers.

In response to comments that educational agencies and institutions may remove too much information from education records, we note that while we have attempted to provide a balanced standard for the release of de-identified data for school accountability and other purposes, FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students. Further, there is no statutory authority in FERPA to modify the prohibition on disclosure of personally identifiable information from education records, or the exceptions to the written consent requirement, based on the track record of the party, including journalists and researchers, in maintaining the confidentiality of information from education records that they have received.

In response to the comment about allowing a researcher to de-identify education records, educational agencies and institutions may outsource the de-identification process to any outside service provider serving as a school official in accordance with the requirements in § 99.31(a)(1)(i)(B). (Those requirements are discussed in detail in the preamble to the NPRM at 73 FR 15578–15580 and elsewhere in these final regulations.) State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) may outsource the de-identification process to their authorized representatives under the conditions specified in § 99.35.

We agree that the risk of re-identification may be greater for student data than other information because of the regular publication of student directories, commercial databases, and de-identified but detailed educational reports by States and researchers that can be manipulated with increasing ease by computer technology. As noted in the preamble to the NPRM, 73 FR 15584, the re-identification risk of any given release is cumulative, *i.e.*, directly related to what has previously been released, and this includes both publicly-available directory information, which is personally identifiable, and de-identified data releases. For that reason, we advised in the NPRM that parties should minimize information released in directories to the extent possible because, since the enactment of FERPA in 1974, the risk of re-identification from such information has grown as a result of new technologies and methods.

In response to comments about the need to monitor releases of coded, de-identified microdata to avoid re-identification of the data, because the risk of re-identification is cumulative, when making a new disclosure of coded data an educational agency or institution or other party must take into account all releases of information from education records it has made, not just releases it has made to the recipient of new data. We note that some of the publicly available directory information and de-identified data releases that need to be taken into account have been produced by the same agency or institution, State or local educational authority, or Federal official that wishes to release newly de-identified information. In general, FERPA poses no restrictions on the recipient's use of directory information and de-identified data from education records. Therefore, it may be unclear whether previous data releases are available generally, have been shared with a limited number of

parties, or not shared at all. Further, unlike personally identifiable information that is disclosed under §§ 99.31(a)(3) and (a)(6), de-identified information from education records does not have to be destroyed when no longer needed for the purposes for which it was released. We note, however, that a releasing party would reduce its monitoring responsibilities if it requires destruction or prohibits redisclosure of coded, de-identified microdata, because coded, de-identified microdata has a higher risk of re-identification than de-identified microdata. In the future the Department will provide further information on how to monitor and limit disclosure of personally identifiable information in successive statistical data releases.

In response to requests for guidance on what specific steps and methods should be used to de-identify information (and as noted in the preamble to the NPRM, 73 FR 15584), it is not possible to prescribe or identify a single method to minimize the risk of disclosing personally identifiable information in redacted records or statistical information that will apply in every circumstance, including determining whether defining a minimum cell size is an appropriate means to protect the confidentiality of aggregated data and, if so, selection of an appropriate number. This is because determining whether a particular set of methods for de-identifying data and limiting disclosure risk is adequate cannot be made without examining the underlying data sets, other data that have been released, publicly available directories, and other data that are linked or linkable to the information in question. For these reasons, we are unable to provide examples of rules and policies that necessarily meet the de-identification requirements in § 99.31(b). The releasing party is responsible for conducting its own analysis and identifying the best methods to protect the confidentiality of information from education records it chooses to release. We recommend that State educational authorities, educational agencies and institutions, and other parties refer to the examples and methods described in the NPRM at page 15584 and refer to the Federal Committee on Statistical Methodology's Statistical Policy Working Paper 22, *www.fcsm.gov/working-papers/wp22.html*, for additional guidance.

With regard to issues with NCLB reporting in particular, determining the minimum cell size to ensure statistical reliability of information is a completely different analysis than that used to determine the appropriate minimum cell size to ensure confidentiality. Further, as noted in the preceding paragraph and in the preamble to the NPRM, use of minimum cell sizes or data suppression is only one of several ways in which information from education records may be de-identified before release. Statistical Policy Working Paper 22 describes other disclosure limitation methods, such as ''top coding'' and ''data swapping,'' which may be more suitable than simple data suppression for releasing the maximum amount of information to the public without breaching confidentiality requirements. Decisions regarding whether to use data suppression or some other method or combination of methods to avoid disclosing personally identifiable information in statistical information must be made on a case-by-case basis.

We agree with the commenter who said that the example we provided in the preamble to the NPRM regarding the small cell problem in reporting that two Hispanic females failed to graduate was misleading and offer the following, more complete explanation. Simply knowing that one out of 100 Hispanic females failed to graduate does not identify which of the Hispanic females it might be. But suppose this female is an English language learner who is also enrolled in special education classes. The school also publishes tables on participation in special education classes by race, ethnicity, and grade, and tables that include the graduation status of Hispanic females disaggregated in one table by English language proficiency status, and by participation in special education classes in another. Suppose that these three tabulations each show separately that there is one 12th grade Hispanic female enrolled in special education classes, that the one Hispanic female who did not graduate was enrolled in special education classes, and that the one Hispanic female who did not graduate was an English language learner. With this information, the discerning observer knows that the one Hispanic female who failed to graduate is an English language learner and that she was the only 12th grade Hispanic student enrolled in special education classes. Any number of people in the school would be able to identify the Hispanic female who did not graduate with these three pieces of information.

Expanding the example to two individuals, the logic is similar, except in this case each of the Hispanic females knows her own characteristics and can find herself in each of the available tables, and thus by a process of elimination identifies the characteristics of the other non-graduate, perhaps learning something she did not already know about the other student. The published tables show that there are two 12th grade Hispanic females enrolled in special education classes, one with a learning disability and one with mental retardation. The tables also show that the two Hispanic females who did not graduate were enrolled in special education classes, and that the two Hispanic females who did not graduate were both English language learners. Others in the school community may be able to identify the two 12th grade Hispanic females who are English language learners enrolled in special education classes, but not necessarily be able to distinguish the student with the learning disability from the student with mental retardation. However, each girl knows her own disability and by the process of elimination now knows the other girl's disability. Similarly, anyone with knowledge of one of the two Hispanic females who did not graduate can find that girl in the tables, and then isolate the characteristics that belong to the other Hispanic female.

This example can be expanded to an example with three Hispanic females who fail to graduate. All three of the Hispanic females who did not graduate are English language learners, and two Hispanic females who did not graduate are enrolled in special education classes—one with a learning disability and the other with mental retardation. In this case, the one Hispanic female who is an English language learner and did not graduate now knows that the other two Hispanic females in her English language learner classes and also did not graduate are in the special education program, but she does not know which condition each girl has. By the same logic, each of the two females who did not graduate and are in special education classes knows her own disability and as a result knows the disability of the other Hispanic female who was an English language learner enrolled in special education classes who did not graduate. These are some examples of situations in which small cell data reveals personally identifiable information from education records.

The Secretary has no statutory authority to modify the regulations to allow LEAs and SEAs to report that 100 percent of students achieved specified performance levels. In that regard we note that the Department's Non-Regulatory Guidance for NCLB Report Cards (2003) provides:

> [S]chools must also ensure that the data they report do not reveal personally identifiable information about individual students * * *. States must adopt a strategy

for dealing with a situation in which all students in a particular subgroup scored at the same achievement level. One solution, referred to as ''masking'' the data, is to use the notation of >95% when all students in a subgroup score at the same achievement level.

See *www.ed.gov/programs/titleiparta/reportcardsguidance.doc* on page 3. Likewise, LEAs and SEAs must adopt a strategy for ensuring that they do not disclose personally identifiable information about low-performing students when they release information about their high-performing students.

In response to the comments that paragraphs (1) and (2) in § 99.31(b) are confusing, paragraph (1) establishes a standard for de-identifying education records that applies to disclosures made to any party for any purpose, including, for example, parents and other members of the general public who are interested in school accountability issues, as well as education policy makers and researchers. The release of de-identified information from education records under § 99.31(b)(1) is not limited to education research purposes because, by definition, the information does not contain any personally identifiable information.

Paragraph (2) of § 99.31(b) applies only to parties conducting education research; it allows an educational agency or institution, or a party that has received education records, such as a State educational authority, to attach a code to each record that may allow the researcher to match microdata received from the same educational source under the conditions specified. The purpose of paragraph (2) is to facilitate education research by authorizing the release of coded microdata. The requirements in paragraph (2) that apply to a record code preclude matching de-identified data from education records with data from another source. Therefore, by its terms, the release of coded microdata under paragraph (2) is limited to education research.

We agree with the commenter who stated that the reference in § 99.31(b)(1) to ''unique patterns of information about a student'' is confusing in relation to the definition of *personally identifiable information* and believe that it essentially restated the requirements in paragraph (f) of the definition. Therefore, we have removed this phrase from the regulations. We disagree that the definition of *personally identifiable information* and the requirements in § 99.31(b) impose an unnecessary burden on the entity receiving a request for de-identified information from education records and that the requirements in paragraph (f) in the definition are sufficient. As explained above, paragraph (f) does not address the problem of targeted requests. It also does not address the re-identification risk associated with multiple data releases and other reasonably available information, or allow for the coding of de-identified micro data for educational research purposes. Section 99.31(b) provides the additional standards needed to help ensure that educational agencies and institutions and other parties do not identify students when they release redacted records or statistical data from education records.

*Changes:* We have removed the reference to ''unique patterns of information'' in § 99.31(b).

**Notification of Subpoena (§ 99.33(b)(2))**

*Comment:* We received a few comments on our proposal in § 99.33(b)(2) to require a party that has received personally identifiable information from education records from an educational agency or institution to provide the notice to parents and eligible students under § 99.31(a)(9) before it discloses that information on behalf of an educational agency or institution in compliance with a judicial order or lawfully issued subpoena. One national education association supported the proposed amendment.

One commenter asked the Department to clarify the intent of the proposed language. This commenter said that, when an educational agency or institution requests that a third party make the disclosure to comply with a lawfully issued subpoena or court order, it is reasonable to expect the educational agency or institution to send the required notice to the student(s). The commenter also said that it was not clear from the proposed change whether it is sufficient for the educational agency or institution to send the notice or whether it must come from the third party.

*Discussion:* The Secretary agrees that there needs to be clarification about which party is responsible for notifying parents and eligible students before an SEA or other third party outside of the educational agency or institution discloses education records to comply with a lawfully issued subpoena or court order. We have revised the regulation to provide that the burden to notify a parent or eligible student rests with the recipient of the subpoena or court order. While a third party, such as an SEA, that is the recipient of a subpoena or court order is responsible for notifying the parents and eligible students before complying with the order or subpoena, the educational agency or institution could assist the third party in the notification requirement, by providing it with contact information so that it could provide the notice.

In order to ensure that this new requirement is enforceable, we have also revised § 99.33(e) so that if the Department determines that a third party, such as an SEA, did not provide the notification required under § 99.31(a)(9)(ii), the educational agency or institution may not allow that third party access to education records for at least five years.

*Changes:* We have amended § 99.33(b)(2) to clarify that the third party that receives the subpoena or court order is responsible for meeting the notification requirements under § 99.31(a)(9). We also have revised § 99.33(e) to provide that if the Department determines that a third party, such as an SEA, did not provide the notification required under § 99.31(a)(9)(ii), the educational agency or institution may not allow that third party access to education records for at least five years.

**Health or Safety Emergency (§ 99.36)**

*Comment:* We received many comments in support of our proposal to amend § 99.36 regarding disclosures of personally identifiable information without consent in a health or safety emergency. Most of the parties that commented stated that the proposed changes demonstrated the right balance between student privacy and campus safety. A number of commenters specifically supported the clarification regarding the disclosure of information from an eligible student's education records to that student's parents when a health or safety emergency occurs. One commenter said that the proposed amendment would provide appropriate protection for sensitive and otherwise protected information while clarifying that educational agencies and institutions may notify parents and other appropriate individuals in an emergency so that they may intervene to help protect the health and safety of those involved.

*Discussion:* We appreciate the commenters' support for the amendments to the ''health or safety emergency'' exception in § 99.36(b). Educational agencies and institutions are permitted to disclose personally identifiable information from students' education records, without consent, under § 99.31(a)(10) in connection with a health or safety emergency. Disclosures under § 99.31(a)(10) must meet the conditions described in § 99.36. We address specific comments

about the proposed amendments to this exception in the following paragraphs.

*Changes:* None.

*(a) Disclosure in Non-Emergency Situations*

*Comment:* Some commenters suggested that we interpret § 99.36 to permit the sharing of information on reportable diseases to health officials in non-emergency situations. These commenters stated that the disclosure of routine immunization data should be subject to State, local, and regional public health laws and regulations and not FERPA. One of these commenters noted that the HIPAA Privacy Rule allows covered entities to disclose personally identifiable health data, without consent, to public health authorities.

*Discussion:* There is no authority in FERPA to exclude students' immunization records from the definition of *education records* in FERPA. Further, the HIPAA Privacy Rule specifically excludes from coverage health care information that is maintained as an ''education record'' under FERPA. 45 CFR 160.103, Protected health information. We understand that the HIPAA Privacy Rule allows covered entities to disclose identifiable health data without written consent to public health authorities. However, there is no statutory exception to the written consent requirement in FERPA to permit this type of disclosure.

As explained in the preamble to the NPRM (73 FR 15589), the amendment to the health or safety emergency exception in § 99.36 does not allow disclosures on a routine, non-emergency basis, such as the routine sharing of student information with the local police department. Likewise, this exception does not cover routine, non-emergency disclosures of students' immunization data to public health authorities. Consequently, there is no statutory basis for the Department to revise the regulatory language as requested by the commenters.

*Changes:* None.

*(b) Strict Construction Standard*

*Comment:* Several commenters expressed concern that removing the language from current § 99.36 requiring strict construction of the ''health and safety emergency'' exception and substituting the language providing for a ''rational basis'' standard would not require schools to make an individual assessment to determine if there is an emergency that warrants a disclosure. One commenter stated that removal of the ''strict construction'' requirement would severely weaken the Department's enforcement capabilities and that schools may see this change as an excuse to disclose sensitive student information when there is not a real emergency.

A commenter stated that the removal of the ''strict construction'' requirement would mean that the Department would eliminate altogether its review of actions taken by schools under the health and safety emergency exception. Another commenter stated that removing the requirement that this exception be strictly construed could erode the privacy rights of individuals. The commenter noted that because parents and eligible students cannot bring suit in court to enforce FERPA, schools face virtually no liability if they violate FERPA requirements.

A commenter asked that the Department clarify what is meant by an ''emergency'' and how severe a concern must be to qualify as an emergency.

*Discussion:* Section 99.36(c) eliminates the previous requirement that paragraphs (a) and (b) of this section be ''strictly construed'' and provides instead that, in making a determination whether a disclosure may be made under the ''health or safety emergency'' exception, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. The new provision states that if there is an articulable and significant threat to the health or safety of the student or other individuals, an educational agency or institution may disclose information to appropriate parties.

As we indicated in the preamble to the NPRM, we believe paragraph (c) provides greater flexibility and deference to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals. 73 FR 15574, 15589. In that regard, paragraph (c) provides that the Department will not substitute its judgment for that of the agency or institution if, based on the information available at the time of the determination there is a rational basis for the agency's or institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties.

We do not agree that removal of the ''strict construction'' standard weakens FERPA or erodes privacy protections. Rather, the changes appropriately balance the important interests of safety and privacy by providing school officials with the flexibility to act quickly and decisively when emergencies arise. Schools should not view FERPA's ''health or safety emergency'' exception as a blanket exception for routine disclosures of student information but as limited to disclosures necessary to protect the health or safety of a student or another individual in connection with an emergency.

After consideration of the comments, we have determined that educational agencies and institutions should be required to record the ''articulable and significant threat to the health or safety of a student or other individuals'' so that they can demonstrate (to parents, students, and to the Department) what circumstances led them to determine that a health or safety emergency existed and how they justified the disclosure. Currently, educational agencies and institutions are required under § 99.32(a) to record any disclosure of personally identifiable information from education records made under § 99.31(a)(10) and § 99.36. We are revising the recordation requirements in § 99.32(a)(5) to require an agency or institution to record the articulable and significant threat that formed the basis for the disclosure. The school must maintain this record with the education records of the student for as long as the student's education records are maintained (§ 99.32(a)(2)).

We do not specify in the regulations a time period in which an educational agency or institution must record a disclosure of personally identifiable information from education records under § 99.32(a). We interpret this to mean that an agency or institution must record a disclosure within a reasonable period of time after the disclosure has been made, and not just at the time, if any, when a parent or student asks to inspect the student's record of disclosures. We will treat the requirement to record the significant and articulable threat that forms the basis for a disclosure under the health or safety emergency exception no differently than the recordation of other disclosures. In determining whether a period of time for recordation is reasonable, we would examine the relevant facts surrounding the disclosure and anticipate that an agency or institution would address the health or safety emergency itself before turning to recordation of any disclosures and other administrative matters.

In response to concerns about the Department's enforcement of the provisions of § 99.36, the ''rational basis'' test does not eliminate the Department's responsibility for oversight and accountability. Actions that the Secretary may take in addressing violations of this and other

FERPA provisions are addressed in the analysis of comments under the section in this preamble entitled *Enforcement.* While parents and eligible students do not have a right to sue for violations of FERPA in a court of law, the statute provides that the Secretary may not make funds available to any agency or institution that has a policy or practice of violating parents' and students' rights under the statute with regard to consent to the disclosure of education records. As such, parents and eligible students may file a complaint with the Office if they believe that a school has violated their rights under FERPA and has disclosed education records under § 99.36 inconsistent with these regulations. In conducting an investigation, the Office will require that schools identify the underlying facts that demonstrated that there was an articulable and significant threat precipitating the disclosure under § 99.36.

In response to the comment about what would constitute an emergency, FERPA permits disclosure ''* * * in connection with an emergency * * * to protect the health or safety of the student or other persons.'' 20 U.S.C. 1232g(b)(1)(I). We note that the word ''protect'' generally means to keep from harm, attack, or injury. As such, the statutory text underscores that the educational agency or institution must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury. Moreover, to be ''in connection with an emergency'' means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.

*Changes:* We have amended the recordkeeping requirements in § 99.32(a)(5) to require educational agencies and institutions to record the articulable and significant threat that formed the basis for a disclosure under the health or safety emergency exception and the parties to whom the information was disclosed.

*(c) Articulable and Significant Threat*

*Comment:* One commenter stated that the word ''articulable'' in § 99.36(c) was confusing in reference to a school's determination that there is an ''articulable and significant threat to the health or safety of a student or other individuals.'' This commenter stated that school officials might interpret the provision to mean that there must be a verbal threat or that school officials must write down the exact wording of the threat.

*Discussion:* The requirement that there must be an ''articulable and significant threat'' does not mean that the threat must be verbal. It simply means that the institution must be able to articulate what the threat is under § 99.36 when it makes and records the disclosure.

In that regard, the words ''articulable and significant'' are adjectives modifying the key noun ''threat.'' As such, the focus is on the threat, with the question being whether the threat itself is articulable and significant. The word ''articulable'' is defined to mean ''capable of being articulated.'' *http://www.merriam-webster.com/dictionary/articulable.* This portion of the standard simply requires that a school official be able to express in words what leads the official to conclude that a student poses a threat. The other half of the standard is the word ''significant,'' which means ''of a noticeably or measurably large amount.'' *http://www.merriam-webster.com/dictionary/significant.* Taken together, the phrase ''articulable and significant threat'' means that if a school official can explain why, based on all the information then available, the official reasonably believes that a student poses a significant threat, such as a threat of substantial bodily harm, to any person, including the student, the school official may disclose education records to any person whose knowledge of information from those records will assist in protecting a person from that threat.

*Changes:* None.

*(d) Parties That May Receive Information Under § 99.36*

*Comment:* A commenter recommended that the Department adopt a more subjective standard regarding the persons to whom education records may be disclosed under § 99.36, suggesting that we remove the requirement that the disclosure must be to a person ''whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.'' Conversely, another commenter expressed concern that the Department was sending the wrong message to educational agencies and institutions with these changes to § 99.36. The commenter stated that the health or safety emergency exception must not be perceived to permit schools to routinely disclose education records to parents, police, or others.

A commenter asked who at a school may share personally identifiable information in a health or safety emergency, and specifically whether a school secretary would be allowed to tell parents that a student on campus made a threat to others.

A commenter stated that school districts, especially small or rural districts, may not have the expertise on staff to determine whether a situation constitutes an ''articulable and significant threat.'' The commenter said that personally identifiable information on students may need to be disclosed to outside law enforcement and mental health professionals so that they can help schools determine whether a real threat exists. The commenter recommended that the Department change the proposed regulations to allow school districts to involve outside experts in determining whether a health or safety emergency exists. Noting that the NPRM addressed the disclosure of education records to an eligible student's parents, the organization also asked for clarification regarding whether the parents of a potential perpetrator and the potential victim at the K–12 level could be told about a threat.

Several commenters stated that our proposed amendments did not go far enough and urged the Department to expand § 99.36 to permit a school to notify whomever the student has listed as his or her emergency contact. Another commenter requested that the Secretary, through these regulations, direct institutions to proactively notify parents of students who are in acute care situations, such as illness or accidents, if any institutional official is aware of the emergency.

*Discussion:* On its face, FERPA permits disclosure to ''appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.'' 20 U.S.C. 1232g(b)(1)(I). FERPA does not require that the person receiving the information be responsible for providing the protection. Rather, the focus of the statutory provision is on the information itself: The ''health or safety emergency'' exception permits the institution to disclose information from education records in order to gather information from any person who has information that would be necessary to

provide the requisite protection. Thus, for example, an educational institution that reasonably believes that a student poses a threat of bodily harm to any person may disclose information from education records to current or prior peers of the student or mental health professionals who can provide the institution with appropriate information to assist in protecting against the threat. Moreover, the institution may disclose records to persons such as law enforcement officials that it determines may be helpful in providing appropriate protection from the threat. An educational agency or institution may also generally disclose information under § 99.36 to a potential victim and the parents of a potential victim as ''other individuals'' whose health or safety may need to be protected.

Similarly, in order to obtain information that would inform its judgment on how to address the threat, the student's current institution may disclose information from education records to other schools or institutions which the student previously attended. In that regard, the same set of facts underlying the current institution's determination that an emergency existed would also permit former schools and institutions attended by the student to disclose personally identifiable information from education records to the student's current institution. That is, a former school would not need to make a separate determination regarding the existence of an articulable and significant threat to the health or safety of a student or others, and could rely instead on the determination made by the school currently attended by the student in making the disclosure.

In the discussion on page 15589 of the NPRM, we noted that the ''health or safety emergency'' exception does not permit a local school district to routinely share its student information database with the local police department. This example was meant to clarify that FERPA's health or safety provisions would not permit a school to disclose without consent education records to the local police department unless there was a health or safety emergency and the disclosure of the information was necessary to protect the health or safety of students or other individuals. This does not prevent schools from having working relationships with local police authorities and to use local police officers in maintaining the safety of their campuses.

In response to the comment about which school official should be permitted to disclose information under § 99.36, an educational agency or institution will need to make its own determination about which school officials may access a student's education records and disclose information to parents or other parties whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. Under § 99.31(a)(1), an educational agency or institution may disclose education records, without consent, to school officials whom the agency or institution has determined have legitimate educational interests in the information. It may be helpful for schools to have a policy in place concerning which school officials will have access to and the responsibility for disclosing information in emergency situations.

We understand that some educational agencies and institutions may need assistance in determining whether a health or safety emergency exists for purposes of complying with these regulations. The Department encourages schools to implement a threat assessment program, including the establishment of a threat assessment team that utilizes the expertise of representatives from law enforcement agencies in the community. Schools can respond to student behavior that raises concerns about a student's mental health and the safety of the student and others that is chronic or escalating by using a threat assessment team, and then make other disclosures under the health or safety emergency exception, as appropriate, when an ''articulable and significant threat'' exists. Information on establishing a threat assessment program and other helpful resources for emergency situations can be found on the Department's Web site: *http://www.ed.gov/admins/lead/safety/edpicks.jhtml?src=ln*.

An educational agency or institution may disclose education records to threat assessment team members who are not employees of the district or institution if they qualify as ''school officials'' with ''legitimate educational interests'' under § 99.31(a)(1)(i)(B), which is discussed elsewhere in this preamble. To receive the education records under the ''school officials'' exception, members of the threat assessment team must be under the direct control of the educational agency or institution with respect to the maintenance and use of personally identifiable information from education records. For example, a representative from the city police who serves on a school's threat assessment team generally could not redisclose to the city police personally identifiable information from a student's education records to which he or she was privy as part of the team. As noted above, however, the institution may disclose personally identifiable information from education records when and if the threat assessment team determines that a health or safety emergency exists under §§ 99.31(a)(10) and 99.36.

We believe that § 99.36 does not need to be expanded to permit a school to contact whomever an eligible student has listed as his or her emergency contact, nor is there authority to do so. FERPA does not preclude institutions from contacting other parties, including parents, in addition to the emergency contacts provided by the student, if the school determines these other parties are ''appropriate parties'' under this exception. (An eligible student may provide consent for the institution to notify certain individuals in case of an emergency, should an emergency occur.)

The regulations would not prevent an institution from having a policy of seeking prospective consent from eligible students for the disclosure of personally identifiable information or from having a policy for obtaining consent for disclosure on a case-by-case basis. However, FERPA does not require that a postsecondary institution disclose information to any party except to the eligible student, even if the student has consented to the disclosure. Thus, the Secretary does not have the statutory authority to require school officials to disclose information from a student's education records in compliance with a consent signed by the student or to otherwise require the institution to contact a family member.

*Changes:* None.

*(e) Treatment Records*

*Comment:* A commenter stated that while the amendments to § 99.36 provide needed clarification about when an educational agency or institution may disclose students' education records to avert tragedies like the one at Virginia Tech in April 2007, the NPRM did not provide clarity on the issue of information sharing between on-campus and off-campus health care providers. The commenter also noted that the Virginia Tech Review Panel recommended that Congress amend FERPA to explain how Federal privacy laws apply to medical records held for treatment purposes and that the NPRM did not provide that clarity.

Another commenter stated that if information about a student related to a health or safety emergency is part of the treatment records maintained by a university's health clinic, the treatment records should be treated like education

records so that they may be disclosed under the health and safety emergency exception. A commenter asked that the Department clarify that college health and mental health records are not education records under FERPA and must be treated like other health and mental health records in other settings.

*Discussion:* While we have carefully considered the comments concerning ''treatment records,'' the Secretary does not believe that it is necessary to amend the regulations to provide clarification on the handling of health and medical records. The Departments of Education and Health and Human Services have issued joint guidance that explains the relationship between FERPA and the HIPAA Privacy Rule. The guidance addresses this issue for these records at the elementary and secondary levels, as well as at the postsecondary level. The joint guidance, which is on the Web sites of both agencies, addresses many of the questions raised by school administrators, health care professionals, and others as to how these two laws apply to records maintained on students. It also addresses certain disclosures that are allowed without consent or authorization under both laws, especially those related to health and safety emergency situations. The guidance can be found here: *http://www.ed.gov/policy/gen/guid/fpco/index.html.*

As discussed elsewhere in this preamble with respect to § 99.31(a)(2), while ''treatment records'' are excluded from the definition of *education records* under FERPA, if an eligible student's treatment records are used for any purpose other than the student's treatment, or if a school wishes to disclose the treatment records for any purpose other than the student's treatment, they may only be disclosed as education records subject to FERPA requirements. Therefore, an eligible student's treatment records may be disclosed to any party, without consent, as long as the disclosure meets one of the exceptions to FERPA's general consent rule. *See* 34 CFR 99.31. One of the permitted disclosures under this section is the ''health or safety emergency'' exception.

*Changes:* None.

**Identification and Authentication of Identity (§ 99.31(c))**

*Comment:* Several commenters supported our proposal to require educational agencies and institutions to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records. One commenter supported the provision but advocated requiring the use of two-factor identification for information that could be used to commit identity theft and financial fraud. (Two-factor identification requires the use of two methods to authenticate identity, such as fingerprint identification in addition to a PIN.)

One commenter said that the identification and authentication requirement will help protect students affected by domestic violence who are living in substitute care situations. The commenter noted that many parents in situations involving domestic violence do not have photo identification (ID) and would be unable to meet a requirement to provide photo ID in order to access their children's education records.

One commenter strongly supported the proposed amendment and said it will be valuable in aiding the privacy and protection of homeless children. Another commenter questioned whether the identification and authentication requirement is necessary for staff of large school districts with centralized offices.

One commenter did not support the proposed regulation stating that it will be an additional burden on school districts. The commenter agreed with our statement in the preamble to the NPRM that the regulations should permit districts to determine their own methods of identification and authentication. However, the commenter stated that districts should not be required to have a sliding scale of control based on the level of potential threat and harm and that it would not be practical to give every person requesting access to education records a PIN or similar method of authentication. For example, the commenter stated that parents might be provided with a PIN, but districts would not want to provide a PIN to a reporter or other third party. The commenter requested additional examples of how districts may authenticate requests received by phone or e-mail. The commenter also stated that districts are sometimes concerned that government-issued photo IDs are fraudulent. As a result, the group requested that the Department adopt a ''safe harbor'' provision that requiring a government-issued photo ID for in-person requests is reasonable.

One commenter expressed concern that the proposed regulations were too restrictive and could be too complex to administer, and that this would cause an institution to choose not to transfer information even though it is permitted to do so. This commenter asked whether the Department will accept an institution's efforts at compliance as sufficient without examining the effectiveness of those efforts.

*Discussion:* The identification and authentication methods discussed in the NPRM (73 FR 15585) are intended as examples and should not be considered to be exhaustive. Because there are many methods available to provide secure authentication of identity, and as more methods continue to be developed, we do not think it appropriate at this time to require the use of two-factor authentication as requested by the commenter. Two-factor authentication can be expensive and cumbersome, and we believe that each educational agency or institution should decide whether to use its resources to implement a two-factor authentication method or another reasonable method to ensure that education records are disclosed only to an authorized party. The comment that a portion of the population will be disadvantaged if only photo ID is permitted to authenticate identity confirms that we need to retain flexibility in the regulations.

We do not agree that certain types of staff should be excepted from the identification and authentication requirement. All staff members, whether in a centralized office, or in separate administrative offices throughout a school system, must be cognizant of and responsible for complying with identification and authentication requirements.

Due to the differences in size, complexity, and access to technology, we believe that educational agencies and institutions should have the flexibility to decide the methods for identification and authentication of identity best suited to their own circumstances. The regulatory requirement is that agencies and institutions use ''reasonable'' methods to identify and authenticate identity when disclosing personally identifiable information from education records. ''Effectiveness'' is certainly one measure, but not necessarily a dispositive measure, of whether the methods used by an agency or institution are ''reasonable''. As we explained in the NPRM, an agency or institution is not required to eliminate all risk of unauthorized disclosure of education records but to reduce that risk to a level commensurate with the likely threat and potential harm. 73 FR 15585.

Further in that regard, we note that a ''sliding scale'' of protection is not mandated *per se.* However, it may not be ''reasonable'' to use the same

methods to protect students' SSNs or credit card numbers from unauthorized access and disclosure that are used to protect students' names and other directory information. We believe that a PIN process could be useful to provide access to education records for parties, such as parents, students, or school officials, but that it would not generally be useful for providing records to outside parties, such as reporters or parties seeking directory information. While the use of government-issued photo ID may be a reasonable method to authenticate identity, depending on the circumstances and the information being released, we are unable to conclude at this time that it is sufficiently secure to constitute a safe harbor for meeting this requirement.

*Changes:* None.

**Enforcement (§ 99.64)**

*(a) § 99.64(a)*

*Comment:* One commenter supported our proposal to amend § 99.64(a) to provide that a complaint submitted to FPCO does not have to allege that a violation or failure to comply with FERPA is based on a policy or practice of the agency or institution. The commenter stated that parents often are not aware of legal and technical criteria, and complaints filed by parents should not be subject to technical rules typically applied to filings made by attorneys.

Another commenter did not support the proposed amendment and asked several questions concerning the effects of the change. The commenter asked whether this provision means that the Office will investigate an allegation concerning a single and perhaps unintentional action not related to a policy or practice of the institution. The commenter also asked whether such an investigation could result in a finding of a violation if the finding is not based on an institution's policy or practice, and what enforcement actions can be taken in those circumstances. The commenter suggested that we modify the regulations to provide that, for complaints not alleging a violation based on an institution's policy or practice, the Office will undertake an investigation only when it determines that the allegations are of a sufficiently serious nature to warrant an inquiry.

*Discussion:* The changes we proposed in this section were intended to clarify that it is sufficient for a complaint to allege that an educational agency or institution violated a requirement of FERPA, and that a complaint does not need to allege that the violation is a result of a policy or practice of an agency or institution in order for the Office to investigate the complaint.

We explain in our discussion of the proposed changes to § 99.67 that the Secretary must find that an educational agency or institution has a policy or practice in violation of the non-disclosure requirements in FERPA before seeking to withhold, terminate, or recover program funds for that violation. However, FPCO is not limited to investigating complaints and finding that an educational agency or institution violated FERPA only if the allegations and findings are based on a policy or practice of an educational agency or institution.

Moreover, we do not agree that only conduct that involves a policy or practice or that affects multiple students is serious enough to warrant an investigation of the allegations. An educational agency or institution may not even be aware of FERPA violations committed by its own school officials until the Office investigates an allegation of misconduct. These kinds of investigations often serve the very important purpose of helping ensure that single instances of misconduct do not become policies or practices of an agency or institution. Further, while an agency or institution may not think that a single, unintentional violation of FERPA is significant, it is often considered serious by the parent or student affected by the violation.

Therefore, consistent with its current practice, the Office may find that an educational agency or institution violated FERPA without also finding that the violation was based on a policy or practice. Note that under §§ 99.66(c) and 99.67, the Office may not take any enforcement action against an agency or institution that has violated FERPA until it provides the agency or institution with a reasonable period of time to come into compliance voluntarily.

*Changes:* None.

*(b) § 99.64(b)*

*Comment:* A number of commenters supported proposed § 99.64(b), which provided that the Office may investigate a possible FERPA violation even if it has not received a timely complaint from a parent or student or if a valid complaint is subsequently withdrawn. Several of these commenters stated that it is appropriate and important to permit persons who are not parents or eligible students, but who have knowledge of potential FERPA violations, to provide this information to the Office for consideration of a possible investigation.

Several commenters objected to the proposed change. One commenter expressed serious concern that the regulations will greatly expand the authority of the Office to investigate any potential FERPA violation, even when no complaint is filed or when a complaint has been withdrawn. In particular, the commenter stated that an institution would not have an opportunity to review and respond to specific allegations when the investigation does not concern a particular complaint.

Another commenter asserted that the Department has not demonstrated why the proposed amendment is necessary. The commenter said that unless there is evidence of a widespread problem, the proposed change will increase university costs in responding to investigations without a corresponding benefit to the public.

Another commenter said that the Office should not investigate allegations that are not filed by a parent or eligible student because an institution must know the name of the filing party and the specific circumstances of the allegation in order to properly defend its actions. The commenter said that it should not be unnecessarily burdened by an investigation by the Office when it has already dealt with the situation to the satisfaction of the affected student, and that any student who is not satisfied with the institution's efforts retains the ability to file a complaint. The commenter also noted that a complaint filed by an affected student has more credibility than allegations made by other parties. The commenter was concerned that accepting information from other parties could result in filings from persons with grievances unrelated to FERPA, such as a disgruntled employee, or an applicant rejected for admission, or a parent or eligible student who missed a filing deadline of some kind.

One commenter said that the proposed change would result in an ineffective use of the limited resources of the Office because it would be investigating allegations that may not have a sufficient basis.

*Discussion:* We proposed the changes to § 99.64(b) to clarify that the Office may initiate its own investigation that an educational agency or institution has violated FERPA. (The amendment also clarifies that if the Office determines that an agency or institution violated FERPA, it may also determine whether the violation was based on a policy or practice of the agency or institution.)

Our experience has shown that sometimes FERPA violations are brought to the attention of the Office by

school officials, officials in other schools, or by the media. It is important that the Office have authority to investigate allegations of non-compliance in these situations. Consistent with its current practice, a notice of investigation issued by the Office will provide sufficient and specific factual information to permit the agency or institution to adequately investigate and respond to the allegations, whether or not the investigation is based on a complaint by a parent or eligible student.

We do not agree that allowing the Office to initiate its own investigations of possible FERPA violations will lead to abuses of the process by persons seeking to redress other grievances with an institution. The Office will continue to be responsible for evaluating the validity of the information and allegations that come to its attention by means other than a valid complaint and determining whether to initiate an investigation. We do not anticipate that the Office will initiate an investigation of every allegation or information it receives. We believe, however, that it is important that the Office be able to investigate any violation of FERPA for which it receives notice. As stated in the NPRM, 73 FR 15591, the Department is not seeking to expand the scope of FERPA investigations beyond the current practices of the Office.

*Changes:* None.

*(c) § 99.66*

*Comment:* We received one comment on the proposed change to § 99.66(c), which allows but does not require FPCO to make a finding that an educational agency or institution has a policy or practice in violation of a FERPA requirement when the Office issues a notice of findings in § 99.66(b). The commenter stated that its review of FERPA and the Supreme Court decision in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002) (*Gonzaga*), indicates that the Office may not issue a finding of a violation of FERPA and require corrective action or take any enforcement action without also finding that the violation constituted a policy or practice of the agency or institution.

*Discussion:* We explain in the discussion of the changes to § 99.67 that there are circumstances in which the Office would be required to find that an educational agency or institution has a policy or practice in violation of a FERPA requirement before taking certain enforcement actions, such as an action to terminate funding for a violation of the non-disclosure requirements, 20 U.S.C. 1232g(b)(1) and (b)(2) and 34 CFR 99.30. However, the Office is not required to find a policy or practice in violation of FERPA before issuing a notice of findings or taking other kinds of enforcement actions.

*Changes:* None.

*(d) § 99.67*

*Comment:* One commenter supported the clarification in proposed § 99.67 that the Office may not seek to withhold payments, terminate eligibility for funding, or take certain other enforcement actions unless it determines that the educational agency or institution has a policy or practice that violates FERPA. Another commenter expressed general support for the proposed change, including the clarification that the Secretary may take any legally available enforcement action, in addition to those specifically listed in the current regulations. The commenter expressed concern, however, that the penalties are not severe enough to effectively discourage unintentional or willful violations by third parties, particularly in areas of research and data sharing with outside parties.

Another commenter expressed concern that the proposed amendment would unnecessarily broaden the enforcement options available to the Secretary. The commenter stated that educational agencies and institutions will not be able to assess the risks and consequences associated with their actions without a limitation on the range of enforcement actions available to the Department when a violation of FERPA is found.

One commenter asked the Department to clarify that all methods of enforcing FERPA that are contained in the current regulations will be retained in the final regulations. The commenter said that the proposed regulations in the NPRM (73 FR 15602) appear to remove the Secretary's ability to terminate funding.

*Discussion:* We explained in the preamble to the NPRM (73 FR 15592) that there were two reasons for the proposed changes to § 99.67(a). One was the need to clarify that the Secretary may take any enforcement action that is legally available and is not limited to those specified under the current regulations, *i.e.*, withholding further payments under any applicable program; issuing a complaint to compel compliance through a cease-and-desist order; or terminating eligibility to receive funding under any applicable program. Other actions the Secretary may take to enforce FERPA include entering into a compliance agreement under 20 U.S.C. 1234f and seeking an injunction.

This change to § 99.67(a) does not broaden the Secretary's enforcement options, as suggested by one commenter. The General Education Provisions Act (GEPA) provides the Secretary with the authority to take certain enforcement actions to address violations of statutory and regulatory requirements, including general authority to ''take any other action authorized by law with respect to the recipient.'' 20 U.S.C. 1234c(a)(4). The change to § 99.67(a) simply includes, for purposes of clarity, the Secretary's existing authority under GEPA to take any legally available action to enforce FERPA requirements. (We note that before taking enforcement action the Office must determine that the educational agency or institution is failing to comply substantially with a FERPA requirement and provide it with a reasonable period of time to comply voluntarily. See 20 U.S.C. 1234c(a); 20 U.S.C. 1232g(f); and 34 CFR 99.66(c).)

We also proposed to amend § 99.67(a) to clarify that the Office may issue a notice of violation for failure to comply with specific FERPA requirements and require corrective actions but may not seek to terminate eligibility for funding, withhold payments, or take other enforcement actions unless the Office determined that an agency or institution has a policy or practice in violation of FERPA requirements (73 FR 15592). Upon further review, we have decided not to adopt this particular change because we believe it limits the Secretary's enforcement authority in a manner that is not legally required.

In support of its holding in *Gonzaga* that FERPA's non-disclosure provisions do not create rights that are enforceable under 42 U.S.C. 1983, the Court observed that FERPA provides that no funds shall be made available to an educational agency or institution that has a policy or practice of disclosing education records in violation of FERPA requirements. 536 U.S. at 288; see also 20 U.S.C. 1232g(b)(1) and (b)(2); 34 CFR 99.30. As such, the statute and Gonzaga decision suggest that with respect to violations of FERPA's non-disclosure requirements, the Secretary must find that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking actions to terminate, withhold, or recover funds for those violations. However, there is no requirement under the statute (or the *Gonzaga* decision) for the Secretary to find a policy or practice in violation of FERPA requirements on the part of an educational agency or institution before taking other kinds of enforcement actions for violations of the non-disclosure requirements, such as

seeking an injunction or a cease-and-desist order. We note also that the *Gonzaga* opinion does not address violations of other FERPA requirements, such as parents' right to inspect and review their children's education records and the requirement that educational agencies and institutions afford parents an opportunity for a hearing to challenge the content of a student's education records under certain circumstances, which do not contain the same ''policy or practice'' language as the non-disclosure requirements. Because we did not address enforcement of these other FERPA requirements in the NPRM, we have decided not to address in the final regulations limitations or pre-conditions that apply solely to actions to terminate, withhold, or recover program funds for violations of the non-disclosure requirements.

In response to the comment that the available penalties are not severe enough to discourage FERPA violations, we note that the Secretary has authority to terminate, withhold, and recover program funds and take other enforcement actions in accordance with part E of GEPA. The Secretary may not increase penalties beyond those authorized under FERPA and GEPA. Further, the regulations do not remove the Secretary's authority to terminate eligibility for program funding or any other enforcement authority. The changes noted by the commenter who was concerned that the proposed regulations removed the Secretary's authority to terminate funding were corrections to punctuation and formatting only, not substantive changes.

*Changes:* We have removed the language in § 99.67(a) that requires the Office to determine that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking any enforcement action.

**Department Recommendations for Safeguarding Education Records**

*Comment:* We received a few comments on the recommendations for safeguarding education records included in the NPRM. One commenter expressed concern that schools and school districts should exercise enhanced security for the records of children receiving special education services. According to the commenter, these children often have a large number of records and may receive services from a variety of providers, which can add to the challenge of ensuring that appropriate privacy controls are used.

One commenter supported the safeguarding recommendations and suggested that we revise the recommendations to list non-Federal government sources providing guidance on methods for safeguarding education records. Another commenter supported the recommendations, but suggested that the regulations should require that a parent or eligible student receive notification of an unauthorized release or theft of information.

*Discussion:* The comments on the records of students who receive special education services illustrate the necessity for educational agencies and institutions to ensure that adequate controls are in place so that the education records of all students are handled in accordance with FERPA's privacy protections. The safeguarding recommendations that we provided in the NPRM, and are repeated in these final regulations, are intended to provide agencies and institutions additional information and resources to assist them in meeting this responsibility. In addition, educational agencies and institutions should refer to the protections required under § 300.623 of the confidentiality of information requirements in Part B of the IDEA, 34 CFR 300.623 (Safeguards).

We acknowledge that there are many sources available concerning information security technology and processes. The Department does not wish to appear to endorse the information or product of any company or organization; therefore, we have included only Federal government sources in this notice.

The Department does not have the authority under FERPA to require that agencies or institutions issue a direct notice to a parent or student upon an unauthorized disclosure of education records. FERPA only requires that the agency or institution record the disclosure so that a parent or student will become aware of the disclosure during an inspection of the student's education record.

*Changes:* None.

We are republishing here, for the administrative convenience of educational agencies and institutions and other parties, the *Department Recommendations for Safeguarding Education Records* that were published in the preamble to the NPRM (73 FR 15598–15599):

The Department recognizes that agencies and institutions face significant challenges in safeguarding educational records. We are providing the following information and recommendations to assist agencies and institutions in meeting these challenges.

As noted elsewhere in this document, FERPA provides that no funds administered by the Secretary may be made available to any educational agency or institution that has a policy or practice of releasing, permitting the release of, or providing access to personally identifiable information from education records without the prior written consent of a parent or eligible student except in accordance with specified exceptions. In light of these requirements, the Secretary encourages educational agencies and institutions to utilize appropriate methods to protect education records, especially in electronic data systems.

In recent years the following incidents have come to the Department's attention:

- Students' grades or financial information, including SSNs, have been posted on publicly available Web servers;
- Laptops and other portable devices containing similar information from education records have been lost or stolen;
- Education records, or devices that maintain education records, have not been retrieved from school officials upon termination of their employment or service as a contractor, consultant, or volunteer;
- Computer systems at colleges and universities have become favored targets because they hold many of the same records as banks but are much easier to access. See ''College Door Ajar for Online Criminals'' (May 2006), available at *http://www.uh.edu/ednews/2006/latimes/200605/20060530hackers.html.* and July 10, 2006, Viewpoint in Business Week/Online available at *http://www.businessweek.com/technology/content/jul2006/tc20060710_558020.htm*;
- Nearly 65 percent of postsecondary educational institutions identified theft of personal information (SSNs, credit/debit/ATM card, account or PIN numbers, etc.) as a high risk area. See Table 7, Perceived Risks at *http://www.educause.edu/ir/library/pdf/ecar_so/ers/ers0606/Ekf0606.pdf*; and
- In December 2006, a large postsecondary institution alerted some 800,000 students and others that the campus computer system containing their names, addresses, and SSNs had been compromised.

The Department's Office of Inspector General (OIG) noted in Final Inspection Alert Memorandum dated February 3, 2006, that the Privacy Rights Clearinghouse reported that between February 15, 2005, and November 19, 2005, there were 93 documented computer breaches of electronic files

involving personal information from education records such as SSNs, credit card information, and dates of birth. According to the reported data, 45 percent of these incidents have occurred at colleges and universities nationwide. OIG expressed concern that student information may be compromised due to a failure to implement or administer proper security controls for information systems at postsecondary institutions.

The Department recognizes that no system for maintaining and transmitting education records, whether in paper or electronic form, can be guaranteed safe from every hacker and thief, technological failure, violation of administrative rules, and other causes of unauthorized access and disclosure. Although FERPA does not dictate requirements for safeguarding education records, the Department encourages the holders of personally identifiable information to consider actions that mitigate the risk and are reasonably calculated to protect such information. Of course, an educational agency or institution may use any method, combination of methods, or technologies it determines to be reasonable, taking into consideration the size, complexity, and resources available to the institution; the context of the information; the type of information to be protected (such as social security numbers or directory information); and methods used by other institutions in similar circumstances. The greater the harm that would result from unauthorized access or disclosure and the greater the likelihood that unauthorized access or disclosure will be attempted, the more protections an agency or institution should consider using to ensure that its methods are reasonable.

One resource for administrators of electronic data systems is ''The National Institute of Standards and Technology (NIST) 800–100, Information Security Handbook: A Guide for Managers'' (October 2006). *See http://csrc.nist.gov/publications/nistpubs/800-100/SP800-100-Mar07-2007.pdf.* A second resource is NIST 800–53, Information Security, which catalogs information security controls. *See http://csrc.nist.gov/publications/nistpubs/800-53-Rev1/800-53-rev1-final-clean-sz.pdf.* Similarly, a May 22, 2007, memorandum to heads of Federal agencies from the Office of Management and Budget requires executive departments and agencies to ensure that proper safeguards are in place to protect personally identifiable information that they maintain, eliminate the unnecessary use of SSNs, and develop and implement a ''breach notification policy.'' This memorandum, although directed towards Federal agencies, may also serve as a resource for educational agencies and institutions. *See http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf.*

Finally, if an educational agency or institution has experienced a theft of files or computer equipment, hacking or other intrusion, software or hardware malfunction, inadvertent release of data to Internet sites, or other unauthorized release or disclosure of education records, the Department suggests consideration of one or more of the following steps:

- Report the incident to law enforcement authorities.
- Determine exactly what information was compromised, *i.e.*, names, addresses, SSNs, ID numbers, credit card numbers, grades, and the like.
- Take steps immediately to retrieve data and prevent any further disclosures.
- Identify all affected records and students.
- Determine how the incident occurred, including which school officials had control of and responsibility for the information that was compromised.
- Determine whether institutional policies and procedures were breached, including organizational requirements governing access (user names, passwords, PINS, etc.); storage; transmission; and destruction of information from education records.
- Determine whether the incident occurred because of a lack of monitoring and oversight.
- Conduct a risk assessment and identify appropriate physical, technological, and administrative measures to prevent similar incidents in the future.
- Notify students that the Department's Office of Inspector General maintains a Web site describing steps students may take if they suspect they are a victim of identity theft at *http://www.ed.gov/about/offices/list/oig/misused/idtheft.html;* and *http://www.ed.gov/about/offices/list/oig/misused/victim.html.*

FERPA does not require an educational agency or institution to notify students that information from their education records was stolen or otherwise subject to an unauthorized release, although it does require the agency or institution to maintain a record of each disclosure. 34 CFR 99.32(a)(1). (However, student notification may be required in these circumstances for postsecondary institutions under the Federal Trade Commission's Standards for Insuring the Security, Confidentiality, Integrity and Protection of Customer Records and Information (''Safeguards Rule'') in 16 CFR part 314.) In any case, direct student notification may be advisable if the compromised data includes student SSNs and other identifying information that could lead to identity theft.

**Executive Order 12866**

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

*1. Summary of Public Comments*

The Department did not receive any comments on the analysis of the costs and benefits in the NPRM. However, since the publication of the NPRM, we have identified several information collection requirements that were not identified in the NPRM. We have added discussions of the costs and benefits of two information collection requirements in the following Summary of Costs and Benefits.

*2. Summary of Costs and Benefits*

Following is an analysis of the costs and benefits of the most significant changes to the FERPA regulations. In conducting this analysis, the Department examined the extent to which the regulations add to or reduce the costs of educational agencies and institutions and, where appropriate, State educational agencies (SEAs) and other State and local educational authorities in relation to their costs of complying with the FERPA regulations prior to these changes.

This analysis is based on data from the most recent *Digest of Education Statistics* (2007) published by the National Center for Education Statistics (NCES), which projects total enrollment for Fall 2008 of 49,812,000 students in public elementary and secondary schools and 18,264,000 students in postsecondary institutions; and a total of 97,382 public K–12 schools; 14,166 school districts; and 6,463 postsecondary institutions. (Excluded are data from private institutions that do not receive Federal funding from the Department and, therefore, are not subject to FERPA.) Based on this analysis, the Secretary has concluded that the changes in these regulations will not impose significant net costs on educational agencies and institutions. Analyses of specific provisions follow.

**Alumni Records**

The regulations in § 99.3 clarify the current exclusion from the definition of *education records* for records that only contain information about an individual after he or she is no longer a student, which is intended to cover records of alumni and similar activities. Some institutions have applied this exclusion to records that are created after a student has ceased attending the institution but that are directly related to his or her attendance as a student, such as investigatory reports and settlement agreements about incidents and injuries that occurred during the student's enrollment. The amendment will clarify that this provision applies only to records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

We believe that most of the more than 103,845 K–12 schools and postsecondary institutions subject to FERPA already adhere to this revised interpretation in the regulations and that for those that do not, the number of records affected is likely to be very small. Assuming that each year one half of one percent of the 68.1 million students enrolled in these institutions have one record each affected by the change, in the year following issuance of the regulations institutions will be required to try to obtain written consent before releasing 350,380 records that they would otherwise release without consent. We estimate that for the first year contacting the affected parent or student to seek and process written consent for these disclosures will take approximately one-half hour per record at an average cost of $32.67 per hour for a total cost of $5,562,068. (Compensation for administrative staff time is based on published estimates for 2005 from the Bureau of Labor Statistics' National Compensation Survey of $23.50 per hour plus an average 39 percent benefit load for Level 8 administrators in education and related fields.)

In terms of benefits, the change will protect the privacy of parents and students by clarifying the intent of this regulatory exclusion and help prevent the unlawful disclosure of these records. It will also provide greater legal certainty and therefore some cost savings for those agencies and institutions that may be required to litigate this issue in connection with a request under a State open records act or other legal proceeding. For these reasons, we believe that the overall benefits outweigh the potential costs of this change.

**Exclusion of SSNs and ID Numbers From Directory Information**

The proposed regulations in § 99.3 clarified that a student's SSN or student ID number is personally identifiable information that may not be disclosed as directory information under FERPA. The final regulations allow an educational agency or institution to designate and disclose student ID numbers as directory information if the number cannot be used by itself to gain access to education records, *i.e.* , it is used like a name. SSNs may never be disclosed as directory information.

The principal effect of this change is that educational agencies and institutions may not post grades by the student's SSN or non-directory student ID number and may not include these identifiers with directory information they disclose about a student, such as a student's name, school, and grade level or class, on rosters, or on sign-in sheets that are made available to students and others. (Educational agencies and institutions may continue to include SSNs and non-directory student ID numbers on class rosters and schedules that are disclosed only to teachers and other school officials who have legitimate educational interests in this information.)

A class roster or sign-in sheet that contains or requires students to affix their SSN or non-directory student ID number makes that information available to every individual who signs in or sees the document and increases the risk that the information may be improperly used for purposes such as identity theft or to find out a student's grades or other confidential educational information. In regard to posting grades, an individual who knows which classes a particular student attends may be able to ascertain that student's SSN or non-directory student ID number by comparing class lists for repeat numbers. Because SSNs are not randomly generated, it may be possible to identify a student by State of origin based on the first three (area) digits of the number, or by date of issuance based on the two middle digits.

The Department does not have any actual data on how many class or test grades are posted by SSN or non-directory student ID number at this time, but we believe that the practice is rare or non-existent below the secondary level. Although the practice was once widespread, particularly at the postsecondary level, anecdotal evidence suggests that as a result of consistent training and informal guidance by the Department over the past several years, together with the increased attention States and privacy advocates have given to the use of SSNs, many institutions now either require teachers to use a code known only to the teacher and the student or prohibit the posting of grades entirely.

The most recent figures available from the Bureau of Labor Statistics (2007) indicate that there are approximately 2.7 million secondary and postsecondary teachers in the United States. As noted above, we assume that most of these teachers either do not post grades at all or already use a code known only to the teacher or student. We assume further that additional costs to deliver grades personally in the classroom or through electronic mail, instead of posting, will be minimal. For purposes of this analysis, we estimate that no more than five percent of 2.7 million, or 135,000 teachers, continue to post grades by SSN or non-directory student ID number and thus will need to convert to a code, which will require them to spend an average of one-half hour each semester establishing and managing grading codes for students. Since we do not know how many teachers at either education level will continue to post grades, and wages for postsecondary teachers are higher than secondary teacher wages, we use postsecondary teacher wages to ensure that the estimate encompasses the upper limit of possible costs. Using the Bureau of Labor Statistics' published estimate of average hourly wages of $42.98 for teachers at postsecondary institutions and an average 39 percent load for benefits, we estimate an average cost of $59.74 per teacher per year, for a total of $8,064,900. Parents and students should incur no costs except for the time they might have to spend to

contact the school official if they forget the student's grading code.

This change will benefit parents and students and educational agencies and institutions by reducing the risk of identity theft associated with posting grades by SSN, and the risk of disclosing grades and other confidential educational information caused by posting grades by a non-directory student ID number. It is difficult to quantify the value of reducing the risk of identity theft. According to the Federal Trade Commission, however, for the past few years over one-third of complaints filed with that agency have been for identity theft. According to the Better Business Bureau, identity theft costs businesses nearly $57 billion in 2006, while victims spent an average of 40 hours resolving identity theft issues. It is even more difficult to measure the benefits of enhanced privacy protections for student grades and other confidential educational information from education records because the value individuals place on the privacy of this information varies considerably and because we are unable to determine how often it happens. Therefore, we have no basis to estimate the value of these enhanced privacy protections in relation to the expected costs to implement the changes.

**Prohibit Use of SSN To Confirm Directory Information**

The regulations will prevent an educational agency or institution (or a contractor providing services for an agency or institution) from using a student's SSN (or other non-directory information) to identify the student when releasing or confirming directory information. This occurs, for example, when a prospective employer or insurance company telephones an institution or submits an inquiry through the institution's Web site to find out whether a particular individual is enrolled in or has graduated from the institution. While this provision will apply to educational agencies and institutions at all grade levels, we believe that it will affect mainly postsecondary institutions because K–12 agencies and institutions typically do not provide enrollment and degree verification services.

A survey conducted in March 2002 by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) showed that nearly half of postsecondary institutions used SSNs as the primary means to track students in academic databases. Since then, use of SSNs as a student identifier has decreased significantly in response to public concern about identity theft. While postsecondary institutions may continue to collect students' SSNs for financial aid and tax reporting purposes, many have ceased using the SSN as a student identifier either voluntarily or in compliance with State laws. Also, over the past several years the Department has provided training on this issue and published on the Office Web site a 2004 letter finding a postsecondary institution in violation of FERPA when its agent used a student's SSN, without consent, to search its database to verify that the student had received a degree. *www.ed.gov/policy/gen/guid/fpco/ferpa/library/auburnuniv.html.* Given these circumstances, we estimate that possibly one-quarter of the nearly 6,463 postsecondary institutions in the United States, or 1,616 institutions, may ask a requester to provide the student's SSN (or non-directory student ID number) in order to locate the record and respond to an inquiry for directory information.

Under the regulations an educational agency or institution that identifies students by SSN (or non-directory student ID number) when releasing directory information will either have to ensure that the student has provided written consent to disclose the number to the requester, or rely solely on a student's name and other properly designated directory information to identify the student, such as address, date of birth, dates of enrollment, year of graduation, major field of study, degree received, etc. Costs to an institution of ensuring that students have provided written consent for these disclosures, for example by requiring the requester to fax copies of each written consent to the institution or its contractor, or making arrangements to receive them electronically, could be substantial for large institutions and organizations that utilize electronic recordkeeping systems. Institutions may choose instead to conduct these verifications without using SSNs or non-directory student IDs, which may make it more difficult to ensure that the correct student has been identified because of the known problems in matching records without the use of a universal identifier. Increased institutional costs either to verify that the student has provided consent or to conduct a search without use of SSNs or non-directory student ID numbers should be less for smaller institutions, where the chances of duplicate records are decreased. Parents and students may incur additional costs if an employer, insurance company, or other requester is unable to verify enrollment or graduation based solely on directory information, and written consent for disclosure of the student's SSN or non-directory student ID number is required. Due to the difficulty in ascertaining actual costs associated with these transactions, we have no basis to estimate costs that educational agencies and institutions and parents and students will incur as a result of this change.

The enhanced privacy protections of this amendment will benefit students and parents by reducing the risk that third parties will disclose a student's SSN without consent and possibly confirm a questionable number for purposes of identity theft. Similarly, preventing institutions from implicitly confirming a questionable non-directory student ID number will help prevent unauthorized individuals from obtaining confidential information from education records. In evaluating the benefits or value of this change, we note that this provision does not affect any activity that an educational agency or institution is permitted to perform under FERPA or other Federal law, such as using SSNs to identify students and confirm their enrollment status for student loan purposes, which is permitted without consent under the financial aid exception in § 99.31.

**User ID for Electronic Communications**

The regulations will allow an educational agency or institution to disclose as directory information a student's ID number, user ID or other electronic identifier so long as the identifier functions like a name; that is, it cannot be used without a PIN, password, or some other authentication factor to gain access to education records. This change will impose no costs and will provide benefits in the form of regulatory relief allowing agencies and institutions to use directory services in electronic communications systems without incurring the administrative costs associated with obtaining student consent for these disclosures.

Costs related to honoring a student's decision to opt out of these disclosures will be minimal because we assume that only a small number of students will elect not to participate in electronic communications at their school. Applying this change to records of both K–12 and postsecondary students and assuming that one-tenth of one percent of parents and eligible students will opt out of these disclosures, we estimate that institutions will have to flag the records of approximately 68,000 students for opt-out purposes. We lack sufficient data on costs institutions currently incur to flag records for

directory information opt-outs for other purposes, so we are unable to estimate the administrative and information technology costs institutions will incur to process these new directory information opt-outs resulting from this change.

**Student Anonymity in the Classroom**

The final regulations will ensure that parents and students do not use the right to opt out of directory information disclosures to remain anonymous in the classroom, by clarifying that opting out does not prevent disclosure of the student's name, institutional e-mail address, or electronic identifier in the student's physical or electronic classroom. We estimate that this change will result in a small net benefit to educational agencies and institutions because they will have greater legal certainty about the element of classroom administration, and it will reduce the institutional costs of responding to complaints from students and parents about the release of this information.

**Disclosing Education Records to New School and to Party Identified as Source Record**

The final regulations in § 99.31(a)(2) will allow an educational agency or institution to disclose education records, or personally identifiable information from education records, to a student's new school even after the student is already attending the new school so long as the disclosure relates to the student's enrollment in the new school. This change will provide regulatory relief by reducing legal uncertainty about how long a school may continue to send records or information to a student's new school, without consent, under the ''seeks or intends to enroll'' exception.

The amendment to the definition of *disclosure* in § 99.3 will allow a school that has concerns about the validity of a transcript, letter of recommendation, or other record to return these documents (or personally identifiable information from these documents) to the student's previous school or other party identified as the source of the record in order to resolve questions about their validity. Combined with the change to § 99.31(a)(2), discussed earlier in this analysis, this change will also allow the student's previous school to continue to send education records, or clarification about education records, to the student's new school in response to questions about the validity or meaning of records sent previously by that party. We are unable to determine how much it will cost educational agencies and institutions to return potentially fraudulent documents to the party identified as the sender because we do not have any basis for estimating how often this occurs. However, we believe that these changes will provide significant regulatory relief to educational agencies and institutions by helping to reduce transcript and other educational fraud based on falsified records.

**Outsourcing**

The regulations in § 99.31(a)(1)(i) will allow educational agencies and institutions to disclose education records, or personally identifiable information from education records, without consent to contractors, volunteers, and other non-employees performing institutional services and functions as school officials with legitimate educational interests. An educational agency or institution that uses non-employees to perform institutional service and functions will have to amend its annual notification of FERPA rights to include these parties as school officials with legitimate educational interests.

This change will provide regulatory relief by permitting, and clarifying the conditions for, non-consensual disclosure of education records. Our experience suggests that virtually all of the more than 103,000 schools subject to FERPA will take advantage of this provision. We have no actual data on how many school districts publish annual FERPA notifications for the 97,382 K–12 public schools included in this total and, therefore, how many entities will be affected by this requirement. However, because educational agencies and institutions were already required under previous regulations to publish a FERPA notification annually, we believe that costs to include this new information will be minimal.

**Access Control and Tracking**

The regulations in § 99.31(a)(1)(ii) will require an educational agency or institution to use reasonable methods to ensure that teachers and other school officials obtain access to only those education records in which they have legitimate educational interests. This requirement will apply to records in any format, including computerized or electronic records and paper, film, and other hard copy records. An educational agency or institution that chooses not to restrict access to education records with physical or technological controls, such as locked cabinets and role-based software security, must ensure that its administrative policy for controlling access is effective and that it remains in compliance with the legitimate educational interest requirement.

Administrative experience has shown that schools that allow teachers and other school officials to have unrestricted access to education records tend to have more problems with unauthorized disclosures, such as school officials obtaining access to education records for personal rather than professional reasons. Preventing unrestricted access to education records by teachers and other school officials will benefit parents and students by helping to ensure that education records are used only for legitimate educational purposes. It will also help ensure that education records are not accessed or disclosed inadvertently.

Information gathered by the Director of the Office at numerous FERPA training sessions and seminars, along with recent discussions with software vendors and educational organizations, indicates that the vast majority of mid- and large-size school districts and postsecondary institutions currently use commercial software for student information systems. These systems generally include role-based security features that allow administrators to control access to specific records, screens, or fields according to a school official's duties and responsibilities. These systems also typically contain transactional logging features that document or track a user's actual access to particular records, which will help ensure that an agency's or institution's access control methods are effective. Educational agencies and institutions that already have these systems will incur no additional costs to comply with the regulations.

For purposes of this analysis we excluded from a total of 14,166 school districts and 6,463 postsecondary institutions those with more than 1,000 students, for a total of 6,887 small K–12 districts and 3,906 small postsecondary institutions that may not have software with access control security features. The discussions that the Director of the Office has had with numerous SEAs and local districts suggest that the vast majority of these small districts and institutions do not make education records available to school officials electronically or by computer but instead use some system of administrative and physical controls.

We estimate for this analysis that 15 percent, or 1,619, of these small districts and institutions use home-built computerized or electronic systems that may not have the role-based security features of commercial software. The most recent published estimate we have for software costs comes from the final

Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule) published by the Department of Health and Human Services (HHS) on December 28, 2000, which estimated that the initial per-hospital cost of software upgrades to track the disclosure of medical records would be $35,000 (65 FR 82768). We assume that costs will be comparable for education records, and, as discussed above, software that tracks disclosure history can also be used to control or restrict access to electronic records. Based on these assumptions, if 1,619 small K–12 districts and postsecondary institutions decide to purchase student information software rather than rely on administrative policies to comply with the regulations, they will incur estimated costs of $56,665,000. We estimate that the remaining 9,174 small districts and institutions will not purchase new software because they do not make education records available electronically and rely instead on less costly administrative and physical methods to control access to records by school officials. Those that provide school officials with open access to hard copy education records may incur new costs to track actual disclosures to help ensure that they remain in compliance with legitimate educational interests requirements. We assume that these districts and institutions may devote some additional administrative staff time to procedures such as keeping logs of school officials who access records. However, no reliable estimates exist for the average number of teachers and other school officials who access education records or the number of times access is sought, so we are unable to estimate the cost of restricting or tracking actual disclosures of hard copy education records to school officials.

**Education Research**

The regulations in § 99.31(a)(6)(ii)(C) require an educational agency or institution to enter into a written agreement before disclosing personally identifiable information from education records, without consent, to organizations conducting studies for, or on behalf of, the educational agency or institution to: (a) Develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. The written agreement must specify the purpose or purposes, scope, and duration of the study or studies and the information to be disclosed, require the organization to conduct the study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests, require the destruction or return of the information to the educational agency or institution when the study is completed, and specify the time period for destruction or return of the information. We believe that the additional cost of entering into written agreements to comply with this change is unlikely to be significant because most educational agencies and institutions already specify the terms under which personally identifiable information can be used when it is disclosed to organizations for these types of studies. Although this change will create an additional information collection requirement, we believe the benefits of the written agreement outweigh the costs, because it will ensure better compliance with FERPA and provide clarity for both researchers and educational agencies and institutions about the restrictions and use of personally identifiable information disclosed under § 99.31(a)(6) for studies.

**Identification and Authentication of Identity**

The regulations in § 99.31(c) require educational agencies and institutions to use reasonable methods to identify and authenticate the identity of parents, students, school officials and other parties to whom the agency or institution discloses personally identifiable information from education records. The use of widely available information to authenticate identity, such as the recipient's name, date of birth, SSN or student ID number, is not considered reasonable under the regulations.

The regulations will impose no new costs for educational agencies and institutions that disclose hard-copy records through the U.S. postal service or private delivery services with use of the recipient's name and last known official address.

We were unable to find reliable data that would allow us to estimate the additional administrative time that educational agencies and institutions will spend checking photo ID against school records or using other reasonable methods, as appropriate, to identify and authenticate the identity of students, parents, and other parties to whom the agency or institution discloses education records in person.

Authentication of identity for electronic or telephonic access to education records involves a wider array of security options because of continuing advances in technologies, but is not necessarily more costly than authentication of identity for hard-copy records. We assume that educational agencies and institutions that require users to enter a secret password or PIN to authenticate identity will deliver the password or PIN through the U.S. postal service or in person. We estimate that no new costs will be associated with this process because agencies and institutions already have direct contact with parents, eligible students, and school officials for a variety of other purposes and will use these opportunities to deliver a secret authentication factor.

As noted in the preamble to the NPRM, 73 FR 15585, single-factor authentication of identity, such as a standard form user name combined with a secret password or PIN, may not provide reasonable protection for access to all types of education records or under all circumstances. We lack a basis for estimating costs of authenticating identity when educational agencies and institutions allow authorized users to access sensitive personal or financial information in electronic records for which single-factor authentication would not be reasonable.

**Redisclosure and Recordkeeping**

The regulations allow the officials and agencies listed in § 99.31(a)(3) (the U.S. Comptroller General, the U.S. Attorney General, the Secretary, and State and local educational authorities) to redisclose education records, or personally identifiable information from education records, without consent under the same conditions that apply currently to other recipients of education records under § 99.33(b). This change provides substantial regulatory relief to these parties by allowing them to redisclose information on behalf of educational agencies and institutions under any provision in § 99.31(a), which allows disclosure of education records without consent. For example, States will be able to consolidate K–16 education records under the SEA or State higher educational authority without having to obtain written consent under § 99.30. Parties that currently request access to records from individual school districts and postsecondary institutions will in many instances be able to obtain the same information in a more cost-effective manner from the appropriate State educational authority or the Department.

In accordance with the current regulations in § 99.32(b), an educational agency or institution must record any redisclosure of education records made on its behalf under § 99.33(b), including the names of the additional parties to

which the receiving party may redisclose the information and their legitimate interests or basis for the disclosure without consent under § 99.31 in obtaining the information. The regulations require SEAs and other State educational authorities (such as higher education authorities), the Secretary, and other officials or agencies listed in § 99.31(a)(3) that make further disclosures on behalf of an educational agency or institution to maintain the record of redisclosure required under § 99.32(b) if the educational agency or institution has not recorded the redisclosure or if the information was obtained from another State or Federal official or agency listed in § 99.31(a)(3). The regulations also require the State or Federal official or agency listed in § 99.31(a)(3) to provide a copy of its record of redisclosures to the educational agency or institution upon request. In addition, an educational agency or institution must maintain with each student's record of disclosures the names of State and local educational authorities and Federal officials and agencies that may make further disclosures from the student's records without consent under § 99.33(b) and must obtain a copy of the record of redisclosure, if any, maintained by the State or Federal official that redisclosed information on behalf of the agency or institution.

State educational authorities and Federal officials listed in § 99.31(a)(3) will incur new administrative costs if they maintain the record of redisclosure for the educational agency or institution on whose behalf they redisclose education records under the regulations. We estimate that two educational authorities or agencies in each State and the District of Columbia (one for K–12 and one for postsecondary) and the Department itself, for a total of 103 authorities, will maintain the required records of redisclosures. (We anticipate that educational agencies and institutions will record under § 99.32(b)(1) any further disclosures made by the other Federal officials listed in § 99.31(a)(3), the U.S. Comptroller General and the U.S. Attorney General.) We estimate further that these authorities will need to record two redisclosures per year from their records and that it will take one hour of administrative time to record each redisclosure electronically at an average hourly rate of $32.67, for a total annual administrative cost of $6,730. (Compensation for administrative staff time is explained earlier in this analysis.) We also assume for purposes of this analysis that State educational authorities and the Department already have software that will allow them to record these disclosures electronically.

State educational authorities and Federal officials that maintain records of redisclosures will also have to make that information available to the educational agency or institution whose records were redisclosed, upon request, so that the agency or institution can make that record available to a parent or eligible student who has asked to inspect and review the student's record of disclosures. We assume that few parents and students request this information and, therefore, use an estimate that one tenth of one percent of a total of 68.1 million students will make such a request each year, or 68,076 requests. If it takes one-quarter of an hour to locate and print a record of disclosures at an average administrative hourly rate of $32.67, the average annual administrative cost for State and Federal officials and agencies to provide this service will be $556,011, plus mailing costs (at $.42 per letter) of $28,592, for a total of $584,603. We estimate that educational agencies and institutions themselves will incur comparable costs when they ask State and Federal officials to send them these records of redisclosure and then make them available to parents and students. We note that printing and mailing costs may be reduced to the extent that e-mail is used to transmit the record, and if parents or students pick up the record on-site, but we do not have information to estimate these potential savings.

The Department believes that these changes will result in a net benefit to educational agencies and institutions because they will not have to record further disclosures made by State and Federal authorities and officials who redisclose information from education records on their behalf and will not have to ask for a copy unless a parent or eligible student asks to inspect and review the student's record of disclosures. State and Federal authorities and officials will also benefit because they will not have to provide their record of further disclosures to anyone unless the educational agency or institution asks for a copy. Overall, the costs to State and Federal authorities to record their own redisclosures will be offset by the savings that educational agencies and institutions will realize by not having to record the disclosures themselves.

**Notification of Compliance With Court Order or Subpoena**

The regulations in § 99.33(b)92) require any party that redisclosures education records in compliance with a court order or subpoena under § 99.31(a)(9) to provide the notice to parents and eligible students required under § 99.31(a)(9)(ii). We anticipate that this provision will affect mostly State and local educational authorities, which maintain education records they have obtained from their constituent districts and institutions and, under § 99.35(b), may redisclose the information, without consent, in compliance with a court order or subpoena under § 99.31(a)(9).

There is no change in costs as a result of shifting responsibility for notification to the disclosing party under this change. However, we believe that minimizing or eliminating uncertainty about which party is legally responsible for the notification will result in a net benefit to all parties.

**Health or Safety Emergency**

The regulations in § 99.32(a)(5) require that a school that discloses information under the health and safety emergency exception in § 99.36 record the articulable and significant threat that formed the basis for the disclosure and the parties to whom the education records were disclosed. Because § 99.32(a) already requires schools to record disclosures made under § 99.36, including the legitimate interests the parties had in requesting or obtaining the information, we believe these changes will not create any significant additional administrative costs for schools and that the benefit of including the legitimate interests the parties had in requesting or obtaining the information outweighs the costs.

**Directory Information Opt Outs**

The regulations in § 99.37(b) clarify that while an educational agency or institution is not required to notify former students under § 99.37(a) about the institution's directory information policy or allow former students to opt out of directory information disclosures, they must continue to honor a parent's or student's decision to opt out of directory information disclosures after the student leaves the institution. Most agencies and institutions should already comply with this requirement because of informal guidance and training provided by FPCO.

Parents and students will benefit from this clarification because it will help ensure that schools do not invalidate the parent's or student's decisions on directory information disclosures after the student is no longer in attendance. It will also benefit schools by eliminating any uncertainty they may have about whether they must continue to honor an opt out once the student is

no longer in attendance. We have insufficient information to estimate the number of institutions affected and the additional costs involved in changing systems to maintain opt-out flags on education records of former students.

**Paperwork Reduction Act of 1995**

Following publication of the NPRM, we provided, through a notice published in the **Federal Register** (73 FR 28810, May 19, 2008) opportunity for the public to comment on information collections in the current regulations, and indicated in that notice the pendency of the NPRM. Additionally, based on comments received in response to the NPRM, we have identified several information collection requirements associated with these regulations. We describe these information collections in the following paragraphs and will be submitting these sections to OMB for review and approval. We note that the Paperwork Reduction Act of 1995 does not require a response to these information collection requirements unless they display a valid OMB control number. A valid OMB control number will be assigned to the information collection requirements at the end of the affected sections of the regulations.

*(1) § 99.31(a)(6)(ii)*

FERPA permits an educational agency or institution to disclose personally identifiable information from education records, without consent, to organizations conducting studies for or on behalf of the agency or institution for purposes of testing, student aid, and improvement of instruction. In the NPRM, we proposed to add § 99.31(a)(6)(ii) to require that an educational agency or institution to disclose personally identifiable information under § 99.31(a)(6)(i) only if it enters into a written agreement with the organization specifying the purposes of the study. Under these final regulations, this written agreement must specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require the organization to conduct the study in a manner that does not permit personal identification of parents and students by individuals other than representatives with legitimate interest of the organization that conducts the study; require the organization to destroy the information or return to the educational agency or institution when it is no longer needed for the purposes for which the study was conducted; and specify the time period for the destruction or return of the information.

The Department did not identify in the NPRM the requirement in § 99.31(a)(6)(ii) as an information collection requirement under the Paperwork Reduction Act of 1995 and did not realize this would be an information collection requirement until a commenter brought this matter to our attention. The commenter pointed out that, while this change created another paperwork burden for school districts, the commenter did not object to the written agreement requirement because putting the requirements regarding the use and destruction of data in writing may improve compliance with FERPA. The Department agrees with the comment.

*(2) § 99.32(a)(1)*

Under FERPA, an educational agency or institution is required to record its disclosures of personally identifiable information from education records, even when it discloses information to its own State educational authority. This statutory requirement is reflected in the current FERPA regulations. The final regulations permit the State and local educational authorities and Federal officials listed in § 99.31(a)(3) to make further discloses of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b) and require them to record these further disclosures of § 99.33(b) if the educational agency or institution does not do so. We have included provisions in the final regulations that require educational agencies and institutions to maintain a listing in each student's record of the State and local educational authorities and Federal officials and agencies that may make further disclosures of the student's education records without consent so that parents and eligible students will be made aware of these further disclosures.

*(3) § 99.32(a)(4)*

Under this new provision, parents and eligible students will be able to inspect and review any further disclosures that were made by any of the parties listed under § 99.31(a)(3) by asking the educational agency or institution to obtain a copy of the record of further disclosures. We believe that this is only a minor paperwork burden for schools because it would involve asking officials to whom they have disclosed education records for the record of further disclosure or, in the case of some SEAs, accessing the State database for this information. Also, we do not expect that a large number of parents and eligible students will ask to see the record of further disclosures.

*(4) § 99.32(a)(5)*

During the development of the final regulations, we identified another change to the recordation requirements of § 99.32 that would require the collection of information. In response to several comments we received regarding changes to FERPA's ''health or safety emergency exception'' in § 99.36, we have amended § 99.32(a) to include a new recordation requirement. Specifically, we have added a paragraph to the recordation requirement that requires that for any disclosures under § 99.36 a school must record the articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure and the parties to whom the agency or institution disclosed information.

The Secretary believes that this is only a minor paperwork burden for schools because schools are already required to record disclosures made under § 99.36. The new language in § 99.32(a)(5) simply clarifies the type of information that must be recorded when a school discloses personally identifiable information in response to a health or safety emergency, either for one student or for all students in a school.

*(5) § 99.32(b)(2)*

In the NPRM, we specifically noted that the Department was interested in relieving any administrative burdens associated with recording disclosures of education records and, therefore, invited public comment on whether an SEA, the Department, or other authority or official listed in § 99.31(a)(3) should be allowed to maintain the record of the redisclosures it makes on behalf of an educational agency or institution under § 99.32(b).

Several commenters stated that an SEA (or other authority or official listed in § 99.31(a)(3)) should be responsible for maintaining the record of disclosure required under § 99.32 when it redisclosures information on behalf of educational agencies and institutions. The commenters stated that requiring each educational agency or institution, such as school districts, to record each redisclosure made by an SEA or other State educational authority on its behalf imposes an unacceptable recordkeeping burden on school districts and is impractical for State educational authorities to adhere to in making

further disclosures on behalf of the agency or institution. In response to these comments, we are revising § 99.32 to require the State and local educational authorities and Federal officials listed in § 99.31(a)(3) to maintain the record of further disclosures if the educational agency or institution does not do so and make it available to the educational agency or institution upon request. We agree that by requiring State and Federal authorities and officials to record their redisclosures in these circumstances school districts will have less total paperwork burden because schools will not have to comply with the recordkeeping requirement in these instances.

## Assessment of Educational Impact

In the NPRM, and in accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

## Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *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 *www.gpoaccess.gov/nara/index.html.*

(Catalog of Federal Domestic Assistance Number does not apply.)

## List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Directory information, Education records, Information, Parents, Privacy, Records, Social Security Numbers, Students.

Dated: December 2, 2008.

**Margaret Spellings,**

*Secretary of Education.*

■ For the reasons discussed in the preamble, the Secretary amends part 99 of title 34 of the Code of Federal Regulations as follows:

## PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

■ 1. The authority citation for part 99 continues to read as follows:

**Authority:** 20 U.S.C. 1232g, unless otherwise noted.

■ 2. Section 99.2 is amended by revising the note following the authority citation to read as follows:

### § 99.2 What is the purpose of these regulations?

* * * * *

**Note to § 99.2:** 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

■ 3. Section 99.3 is amended by:

■ A. Adding, in alphabetical order, a definition of *Biometric record.*

■ B. Revising the definitions of *Attendance, Directory information, Disclosure,* and *Personally identifiable information.*

■ C. In the definition of *Education records,* revising paragraph (b)(5) and adding a new paragraph (b)(6).

These additions and revisions read as follows:

### § 99.3 What definitions apply to these regulations?

* * * * *

*Attendance* includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

* * * * *

*Biometric record,* as used in the definition of *personally identifiable information,* means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

* * * * *

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.,* undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this section.

(c) Directory information includes a student ID number, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

* * * * *

*Disclosure* means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

* * * * *

Education Records

* * * * *

(b) * * *

(5) Records created or received by an educational agency or institution after

an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

* * * * *

Personally Identifiable Information

The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Authority: 20 U.S.C. 1232g)

* * * * *

■ 4. Section 99.5 is amended by redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

**§ 99.5 What are the rights of students?**

(a)(1) * * *

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

* * * * *

■ 5. Section 99.31 is amended by:

■ A. Redesignating paragraph (a)(1) as paragraph (a)(1)(i)(A) and adding new paragraphs (a)(1)(i)(B) and (a)(1)(ii).

■ B. Revising paragraph (a)(2).

■ C. Redesignating paragraphs (a)(6)(iii) and (a)(6)(iv) as paragraphs (a)(6)(iv) and (a)(6)(v), respectively.

■ D. Revising paragraph (a)(6)(ii).

■ E. Adding a new paragraph (a)(6)(iii).

■ F. In paragraph (a)(9)(ii)(A), removing the word ''or'' after the punctuation ''\;''.

■ G. In paragraph (a)(9)(ii)(B), removing the punctuation ''.'' and adding in its place the word ''\;or''.

■ H. Adding paragraph (a)(9)(ii)(C).

■ I. Adding paragraph (a)(16).

■ J. Revising paragraph (b).

■ K. Adding paragraphs (c) and (d).

■ L. Revising the authority citation at the end of the section.

The additions and revisions read as follows:

**§ 99.31 Under what conditions is prior consent not required to disclose information?**

(a) * * *

(1)(i)(A) * * *

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(*1*) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(*2*) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(*3*) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

**Note:** Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(6)(i) * * *

(ii) An educational agency or institution may disclose information under paragraph (a)(6)(i) of this section only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution enters into a written agreement with the organization that—

(*1*) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(*2*) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(*3*) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests;

and

(*4*) Requires the organization to destroy or return to the educational agency or institution all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

(iii) An educational agency or institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

* * * * *

(9) * * *

(ii) * * *

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

* * * * *

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or

institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)).

■ 6. Section 99.32 is amended by:

■ A. Revising paragraph (a)(1).

■ B. Adding new paragraphs (a)(4) and (a)(5).

■ C. Redesignating paragraphs (b)(1) and (b)(2) as paragraphs (b)(1)(i) and (b)(1)(ii) and redesignating paragraph (b), introductory text, as paragraph (b)(1).

■ D. Revising newly redesignated paragraph (b)(1).

■ E. Adding a new paragraph (b)(2).

■ F. Revising paragraph (d)(5).

The additions and revisions read as follows:

**§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?**

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

* * * * *

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

* * * * *

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

* * * * *

(d) * * *

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

* * * * *

■ 7. Section 99.33 is amended by revising paragraphs (b), (c), (d), and (e) to read as follows:

* * * * *

**§ 99.33 What limitations apply to the redisclosure of information?**

* * * * *

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of § 99.31; and

(ii)(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and redisclosures personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required

to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(e) If this Office determines that a third party outside the educational agency or institution improperly rediscloses personally identifiable information from education records in violation of this section, or fails to provide the notification required under paragraph (b)(2) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

* * * * *

■ 8. Section 99.34 is amended by revising paragraph (a)(1)(ii) to read as follows:

**§ 99.34 What conditions apply to disclosure of information to other educational agencies and institutions?**

(a) * * *

(1) * * *

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

* * * * *

■ 9. Section 99.35 is amended by revising paragraphs (a) and (b)(1) to read as follows:

**§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?**

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) Authority for an agency or official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by the Act or this part and must be established under other Federal, State, or local authority.

(b) * * *

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the officials or agencies headed by officials referred to in paragraph (a) of this section, except that those officials and agencies may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and

* * * * *

■ 10. Section 99.36 is amended by revising paragraphs (a) and (c) to read as follows:

**§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?**

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

* * * * *

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

* * * * *

■ 11. Section 99.37 is amended by:

■ A. Revising paragraph (b).

■ B. Adding new paragraphs (c) and (d).

The revision and additions read as follows:

**§ 99.37 What conditions apply to disclosing directory information?**

* * * * *

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled.

(d) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

* * * * *

■ 12. Section 99.62 is revised to read as follows:

**§ 99.62 What information must an educational agency or institution submit to the Office?**

The Office may require an educational agency or institution to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out its enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(f) and (g))

**§ 99.63 [Amended]**

■ 13. Section 99.63 is amended by removing the mail code designation ''4605'' before the punctuation ''.''

■ 14. Section 99.64 is amended by:

■ A. Revising the section heading.

■ B. Revising paragraphs (a) and (b).

The revisions read as follows:

**§ 99.64 What is the investigation procedure?**

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution.

* * * * *

■ 15. Section 99.65 is revised to read as follows:

**§ 99.65 What is the content of the notice of investigation issued by the Office?**

(a) The Office notifies the complainant, if any, and the educational agency or institution in writing if it initiates an investigation under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the allegations against the educational agency or institution; and

(2) Directs the agency or institution to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

■ 16. Section 99.66 is amended by revising paragraphs (a), (b), and the introductory text of paragraph (c) to read as follows:

**§ 99.66 What are the responsibilities of the Office in the enforcement process?**

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution. A notice of findings issued under paragraph (b) of this section to an educational agency or institution that has not complied with a provision of the Act or this part—

* * * * *

■ 17. Section 99.67 is amended by revising paragraph (a) to read as follows:

**§ 99.67 How does the Secretary enforce decisions?**

(a) If an educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part E of the General Education Provisions Act—

* * * * *

[FR Doc. E8–28864 Filed 12–8–08; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Tuesday,
December 9, 2008

# Part III

# Office of Personnel Management

**5 CFR Part 591**

**Nonforeign Area Cost-of-Living Allowances; 2008 Interim Adjustments; 2007 Nonforeign Area Cost-of-Living Allowance Survey Report: Pacific and Washington, DC Areas; Proposed Rule and Notice**

**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 591**

**RIN 3206–AL72**

## Nonforeign Area Cost-of-Living Allowances; 2008 Interim Adjustments

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is proposing to change the cost-of-living allowance (COLA) rates received by certain white-collar Federal and U.S. Postal Service employees in the Pacific and Alaska COLA areas. The proposed rate changes are the result of interim adjustments OPM calculated based on relative Consumer Price Index differences. The proposed regulations would reduce the COLA rates for the Pacific allowance areas and Anchorage, Fairbanks, and Juneau, Alaska, by 1 percentage point.

**DATES:** We will consider comments received on or before February 9, 2009.

**ADDRESSES:** Send or deliver comments to Charles D. Grimes III, Deputy Associate Director for Performance and Pay Systems, Strategic Human Resources Policy Division, U.S. Office of Personnel Management, Room 7300B, 1900 E Street, NW., Washington, DC 20415–8200; *fax:* (202) 606–4264; or *e-mail: COLA@opm.gov*.

**FOR FURTHER INFORMATION CONTACT:** J. Stanley Austin, (202) 606–2838; *fax:* (202) 606–4264; or *e-mail: COLA@opm.gov*.

**SUPPLEMENTARY INFORMATION:** Section 5941 of title 5, United States Code, authorizes Federal agencies to pay cost-of-living allowances (COLAs) to white-collar Federal and U.S. Postal Service employees stationed in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands (CNMI), Puerto Rico, and the U.S. Virgin Islands. Executive Order 10000, as amended, delegates to the U.S. Office of Personnel Management (OPM) the authority to administer nonforeign area COLAs and prescribes certain operational features of the program. OPM conducts living-cost surveys in each allowance area and in the Washington, DC, area to determine whether, and to what degree, COLA area living costs are higher than those in the DC area. We set the COLA rate for each area based on the results of these surveys.

As required by section 591.223 of title 5, Code of Federal Regulations, we conduct cost-of-living surveys in the Caribbean, Alaska, and Pacific COLA areas on a 3-year rotating basis, and in the Washington, DC, area on an annual basis. For areas not surveyed during a particular year, we adjust COLA rates by the relative change in the Consumer Price Index (CPI) for the COLA area compared with the Washington, DC, area. (See 5 CFR 591.224–226.) We adopted these regulations pursuant to the stipulation for settlement in *Caraballo et al.* v. *United States*, No. 1997–0027 (D.V.I.), August 17, 2000. *Caraballo* was a class-action lawsuit that resulted in many changes in the COLA methodology and regulations.

### 2007 Pacific Survey Results

We conducted living-cost surveys in the Hawaii COLA areas (Honolulu, Hawaii County, Maui, and Kauai), Guam, and the Washington, DC, area in the spring of 2007. We publish the results of these surveys in the *2007 Nonforeign Area Cost-of-Living Allowance Survey Report: Pacific and Washington, DC, Areas*, which accompanies this proposed rule in this separate part.

As described in the 2007 survey report, we compared the results of the COLA area surveys with the results of the DC area survey to compute a living-cost index for each of the Pacific COLA areas. Table 1 shows the final 2007 Pacific survey living-cost indexes. These indexes are superseded by the 2008 interim CPI adjustment indexes as discussed in the section that follows.

TABLE 1—2007 PACIFIC SURVEY INDEXES

| Allowance area | Index |
|---|---|
| Honolulu County, HI | 121.37 |
| Hawaii County, HI | 111.71 |
| Kauai County, HI | 118.14 |
| Maui County, HI | 123.62 |
| Guam/CNMI | 119.98 |

### 2008 Interim Adjustments

We computed 2008 interim adjustments for the Alaska and Pacific COLA areas based on the relative change in the CPIs for these areas compared with the Washington, DC, area. As required by 5 CFR 591.225, we used the CPI, All Urban Consumers (CPI–U), published by the Bureau of Labor Statistics (BLS) for Anchorage, Honolulu, and the Washington-Baltimore area for the comparisons. We did not compute interim adjustments for Puerto Rico and the U.S. Virgin Islands because we conducted surveys in these areas in 2008.

### Alaska Interim Adjustments

We computed the change in prices for the Anchorage area compared with the change in prices for the Washington-Baltimore area using the CPI–Us for each area. Table 2 shows this process.

TABLE 2—ANCHORAGE AND WASHINGTON-BALTIMORE CPI–U CHANGES 2006 TO 2008

| Survey area | CPI–U |
|---|---|
| Anchorage 2006 CPI–U First Half | 176.7 |
| Anchorage 2008 CPI–U First Half | 187.659 |
| Anchorage change | 6.202% |
| DC-Baltimore 2006 CPI–U first half | 127.7 |
| DC-Baltimore 2008 CPI–U first half | 138.49 |
| DC-Baltimore change | 8.4495% |

Next, we multiplied the *price* indexes from the four 2006 Alaska surveys—Anchorage, Fairbanks, Juneau, and Rest of the State of Alaska (represented by Kodiak)—by the change in the Anchorage CPI–U and divided that by the change in the Washington-Baltimore CPI–U. We used the Alaska area price indexes from the 2006 Alaska survey report, published on January 3, 2008, at 73 FR 774. The price index is the COLA survey index before the addition of the adjustment factor specified in 5 CFR 591.227. The adjustment factor reflects differences in need, access to and availability of goods and services, and quality of life in the COLA area relative to the DC area and is a fixed amount. Therefore, it is not adjusted by the change in the CPI.

Table 3 shows the interim adjustment process. For example, the 2006 Fairbanks COLA survey adjusted index, as published in the **Federal Register**, is 118.90. The Fairbanks adjustment factor is 9 points. Therefore, subtracting the adjustment factor shows 109.90 as the *price* index from the 2006 survey. We increased this price index by 6.202 percent (i.e., multiplied by 1.06202), the change in the Anchorage CPI–U, and reduced it by 8.4495 percent (i.e., divided by 1.084495), the change in the Washington-Baltimore CPI–U, to give a new price index of 107.62. We then added the 9-point adjustment factor to the new price index, which yields a 2008 Fairbanks interim adjustment COLA rate of 116.62.

TABLE 3—ALASKA COLA AREA CPI–U PRICE INDEX ADJUSTMENTS

| | Anchorage | Fairbanks | Juneau | Kodiak |
|---|---|---|---|---|
| 2006 COLA Survey Indexes | 109.81 | 118.90 | 120.08 | 132.82 |
| Adjustment Factors | 7 | 9 | 9 | 9 |
| 2006 COLA Survey Price Indexes | 102.81 | 109.90 | 111.08 | 123.82 |
| 2008 CPI Adjusted Price Indexes | 100.68 | 107.62 | 108.78 | 121.25 |
| 2008 COLA Indexes with Adj. Factors | 107.68 | 116.62 | 117.78 | 130.25 |

**Pacific Interim Adjustments**

The process we used to compute the interim adjustments for the Pacific areas (i.e., Honolulu, Hawaii County, Kauai, Maui, and Guam/CNMI) is identical to the one for the Alaska areas except we used the BLS CPI–U for Honolulu, as specified in § 591.225. Table 4 shows the relative change in the Honolulu CPI–U compared with the Washington-Baltimore CPI–U.

TABLE 4—HONOLULU AND WASHINGTON-BALTIMORE CPI–U CHANGES 2007 TO 2008

| Survey area | CPI–U |
|---|---|
| Honolulu 2007 CPI–U First Half | 216.62 |
| Honolulu 2008 CPI–U First Half | 227.334 |
| Honolulu change | 4.946% |
| DC-Baltimore 2006 CPI–U first half | 132.0 |
| DC-Baltimore 2008 CPI–U first half | 138.49 |
| DC-Baltimore change | 4.9167% |

We multiplied the price indexes from the five 2007 Pacific surveys—Honolulu, Hawaii County, Kauai, Maui, and Guam—by the change in the Honolulu CPI–U and divided that by the change in the Washington-Baltimore CPI–U. We used the Pacific area price indexes from the 2007 Pacific survey report, which accompanies this proposed rule. Table 5 shows the indexes, the interim adjustment process, and the final results.

TABLE 5—PACIFIC COLA AREA CPI–U PRICE INDEX ADJUSTMENTS

| | Honolulu | Hawaii Co. | Kauai | Maui | Guam |
|---|---|---|---|---|---|
| 2007 COLA Survey Indexes | 121.17 | 111.72 | 118.15 | 123.63 | 119.97 |
| Adjustment Factors | 5 | 7 | 7 | 7 | 9 |
| 2007 COLA Survey Price Indexes | 116.17 | 104.72 | 111.15 | 116.63 | 110.97 |
| 2008 CPI Adjusted Price Indexes | 116.40 | 104.74 | 111.17 | 116.65 | 111.01 |
| 2008 COLA Indexes with Adj. Factors | 121.40 | 111.74 | 118.17 | 123.65 | 120.01 |

**COLA Rate Reductions**

As a result of the interim adjustments, we are proposing to reduce the COLA rates for Anchorage, Fairbanks, Juneau, and the Pacific allowance areas because we have determined costs in these areas have decreased *in relation to* the DC area. Section 5941 of title 5, U.S. Code, requires that the nonforeign area cost-of-living allowance be based on living costs in an area that are substantially higher than living costs in the DC area.

On January 3, 2008, at 73 FR 772, we published a proposed rule to reduce the COLA rates in Anchorage, Fairbanks, and Juneau from 24 percent to 23 percent based on the results of the 2006 COLA surveys in Alaska. On August 25, 2008, at 73 FR 50174, we published a second proposed rule that would further reduce the COLA rates in Anchorage, Fairbanks, and Juneau from 23 percent to 22 percent based on the results of the 2007 interim CPI adjustments.

The 1-percent decrease proposed in this rule would further reduce the rates in these areas to 21 percent. However, 5 CFR 591.228(c) limits COLA rate reductions to 1 percentage point in a 12-month period. Therefore, we would not implement COLA rate reductions in the Alaska areas under this proposed rule until at least 12 months after the effective date of the 2007 interim adjustment reductions. For example, if the proposed reductions based on the 2006 survey results become effective in mid-December of this year, we would not implement the proposed 2007 interim adjustment reductions before mid-December of 2009, and would not implement the reductions proposed under this rule before mid-December of 2010. Under this timeframe, the 2009 Alaska survey indexes may supersede the 2008 CPI adjustment indexes.

The rate reductions proposed for the Pacific areas are not affected by the 12-month delay on reductions under 5 CFR 591.228(c). Therefore, we plan to implement the Pacific and Alaska reductions in separate actions.

**Executive Order 12866, Regulatory Review**

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

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will affect only Federal agencies and employees.

**List of Subjects in 5 CFR Part 591**

Government employees, Travel and transportation expenses, Wages.

Office of Personnel Management.

**Michael W. Hager,**

*Acting Director.*

Accordingly, OPM proposes to amend subpart B of 5 CFR part 591 as follows:

## PART 591—ALLOWANCES AND DIFFERENTIALS

### Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

1. The authority citation for subpart B of 5 CFR part 591 continues to read as follows:

**Authority:** 5 U.S.C. 5941; E.O. 10000, 3 CFR, 1943–1948 Comp., p. 792; and E.O. 12510, 3 CFR, 1985 Comp., p. 338.

2. Revise appendix A of subpart B to read as follows:

**Appendix A to Subpart B of Part 591—Places and Rates at Which Allowances Are Paid**

This appendix lists the places approved for a cost-of-living allowance and shows the authorized allowance rate for each area. The allowance rate shown is paid as a percentage

of an employee's rate of basic pay. The rates are subject to change based on the results of future surveys.

| Geographic coverage | Allowance rate (percent) |
|---|---|
| State of Alaska: | |
| City of Anchorage and 80-kilometer (50-mile) radius by road | 21 |
| City of Fairbanks and 80-kilometer (50-mile) radius by road | 21 |
| City of Juneau and 80-kilometer (50-mile) radius by road | 21 |
| Rest of the State | 25 |
| State of Hawaii: | |
| City and County of Honolulu | 24 |
| Hawaii County, Hawaii | 17 |
| County of Kauai | 24 |
| County of Maui and County of Kalawao | 24 |
| Territory of Guam and Commonwealth of the Northern Mariana Islands | 24 |
| Commonwealth of Puerto Rico | 14 |
| U.S. Virgin Islands | 25 |

[FR Doc. E8–28832 Filed 12–8–08; 8:45 am]

**BILLING CODE 6325–39–P**

## OFFICE OF PERSONNEL MANAGEMENT

## 2007 Nonforeign Area Cost-of-Living Allowance Survey Report: Pacific and Washington, DC, Areas

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** This notice publishes the ''2007 Nonforeign Area Cost-of-Living Allowance Survey Report: Pacific and Washington, DC, Areas.'' The Federal Government uses the results of surveys such as these to set cost-of-living allowance (COLA) rates for General Schedule, U.S. Postal Service, and certain other Federal employees in Alaska, Hawaii, Guam and the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. This report contains the results of the COLA surveys conducted by the U.S. Office of Personnel Management in Hawaii, Guam, and the Washington, DC, area during the spring and summer of 2007.

**DATES:** Comments on this report must be received on or before February 9, 2009.

**ADDRESSES:** Send or deliver comments to Charles D. Grimes III, Deputy Associate Director for Performance and Pay Systems, Strategic Human Resources Policy Division, U.S. Office of Personnel Management, Room 7300B, 1900 E Street, NW., Washington, DC 20415–8200; *fax:* (202) 606–4264; or *e-mail: COLA@opm.gov*.

**FOR FURTHER INFORMATION CONTACT:** J. Stanley Austin, (202) 606–2838; *fax:* (202) 606–4264; or *e-mail: COLA@opm.gov*.

**SUPPLEMENTARY INFORMATION:** Section 591.229 of title 5, Code of Federal Regulations, requires the Office of Personnel Management (OPM) to publish nonforeign area cost-of-living allowance (COLA) survey summary reports in the **Federal Register**. We are publishing the complete ''*2007 Nonforeign Area Cost-of-Living Allowance Survey Report: Pacific and Washington, DC, Areas*'' with this notice. The report contains the results of the COLA surveys we conducted in Hawaii, Guam, and the Washington, DC, area during the spring and summer of 2007.

### Survey Results

Using an index scale with Washington, DC, area living costs equal to 100, we computed index values of relative prices in the Honolulu County, Hawaii County, Kauai County, Maui County, and Guam and the Commonwealth of the Northern Mariana Islands (CNMI) COLA areas. Then we added an adjustment factor of 5.0 to the Honolulu County price index, 7.0 to the Hawaii County, Kauai County, and Maui County price indexes, and 9.0 to the Guam/CNMI price index and rounded the results to the nearest whole percentage point. The results indicate a reduction in the COLA rates for all Pacific areas.

Office of Personnel Management.

**Michael W. Hager,**

*Acting Director.*

## 2007 Nonforeign Area Cost-of-Living Allowance Survey Report: Pacific and Washington, DC, Areas

**Table of Contents**

**Executive Summary**

1. Introduction
   1.1 Report Objectives
2. Preparing for the Survey
   2.1 COLA Advisory Committees
   2.2 Pre-Survey Meetings
   2.3 Survey Item Selection
   2.3.1 Special Considerations
   2.4 Outlet Selection
   2.5 Geographic Coverage
3. Conducting the Survey
   3.1 Pricing Period
   3.2 Non-Housing Price Data Collection
   3.2.1 Data Collection Teams
   3.2.2 Data Collection Process
   3.3 Housing (Rental) Price Data Collection
4. Analyzing the Results
   4.1 Data Review
   4.2 Special Price Computations
   4.2.1 K–12 Private Education
   4.2.2 Health Insurance
   4.2.3 Water Utilities
   4.2.4 Energy Utilities Model
   4.2.5 Rental Data Hedonic Models
   4.3 Averaging Prices by Item and Area
   4.4 Computing Price Indexes
   4.4.1 Geometric Means
   4.4.2 Special Private Education Computations
   4.5 Applying Consumer Expenditure Weights
5. Final Results
6. Post Survey Meetings

**List of Appendices**

Appendix 1: Prior Survey Results: 1990–2006
Appendix 2: Estimated DC Area Middle Income Annual Consumer Expenditures
Appendix 3: COLA Survey Items and Descriptions
Appendix 4: COLA Rental Survey Data Collection Elements
Appendix 5: Utility Usage and Calculations
Appendix 6: Hedonic Rental Data Equations and Results
Appendix 7: Final Living-Cost Results for COLA Areas

### Executive Summary

The Government pays cost-of-living allowances (COLAs) to Federal employees in nonforeign areas in consideration of living costs significantly higher than those in the Washington, DC area. The Office of Personnel Management (OPM) conducts living-cost surveys to set the COLA rates. The methodology for conducting these surveys is prescribed in regulation at subpart B of part 591 of title 5 of the Code of Federal Regulations.

This report provides the results of the COLA surveys OPM conducted in the spring and summer of 2007 in Honolulu County, Hawaii County, Kauai County, Maui County, Guam, and the Washington, DC area. The report details our comparison of living costs in the Pacific areas with living costs in the Washington, DC area.

For the surveys, we contacted about 1,300 outlets and collected approximately 5,500 prices on more than 240 items representing typical consumer purchases. We also collected about 2,800 prices on rental housing. We then combined the data using consumer expenditure information from the Bureau of Labor Statistics. The final results are living-cost indexes, shown in Table 1. These indexes compare living costs in the Pacific COLA areas to those in the Washington, DC area. The index for the DC area (not shown) is 100.00 because it is, by law, the reference area. The living-cost indexes shown in Table 1 include the adjustment factor prescribed at 5 CFR 591.227.

TABLE 1—FINAL LIVING-COST COMPARISON INDEXES

| Allowance area | Index |
|---|---|
| Honolulu County, HI | 121.37 |
| Hawaii County, HI | 111.71 |
| Kauai County, HI | 118.14 |
| Maui County, HI | 123.62 |
| Guam/CNMI | 119.98 |

### 1. Introduction

#### *1.1 Report Objectives*

This report provides the results of the 2007 Pacific nonforeign area cost-of-living allowance (COLA) survey conducted by the U.S. Office of Personnel Management (OPM) in the spring and summer of 2007. In addition to providing these results, the report describes how we prepared for and conducted the survey, and how we analyzed the results. The results show comparative living-cost differences between the Pacific areas, i.e., Honolulu County, Hawaii County, Kauai County, Maui County, and Guam, and the Washington, DC area. By law, Washington, DC is the base or ''reference'' area for the COLA program.

## 2. Preparing for the Survey

### *2.1 COLA Advisory Committees*

Before conducting the Pacific survey, OPM established COLA Advisory Committees (CACs) in Honolulu, the Hawaii County areas of Hilo and Kailua Kona, Kauai, Maui, and Guam. The settlement of *Caraballo, et al.* v. *United States*, No. 1997–0027 (D.V.I.), August 17, 2000, provides for employee involvement in the administration of the COLA program. As in previous surveys, we found it valuable to involve employee and agency representatives in planning and conducting the surveys and in reviewing the survey results.

Each CAC is composed of approximately 12 agency and employee representatives from the survey area and 2 OPM representatives. The functions of the CACs include the following:

—Advising and assisting OPM in planning COLA surveys;
—Providing or arranging for data collection observers during COLA surveys;
—Advising and assisting OPM in reviewing survey data;
—Advising OPM on its COLA program administration, including survey methodology;
—Assisting OPM in disseminating information to affected employees about the surveys and the COLA program; and
—Advising OPM on special situations or conditions, such as hurricanes and earthquakes, as they relate to OPM's authority to conduct interim surveys or implement some other change in response to conditions caused by a natural disaster or similar emergency.

### *2.2 Pre-Survey Meetings*

To help OPM prepare for the COLA surveys, the CACs held 3-day meetings in Honolulu, Hilo, Kailua Kona, Kauai, Maui, and Guam. The CACs reviewed the preliminary outlet and item lists for the surveys. The committee members researched the outlets and availability and appropriateness of the items in each area and made recommendations concerning the survey. We incorporated these recommendations into the survey design.

We found the work of the CACs to be extremely helpful and informative. The CACs' knowledge of the local area, the popularity of items and outlets, and other information about the COLA area were invaluable in helping plan the survey.

### *2.3 Survey Item Selection*

As described in Sections 2.1 and 2.2, we consulted with the CACs as we selected survey items. We identified items to reflect a wide array of items consumers typically purchase. To determine what consumers purchase, we used the Bureau of Labor Statistics (BLS) 2002/2003 Consumer Expenditure Survey (CES). We aggregated CES expenditures into the following nine major expenditure groups (MEGs):

—Food,
—Shelter and Utilities,
—Household Furnishings and Supplies,
—Apparel,
—Transportation,
—Medical,
—Recreation,
—Education and Communication, and
—Miscellaneous.

We further subdivided each MEG into primary expenditure groups (PEGs). In all, there were 45 PEGs. For example, we subdivided Food into the following nine PEGs:

—Cereals and Bakery Products;
—Meats, Poultry, Fish, and Eggs;
—Dairy Products;
—Fresh Fruits and Vegetables;
—Processed Foods;
—Other Food at Home;
—Nonalcoholic Beverages;
—Food Away from Home; and
—Alcoholic Beverages.

To select survey items, we chose a sufficient number of items to represent each PEG and reduce overall price index variability. To do this, we applied the following guidelines:

Each survey item should be—

—Relatively important (i.e., represent a fairly large expenditure) within the PEG;
—Relatively easy to find in both COLA and DC areas;
—Relatively common, i.e., what people typically buy;
—Relatively stable over time, e.g., not a fad item; and
—Subject to similar supply and demand functions.

In all, we selected over 240 non-housing items to survey. Appendix 2 shows how we organized the CES data into MEGs and PEGs, identifies the Detailed Expenditure Categories (DECs) for which we chose survey items, and shows estimated DC area middle income annual consumer expenditures for each DEC and higher level of aggregations.

Appendix 3 lists the non-housing items we surveyed and their descriptions. Each of these items is specifically described with an exact brand, model, type, and size whenever practical. Thus, we priced exactly the same items or the same quality and quantity of items in both the COLA and DC areas. For example, OPM priced a 10.75-ounce can of Campbell's Chicken Noodle Soup in both the COLA and DC areas because it is typical of canned soups, and consumers commonly purchase it.

#### 2.3.1 Special Considerations

*Health Insurance:* It was not practical to compare the prices of exactly the same quality and quantity of health insurance between the COLA and Washington, DC, areas because the same array of plans is not offered in each area, and a significant proportion of Federal employees in both the COLA and DC areas subscribe to plans not available nationwide. To compare the employee health benefits premiums of these often highly different plans, OPM would have to adjust for differences in benefits and coverage. Research conducted by the parties prior to the *Caraballo* settlement indicated this would not be feasible.

Therefore, we use the non-Postal Service employee's share of the Federal Employees Health Benefits premiums by plan for each plan offered in each area. OPM maintains these data in the Central Personnel Data File (CPDF), including the number of white-collar Federal employees enrolled in each plan. As described in Section 4.2.3 below, we used these data to compute the average ''price'' of health insurance for Federal employees in the COLA and DC areas.

*Housing:* For housing items, we survey rental rates for specific kinds or classes of housing and collect detailed information about each housing unit. We survey the following classes of housing:

—Four bedroom, single family unit, not to exceed 3200 square feet;
—Three bedroom, single family unit, not to exceed 2600 square feet;
—Two bedroom, single family unit, not to exceed 2200 square feet;
—Three bedroom, single family unit, not to exceed 2,600 square feet;
—Two bedroom, single family unit, not to exceed 2,200 square feet;
—Three bedroom apartment unit, not to exceed 2,000 square feet;
—Two bedroom apartment unit, not to exceed 1,800 square feet; and
—One bedroom apartment unit, not to exceed 1,400 square feet.

For each housing unit we surveyed, we assessed approximately 80 characteristics about the unit. For example, we determined the number of bedrooms, bathrooms, square footage, and whether there was a garage, air conditioning, security systems, and recreational facilities. Appendix 4 lists the types of detailed information we collected. We did not collect homeowner data, such as mortgage payments, maintenance expenses, or

insurance. Under the *Caraballo* settlement, the parties agreed to adopt a rental equivalence approach similar to the one BLS uses for the Consumer Price Index. Rental equivalence compares the shelter value (rental value) of owned homes, rather than total owner costs, because the latter are influenced by the investment value of the home (i.e., influenced by what homeowners hope to realize as a profit when they sell their homes). As a rule, living-cost surveys do not compare how consumers invest their money.

We survey rents and use that as a surrogate for rental equivalence. In late 2004 and 2005, we conducted special research, the General Population Rental Equivalence Survey (GPRES), to obtain additional rent and rental equivalence information. The goal was to determine whether we should adjust the rent index before using it to estimate homeowner rental values. The analyses showed no adjustments should be made. Therefore, use of the rents to estimate rental equivalence is appropriate. We published the GPRES results in a **Federal Register** notice on July 31, 2006, at 71 FR 43228.

Although we surveyed rental rates for the same classes of housing in each area, the type, style, size, quality, and other characteristics of each unit varied within each area and between the COLA and DC areas. As described in Section 4.2.5, we used hedonic regression analyses to hold these characteristics constant between the COLA and Washington, DC, area to make rental price comparisons.

### *2.4 Outlet Selection*

Just as it is important to select commonly-purchased items and survey the same items in both the DC area and COLA areas, it is important to select outlets frequented by consumers and find comparable outlets in both the COLA and DC areas. To identify comparable outlets, we categorize outlets by type (e.g., grocery store, convenience store, discount store, hardware store, auto dealer, and catalog outlet) and then survey only specific items at each outlet type. For example, we survey grocery items at supermarkets in all areas because most people purchase their groceries at such stores and because supermarkets exist in nearly all areas. Selecting comparable outlets is particularly important because significant price variations may occur between dissimilar outlets (e.g., comparing the price of milk at a supermarket with the price of milk at a convenience store).

We used the above classification criteria and existing data sources, including previous COLA surveys, phone books, and various business listings, to develop initial outlet lists for the survey. We provided these lists to the CACs and consulted with them on outlet selection. The committees helped us refine the outlet lists and identify other/additional outlets where local consumers generally purchase the survey items.

We also priced some items by catalog, and when we did, we priced the same items by catalog in the COLA areas and in the DC area. We priced 9 items by catalog in the Pacific areas. All catalog prices included any charges for shipping and handling and all applicable taxes, including excise taxes.

In all, we surveyed prices from approximately 1,300 outlets. In the COLA survey areas, we attempted to survey three popular outlets of each type, to the extent practical. For some outlet types, such as local phone service, there were not three outlets. In some areas, there was not a sufficient number of businesses to find three outlets of each particular type. In the Washington, DC, area, we surveyed up to nine popular outlets of each type, three in each of the DC survey areas described in Table 2.

### *2.5 Geographic Coverage*

Table 2 shows the Pacific COLA and DC survey area boundaries. We collected non-housing prices in outlets throughout the Pacific areas described in Table 2. To collect rental housing data, we contracted with Delta-21 Resources, Incorporated, a research organization with expertise in housing and rental data collection. Delta-21 surveyed rental rates in locations within these areas.

In selecting the locations and sample sizes within each location, we used 2000 census data showing the relative number of Federal employees and housing units by zip code. We allocated the rental sample objectively, requiring Delta-21 to attempt to obtain more rental observations in locations with a relatively large number of Federal employees and housing units and fewer observations in locations with a relatively small number of Federal employees and housing units. Although the process provided a rational way to allocate the sample, Delta-21 was limited ultimately by how many units were available for rent within a location. Under the contract, Delta-21 surveyed only units available for rent. It did not survey all renter-occupied housing.

TABLE 2—SURVEY AND DATA COLLECTION AREAS

| COLA areas and reference areas | Survey area |
|---|---|
| Honolulu County | City and County of Honolulu. |
| Hawaii County | Hilo area, Kailua Kona/Waimea area. |
| Kauai County | Kauai Island |
| Maui County | Maui Island. |
| Guam/CNMI | Guam. |
| Washington, DC–DC | District of Columbia. |
| Washington, DC–MD | Montgomery County and Prince Georges County. |
| Washington, DC–VA | Arlington County, Fairfax County, Prince William County, City of Alexandria, City of Fairfax, City of Falls Church, City of Manassas, and City of Manassas Park. |

Note: For selected items, such as golf and air travel, these survey areas include additional geographic locations beyond these jurisdictions.

To collect non-housing data in the DC area, we divide the area into three survey areas, as shown in Table 2. We collect non-housing prices in outlets throughout these areas. We survey certain items, such as golf, in areas beyond the counties and cities specified in Table 2. We also survey the cost of air travel from Ronald Reagan Washington National Airport, Washington Dulles International Airport, and Baltimore/Washington International Airport (BWI) and survey the price of a 5-mile taxi ride originating at these airports. Both Dulles and BWI are outside the counties and cities shown in Table 2. Nevertheless, DC area residents commonly use both airports.

Delta-21 surveyed rental housing rates throughout the DC area. We do not divide the DC area into three separate survey areas for rental housing data collection but rather treat the area as a single survey area. As with the Pacific COLA areas, we used Census data to select specific locations and sample sizes within the DC area. Delta-21 collected data accordingly within these locations.

## 3. Conducting the Survey

### *3.1 Pricing Period*

We collected data from early March through May 2007. We collected non-housing price data concurrently in the Pacific areas in March and collected the bulk of the DC area data in April and May. Delta-21 collected rental data sequentially in the DC area, Guam, Kauai, Kailua Kona/Waimea, Hilo, Maui, and Honolulu County from March through July 2007.

### *3.2 Non-Housing Price Data Collection*

#### 3.2.1 Data Collection Teams

In both the COLA and Washington, DC, areas, OPM central office staff collected non-housing price data. In the COLA areas, data collection observers designated by the local COLA Advisory Committees accompanied the OPM data collectors. The data collection observers advised and assisted the data collectors in contacting outlets, matching items, and selecting substitutes. The observers also advised OPM on other living-cost and compensation issues relating to their areas. We found the observers to be a valuable resource in conducting the local area surveys.

Because of logistical considerations, cost, and the fact OPM central office staff is very knowledgeable about the DC area, we did not use COLA Advisory Committee data collection observers in the Washington, DC, area. However, we made all of the DC area data available to the COLA Advisory Committees. This included both housing and non-housing data. The non-housing data showed the individual prices by item, store, and survey location as well as averages. The housing data included a photograph and a rough sketch of the layout of the rental unit. We also provided the COLA Advisory Committees with maps showing where each rental unit is located.

#### 3.2.2 Data Collection Process

The data collector/observer teams obtained most of the data by visiting stores, auto dealers, and other outlets. The teams also priced some items, such as bank interest, piano lessons, and private education tuition, by telephone. As noted in Section 2.4, we surveyed some items via catalog, including all shipping costs and any applicable taxes in the price. We also collected other data, such as sales tax rates and airline fares, from Web sites on the Internet.

For all items subject to sales and/or excise taxes, we added the appropriate amount of tax to the price for computing COLA rates. We added 4.712 percent in Honolulu County and 4.166 percent in Hawaii County, Kauai County, and Maui County to account for the Hawaii general excise tax on businesses. In the DC area, sales tax rates varied by city, and some sales tax rates also varied by item, such as restaurant meals, within a location. Guam currently has no general sales or business tax that is passed on to the consumer separately at the time of sale.

The data collectors collected the price of the item at the time of the visit to the outlet. Therefore, with certain exceptions, the data collectors collected the sale price if the item was on sale, and we used that sale price in the COLA calculations. The exceptions include coupon prices, going-out-of-business prices, clearance prices, mail-in rebates, and area-wide distress sales, which we do not use. We also do not collect automobile ''sale'' or negotiated prices. Instead, we obtain the sticker (i.e., non-negotiated) price for the model and specified options. The prices are the manufacturer's suggested retail price (including options), destination charges, additional shipping charges, appropriate dealer-added items or options, dealer mark-up, and taxes, including sales tax and licensing and title fees.

### *3.3 Housing (Rental) Price Data Collection*

As noted in Section 2.5, we contracted for the collection of rental housing data with Delta-21, which collected data in the Pacific areas and in the DC area. We arranged for COLA Advisory Committee observers to accompany Delta-21 rental data collectors for a limited period during the local rental surveys. The rental data collected included rental prices, comprehensive information about the size and type of dwelling, number and types of rooms, and other important amenities that might influence the rental price. Appendix 4 lists the data elements Delta-21 collected.

Delta-21 identified units for rent from various sources, including rental property managers, realtor brokers, listing services, newspaper ads, grocery store bulletin boards, and drive-by observation. Delta-21 then visited each rental unit, took a photograph of the unit, made a sketch of the floor plan based on exterior dimensions and shape, and noted the unit's longitude and latitude coordinates. We used longitude and latitude to (1) determine the distance of the rental unit from major commercial and Government centers, (2) to correlate census tract data (e.g., median income) for the tract in which the unit was located, and (3) to map each unit's location. As discussed in Section 4.2.5, we used certain census tract data elements along with the data Delta-21 collected to determine the relative price of rents. OPM made the rental data available to the COLA Advisory Committees, including the photographs, sketches, and maps.

## 4. Analyzing the Results

### *4.1 Data Review*

During and after the data collection process, the data collectors reviewed the data for errors and omissions. This involved reviewing the data item-by-item and comparing prices across outlets within an area to spot data entry errors, mismatches, and other mistakes.

After all of the data had been collected in both the COLA areas and the Washington, DC, area, we again reviewed the data by item across all of the areas. One purpose was to spot errors not previously detected, but the principal reason was to look at substitute items.

A substitute is an item similar to but not exactly the same as the specified survey item. For example, we may specify a 32-ounce bottle of Heinz Ketchup as one of the items to survey. However, during the survey we may discover some allowance area stores do not carry this item, but all carry a 24-ounce bottle of Hunt's Ketchup. Therefore, we will price the 24-ounce Hunt's Ketchup in the allowance areas and in the DC area as a substitute. We will use the substitute price information in place of the price of the originally specified item.

### *4.2 Special Price Computations*

After completing the data review, we made special price computations for five survey items: K–12 private education, Federal Employees Health Benefits premiums, water utilities, energy utility prices, and rental housing prices. For each of these, we used special processes to calculate appropriate values for each survey area.

#### 4.2.1 K–12 Private Education

One of the items we surveyed is the average annual tuition for private education, grades K–12. As in previous surveys, we found tuition rates varied by grade level. Therefore, we computed

an overall average tuition ''price'' for each school surveyed by averaging the tuition rates grade-by-grade. Section 4.4.2 below describes the additional special use factor we applied to the average tuition rates in the price comparison process.

4.2.2 Health Insurance

As noted in Section 2.3.1, we surveyed the non-Postal employees' premium for the various Federal Employees Health Benefits (FEHB) plans offered in each survey area. Using enrollment information from the CPDF, we computed two weighted average premium costs—one for self-only coverage and another for family coverage—for white-collar Federal employees in each of the COLA areas and in the Washington, DC, area. As shown in Table 3, we then computed an overall weighted average premium for each survey area by applying the number of white-collar Federal employees nationwide enrolled in self-only and family plans. We used the overall weighted average premiums as ''prices'' in the price averaging process described in Section 4.3.

TABLE 3—2007 AVERAGE FEHB PREMIUMS FOR FULL-TIME PERMANENT EMPLOYEES

[Non-Postal Employees' Share]

| Location | Self premium | Family premium | Bi-weekly weighted average premium | Annual weighted average premium |
|---|---|---|---|---|
| Honolulu County | $36.22 | $80.14 | $62.72 | $1,636.32 |
| Hawaii County | $35.48 | $79.13 | 61.82 | 1,612.84 |
| Kauai County | $35.34 | $80.53 | 62.61 | 1,633.45 |
| Maui County | $36.30 | $80.60 | 63.03 | 1,644.41 |
| Guam/CNMI | $39.77 | $102.42 | 77.57 | 2,023.75 |
| DC Area | $45.20 | $93.96 | 79.93 | 2,085.32 |
| Nationwide Enrollment | 615,389 | 936,075 | | |
| Enrollment Percentage | 39.67% | 60.33% | | |

4.2.3 Water Utilities

OPM surveyed water utility rates in each of the COLA and Washington, DC, survey areas. To compute the ''price'' of water utilities, OPM assumed the average monthly water consumption in each area was 7,600 gallons. This is consistent with the consumption amount OPM used in the previous COLA survey. OPM used this quantity along with the rates charged to compute the average monthly water utility cost by survey area. OPM used these average monthly costs as ''prices'' in the price averaging process described in Section 4.3 below.

4.2.4 Energy Utilities Model

For energy utilities (i.e., electricity, gas, and oil), OPM collected from local utility companies and suppliers in the COLA and DC survey areas the price of various energy utilities used for lighting, cooking, cooling, and other household needs over a 12-month period. OPM then used the results of a heating and cooling engineering model to determine how many kilowatt hours of electricity, cubic feet of gas, and/or gallons of fuel oil are needed in each area to maintain a specific model home at a constant ambient temperature of 69 degrees when heat is used or 72 degrees when cooling is used. The engineering model uses local home construction information and climatic data from the National Oceanic and Atmospheric Administration and also includes the amount of electricity needed to run standard household appliances and lighting. For each survey area, OPM calculated the cost to heat and cool the model home using the different heating fuels and electricity for lighting and appliances. Although some homes use additional energy sources, such as wood, coal, kerosene, and solar energy, OPM did not price or include these in the calculations because, based on the results of the 2000 census, relatively few homes use these as primary energy sources.

For the Pacific areas, OPM surveyed the price of electricity to compute home energy costs because the 2000 census indicated electricity is the primary energy source in more than 95 percent of the homes in Hawaii and Guam. In the DC area, OPM surveyed the costs of all three fuels (gas, oil, and electricity) and applied all taxes, fees, and fuel cost adjustments in effect for the 12-month period. OPM used percentages based on the usage of the different fuels in each survey area to compute a weighted average utility fuel cost for the area. Appendix 5 shows the energy requirements, relative usage percentages, and total costs by area. OPM used these total costs as the ''price'' of utilities in the COLA rate calculations.

4.2.5 Rental Data Hedonic Models

As discussed in Sections 2.5 and 3.3, OPM hired a contractor to collect rental data, including rents and the characteristics of each rental unit. As described in Section 3.3, we collated the rental data with census tract information published by the Bureau of the Census using the longitude and latitude of the rental properties. We used census tracts, which are relatively small geographically, as surrogates for neighborhoods. We believe the census tract characteristics, such as the percentage of school age children, reflect the character and quality of the neighborhoods in which the rental units are found.

OPM uses hedonic regression analysis, which is a type of multiple linear regression analysis, to compare rents in the COLA areas with rents in the DC area. Multiple linear regression is a type of statistical analysis used to determine how the dependent variable (in this case rent) is influenced by the independent variables (in this case the characteristics of the neighborhood and rental unit). In regression analyses, it is very important to choose the independent variables with great care, making certain only those meeting certain statistically significant thresholds are used in the analysis. To select the independent variables, OPM uses a special procedure developed jointly by OPM and the Technical Advisory Committee. (The Technical Advisory Committee was established under the *Caraballo* settlement and is composed of three economists with expertise in living-cost comparisons.) We call this procedure the Variable Selection Protocol (VSP).

VSP is a multi-step procedure that uses objective criteria to eliminate independent variables with little

statistical significance in the regression. It also removes variables with inexplicable signs and variables that negatively affect the precision of the rent indexes. An example of an inexplicable sign is when the landlord provides an amenity (e.g., a microwave), and the variable has a negative sign. In essence, this is the same as saying on average when the landlord did not provide a microwave, the property rented for more than when the landlord did provide a microwave.

How VSP drops variables that negatively affect the precision of rent indexes is a bit more complicated to explain. The key variable in the regression is the survey area, i.e., Honolulu, Hawaii County, Maui, Kauai, Guam, and the Washington, DC, area. As with all variables in the regression, these variables have parameter estimates; but the survey area parameter estimates are especially important because they become the rent indexes for each of the survey areas. Therefore, it is important that the survey area parameter estimates be as accurate as practicable. The accuracy is measured by the standard error of the survey area parameter estimate. In the last steps of VSP, the protocol tests each of the variables in the model and drops variables that if retained would raise the standard errors of the survey area parameter estimates.

Using VSP, we selected variables with the greatest statistical significance. The variables are listed below and are shown in the regression output in Appendix 6.

—Age of unit;

—Age of unit squared;

—Number of bathrooms;

—Number of bedrooms;

—Unit type (detached house, row/townhouse, high rise apartment, garden apartment, and other (in-home apartments, duplex/triplex/quadplex units and other));

—Number of square feet combined (i.e., ''crossed'') with unit type;

—Square footage squared;

—Neighborhood condition (above average, average, or below average);

—Full kitchen (variable values range from 0–1 with three possible levels: 0, .5, or 1—variable receives .5 if unit has a refrigerator and .5 if it has a range or oven);

—Electricity (landlord provides electricity);

—Furniture (landlord provides furniture);

—Percent BA index (percentage of population in the census tract with a baccalaureate degree or higher level of education divided by the percentage of the population in the survey area with a baccalaureate degree or higher level of education);

—Percent school age index (percentage of population in the census tract of school age divided by the percentage of the population in the survey area of school age);

—Percent below the poverty level index (percentage of population in the census tract with income below the poverty level divided by the percentage of the population in the survey area with income below the poverty level);

—Survey year (2006 or 2007 DC area only); and

—Survey area (Honolulu, Hawaii County, Maui, Kauai, Guam, or the DC area).

We included the survey year variable in the regression calculations because, based on the recommendation of the Technical Advisory Committee, we use two years of DC area rental data. We find adding data from the previous year significantly reduces the standard error of the survey area parameter estimate.

As is common in this type of analysis and as was done in the research leading to the *Caraballo* settlement, OPM uses semi-logarithmic regressions. As noted previously in this section, the regression produces parameter estimates for each independent variable, including survey area. When the regression uses the Washington, DC, area as the base, the regression produces parameter estimates for each of the COLA survey areas: Honolulu, Hawaii County, Maui, Kauai, Guam. The exponent of the survey area parameter estimate (i.e., after the estimate is converted from natural logarithms) multiplied by 100 (following the convention used to express indexes) is the survey area's rent index. This index reflects the difference in rents in each of the COLA survey areas relative to the Washington, DC, area, while holding constant important neighborhood and rental unit characteristics captured in the survey and census data.

OPM makes a technical adjustment in the above calculations to correct for a slight bias caused by the use of logarithms because the exponent of the average of the logarithms of a series of numbers is always less than the average of the numbers. Therefore, we added one-half of the standard deviation of the survey area parameter estimate before converting from natural logarithms. (See Arthur Goldberger, ''Best Linear Unbiased Prediction in the Generalized Linear Regression Model,'' *Journal of the American Statistical Association,* 1962.) Table 4 shows the resulting rent indexes. We used these indexes as ''prices'' in the price averaging process described in Section 4.3.

TABLE 4—RENT INDEXES

| Area | Rent index |
|---|---|
| Honolulu County | 115.89 |
| Hilo Area | 58.98 |
| Kailua Kona/Waimea Area | 89.07 |
| Kauai County | 89.51 |
| Maui County | 97.73 |
| Guam | 82.57 |
| Washington, DC, Area | 100.00* |

*By definition, the index of the base area is always 100.00.

Appendix 6 shows the regression equation in SAS code and the regression results. (SAS is a proprietary statistical analysis computer software package.)

### *4.3 Averaging Prices by Item and Area*

After OPM collected, reviewed, and made special adjustments in the data (as required), OPM averaged the prices for each item by COLA survey area. For example, OPM priced a bag of sugar at three different grocery stores in Honolulu County and averaged these prices to compute a single average price for sugar in Honolulu. If OPM collected more than one price for a particular matched item within the same outlet (e.g., priced equivalent brands), OPM used the lowest price by item and outlet to compute the average. (The concept is that, if the item and brands are equivalent, consumers will choose the one with the lowest price.) OPM repeated this item-by-item averaging process for each area.

For Washington, DC, area prices, we first averaged prices within each of the three DC survey areas described in Section 2.5. Then we computed a weighted average of the three DC survey areas using census data on where Federal employees live as the weights.

### *4.4 Computing Price Indexes*

Next, OPM computed a price index for each of the items found in both the COLA survey area and in the Washington, DC, area. To do this, OPM divided the COLA survey area average price by the DC area average price and, following the convention used to express indexes, multiplied this by 100. For the vast majority of survey items, OPM next applied consumer expenditure weights. For a few items, however, OPM first applied special processes as described in Sections 4.4.1 and 4.4.2 below.

#### 4.4.1 Geometric Means

As described in Section 2.3, OPM selected survey items to represent selected detailed expenditure categories (DECs). Generally, OPM surveyed only one item per DEC, but in a few cases, OPM surveyed multiple items at a single

DEC. In these cases, OPM computed the geometric mean of the price indexes to derive a single price index for the DEC. (A geometric mean is the *n*th root of the product of *n* different numbers and is often used in price index computations.) For example, OPM surveyed two prescription drugs—Methylphenidate and Nexium. These two different prescription drugs represent a single DEC called ''prescription drugs.'' To derive a single price index for the DEC, OPM computed the geometric mean of the price index for Methylphenidate and the price index for Nexium.

4.4.2 Special Private Education Computations

As noted in Section 4.2.1, OPM surveyed K–12 private education in the COLA and DC areas and computed an average tuition ''price'' that reflected all grade levels. Because not everyone sends children to private school, OPM made an additional special adjustment for K–12 education by applying ''use factors.'' These use factors reflect the relative extent to which Federal employees make use of private education in the COLA and DC areas. For example, Table 5 shows a use factor of 2.0302 for Honolulu County. OPM computed this by dividing 26.86 percent (the percentage of Federal employees in Honolulu County with at least 1 child in a private school) by 13.23 percent (the percentage of DC area Federal employees with at least 1 child in a private school). OPM obtained the percentages from the results of the 1992/93 Federal Employee Housing and Living Patterns Survey, which is the most current comprehensive data available. Table 5 shows the use factors and the adjusted price indexes for each COLA survey area.

TABLE 5—SUMMARY OF PRIVATE EDUCATION USE FACTORS AND INDEXES

| COLA survey area | Employees w/children in private schools | | Use factor | Price index | Price index w/use factor |
|---|---|---|---|---|---|
| | Local area | DC area | | | |
| Honolulu County | 26.86 | 13.23 | 2.0302 | 78.55 | 159.48 |
| Hilo Area* | 18.94 | 13.23 | 1.4316 | 55.57 | 79.56 |
| Kailua Kona/Waimea* | 18.94 | 13.23 | 1.4316 | 74.77 | 107.04 |
| Kauai County | 22.46 | 13.23 | 1.6977 | 57.74 | 98.03 |
| Maui County | 20.39 | 13.23 | 1.5412 | 52.76 | 81.32 |
| Guam | 42.26 | 13.23 | 3.1943 | 52.02 | 166.18 |

*Use factor data available only for Hawaii County.

*4.5 Applying Consumer Expenditure Weights*

Next, OPM applied consumer expenditure weights to aggregate price indexes by expenditure group. As noted in Section 2.3, OPM used the results of the BLS Consumer Expenditure Survey to estimate the amounts middle income level consumers in the DC area spend on various items. Using expenditure weights, OPM combined the price indexes according to their relative importance. For example, shelter is the most important expenditure in terms of the COLA survey and represents about 30 percent of total consumer expenditures. On the other hand, the purchase of newspapers at newsstands represents less than 1/10th of 1 percent of total expenditures.

Beginning at the lowest level of expenditure aggregation (e.g., sub-PEG), OPM computed the relative importance of each survey item within the level of aggregation, multiplied the price index times its expenditure percentage, and summed the cross products for all of the items within the level of aggregation to compute a weighted price index for that level. OPM repeated this process at each higher level of aggregation (e.g., PEG and MEG). Appendix 7 shows these calculations for each COLA survey area at the PEG and MEG level.

The above process resulted in an overall price index for each of the Pacific COLA areas (shown in Appendix 7), but not for Hawaii County, which has two separate COLA survey areas. To compute an overall price index for Hawaii County, OPM computed weights based on the number of General Schedule (GS) and equivalent Federal employees stationed on the Hilo side of the island compared with the number stationed on the Kailua Kona/Waimea side of the island. OPM then multiplied each of the MEG indexes for Hilo and Kailua Kona by their respective GS employment weights and summed the cross products to produce an overall price index for Hawaii County. (See Appendix 7.) Table 6 shows the weights OPM used.

TABLE 6—HILO AND KAILUA KONA/WAIMEA EMPLOYMENT WEIGHTS

| Area | GS employment | Weight |
|---|---|---|
| Hilo Area | 643 | 66.7 |
| Kailua Kona/Waimea Area | 321 | 33.3 |
| Total | 964 | 100.0 |

**5. Final Results**

To compute the overall living-cost index, OPM added to the price index a non-price adjustment factor. The parties in *Caraballo* negotiated these factors to reflect differences in living costs that might not be captured by the surveys, and OPM adopted these factors in regulation as part of the new methodology. The factor for Honolulu County is five index points. The factor for all other COLA areas in Hawaii is seven index points. The factor for Guam/CNMI is nine index points. The resulting living-cost indexes are shown in Table 7.

TABLE 7—FINAL LIVING-COST COMPARISON INDEXES

| Allowance area | Index |
|---|---|
| Honolulu County, HI | 121.37 |
| Hawaii County, HI | 111.71 |
| Kauai County, HI | 118.14 |
| Maui County, HI | 123.62 |

TABLE 7—FINAL LIVING-COST COMPARISON INDEXES—Continued

| Allowance area | Index |
|---|---|
| Guam/CNMI | 119.98 |

**6. Post Survey Review**

In December 2007, OPM held teleconferences with the COLA Advisory Committees in Honolulu, Hilo, Kailua Kona, Kauai, Maui, and Guam to review the survey results. We provided the committee members with various reports showing the data we collected, examples of how we reviewed these data, the data we used in our analyses, and the results at the PEG and MEG level, as shown in Appendix 7. We explained how we analyzed the rental data and used expenditure weights to combine price indexes to reflect overall living costs.

**Appendix 1—Prior Survey Results: 1990–2006**

| Citation | Contents |
|---|---|
| 73 FR 774 | Report on 2006 living-cost surveys conducted in Alaska. |
| 71 FR 63179 | Report on 2005 living-cost surveys conducted in Puerto Rico and the U.S. Virgin Islands. |
| 70 FR 44989 | Report on 2004 living-cost surveys conducted in Hawaii and Guam. |
| 69 FR 12002 | Report on 2003 living-cost surveys conducted in Alaska. |
| 69 FR 6020 | Report on 2002 living-cost surveys conducted in Puerto Rico and the U.S. Virgin Islands. |
| 65 FR 44103 | Report on 1998 living-cost surveys conducted in Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 63 FR 56432 | Report on 1997 living-cost surveys conducted in Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 62 FR 14190 | Report on 1996 living-cost surveys conducted in Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 61 FR 4070 | Report on winter 1995 living-cost surveys conducted in Alaska. |
| 60 FR 61332 | Report on summer 1994 living-cost surveys conducted in Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 59 FR 45066 | Report on winter 1994 living-cost surveys conducted in Alaska. |
| 58 FR 45558 | Report on summer 1992 and winter 1993 living-cost surveys conducted in Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 58 FR 27316 | Report on summer 1993 living-cost surveys conducted in Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 57 FR 58556 | Report on summer 1991 and winter 1992 living-cost surveys conducted in Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |
| 56 FR 7902 | Report on summer 1990 living-cost surveys conducted in Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands. |

**Appendix 2—Estimated DC Area Middle Income Annual Consumer Expenditures**

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 1 | XTOTAL | | Total Expenditure | $57,910.67 |
| 2 | FOODTOTL | MEG | Food | 6,516.50 |
| 3 | CERBAKRY | PEG | Cereals and bakery products | 426.43 |
| 4 | CEREAL | | Cereals and cereal products | 152.02 |
| 5 | 010110 | | Flour | 4.76 |
| 5 | 010120 | | Prepared flour mixes | 12.20 |
| 5 | 010210 | | Ready to eat and cooked cereals* | 95.36 |
| 5 | 010310 | | Rice* | 17.23 |
| 5 | 010320 | | Pasta, cornmeal and other cereal products* | 22.47 |
| 4 | BAKERY | | Bakery products | 274.41 |
| 5 | BREAD | | Bread | 81.05 |
| 6 | 020110 | | White bread* | 31.35 |
| 6 | 020210 | | Bread, other than white* | 49.70 |
| 5 | CRAKCOOK | | Crackers and cookies | 72.78 |
| 6 | 020510 | | Cookies* | 44.31 |
| 6 | 020610 | | Crackers | 28.47 |
| 5 | 020810 | | Frozen and refrigerated bakery products* | 20.07 |
| 5 | OTHBAKRY | | Other bakery products | 100.51 |
| 6 | 020310 | | Biscuits and rolls* | 37.28 |
| 6 | 020410 | | Cakes and cupcakes* | 29.32 |
| 6 | 020620 | | Bread and cracker products | 3.62 |
| 6 | 020710 | | Sweetrolls, coffee cakes, doughnuts | 18.16 |
| 6 | 020820 | | Pies, tarts, turnovers | 12.13 |
| 3 | ANIMAL | PEG | Meats, poultry, fish, and eggs | 797.61 |
| 4 | BEEF | | Beef | 216.02 |
| 5 | 030110 | | Ground beef* | 90.12 |
| 5 | ROAST | | Roast | 30.38 |
| 6 | 030210 | | Chuck roast* | 8.09 |
| 6 | 030310 | | Round roast* | 6.69 |
| 6 | 030410 | | Other roast | 15.60 |
| 5 | STEAK | | Steak | 77.60 |
| 6 | 030510 | | Round steak* | 13.00 |
| 6 | 030610 | | Sirloin steak* | 22.62 |
| 6 | 030710 | | Other steak | 41.99 |
| 5 | 030810 | | Other beef | 17.92 |
| 4 | PORK | | Pork | 123.62 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 040110 | | Bacon* | 24.11 |
| 5 | 040210 | | Pork chops* | 27.34 |
| 5 | HAM | | Ham | 23.57 |
| 6 | 040310 | | Ham, not canned* | 22.72 |
| 6 | 040610 | | Canned ham* | 0.85 |
| 5 | 040510 | | Sausage | 22.63 |
| 5 | 040410 | | Other pork | 25.99 |
| 4 | OTHRMEAT | | Other meats | 98.39 |
| 5 | 050110 | | Frankfurters* | 19.93 |
| 5 | LNCHMEAT | | Lunch meats (cold cuts) | 70.77 |
| 6 | 050210 | | Bologna, liverwurst, salami* | 17.74 |
| 6 | 050310 | | Other lunchmeats | 53.03 |
| 5 | LAMBOTHR | | Lamb, organ meats and others | 7.69 |
| 6 | 050410 | | Lamb and organ meats | 5.87 |
| 6 | 050900 | | Mutton, goat and game | 1.82 |
| 4 | POULTRY | | Poultry | 150.59 |
| 5 | CHICKEN | | Fresh and frozen chickens | 124.71 |
| 6 | 060110 | | Fresh and frozen whole chicken* | 32.03 |
| 6 | 060210 | | Fresh and frozen chicken parts* | 92.68 |
| 5 | 060310 | | Other poultry | 25.89 |
| 4 | FISHSEA | | Fish and seafood | 174.06 |
| 5 | 070110 | | Canned fish and seafood* | 24.51 |
| 5 | 070230 | | Fresh fish and shellfish* | 88.71 |
| 5 | 070240 | | Frozen fish and shellfish* | 60.84 |
| 4 | 080110 | | Eggs* | 34.93 |
| 3 | DAIRY | PEG | Dairy products | 356.84 |
| 4 | MILKCRM | | Fresh milk and cream | 136.59 |
| 5 | 090110 | | Fresh milk, all types* | 122.82 |
| 5 | 090210 | | Cream | 13.77 |
| 4 | OTHDAIRY | | Other dairy products | 220.25 |
| 5 | 100110 | | Butter | 18.06 |
| 5 | 100210 | | Cheese* | 111.05 |
| 5 | 100410 | | Ice cream and related products* | 58.14 |
| 5 | 100510 | | Miscellaneous dairy products | 33.00 |
| 3 | FRUITVEG | PEG | Fruits and vegetables | 411.55 |
| 4 | FRSHFRUT | | Fresh fruits | 236.25 |
| 5 | 110110 | | Apples* | 38.56 |
| 5 | 110210 | | Bananas* | 36.77 |
| 5 | 110310 | | Oranges* | 26.41 |
| 5 | 110510 | | Citrus fruits, excluding oranges | 20.52 |
| 5 | 110410 | | Other fresh fruits | 113.99 |
| 4 | FRESHVEG | | Fresh vegetables | 175.30 |
| 5 | 120110 | | Potatoes* | 29.88 |
| 5 | 120210 | | Lettuce* | 24.10 |
| 5 | 120310 | | Tomatoes* | 32.62 |
| 5 | 120410 | | Other fresh vegetables | 88.70 |
| 3 | PROCFOOD | PEG | Processed Foods | 704.71 |
| 4 | PROCFRUT | | Processed fruits | 105.96 |
| 5 | FRZNFRUT | | Frozen fruits and fruit juices | 10.47 |
| 6 | 130110 | | Frozen orange juice* | 3.34 |
| 6 | 130121 | | Frozen fruits | 4.27 |
| 6 | 130122 | | Frozen fruit juices | 2.86 |
| 5 | 130310 | | Canned fruits* | 18.85 |
| 5 | 130320 | | Dried fruit | 6.64 |
| 5 | 130211 | | Fresh fruit juice | 16.11 |
| 5 | 130212 | | Canned and bottled fruit juice* | 53.90 |
| 4 | PROCVEG | | Processed vegetables | 79.04 |
| 5 | 140110 | | Frozen vegetables* | 24.44 |
| 5 | CANDVEG | | Canned and dried vegetables and juices | 54.59 |
| 6 | 140210 | | Canned beans* | 10.48 |
| 6 | 140220 | | Canned corn | 5.00 |
| 6 | 140230 | | Canned miscellaneous vegetables | 16.96 |
| 6 | 140320 | | Dried peas | 0.18 |
| 6 | 140330 | | Dried beans | 2.60 |
| 6 | 140340 | | Dried miscellaneous vegetables | 8.69 |
| 6 | 140310 | | Dried processed vegetables | 0.25 |
| 6 | 140410 | | Frozen vegetable juices | 0.18 |
| 6 | 140420 | | Fresh and canned vegetable juices | 10.25 |
| 4 | MISCFOOD | | Miscellaneous foods | 519.71 |
| 5 | FRZNPREP | | Frozen prepared foods | 112.04 |
| 6 | 180210 | | Frozen meals* | 36.91 |
| 6 | 180220 | | Other frozen prepared foods | 75.13 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 180110 | | Canned and packaged soups * | 33.18 |
| 5 | SNACKS | | Potato chips, nuts, and other snacks | 96.38 |
| 6 | 180310 | | Potato chips and other snacks * | 73.94 |
| 6 | 180320 | | Nuts | 22.44 |
| 5 | CONDMNTS | | Condiments and seasonings | 82.84 |
| 6 | 180410 | | Salt, spices, other seasonings * | 17.24 |
| 6 | 180420 | | Olives, pickles, relishes | 10.20 |
| 6 | 180510 | | Sauces and gravies * | 38.13 |
| 6 | 180520 | | Baking needs and miscellaneous products | 17.27 |
| 5 | OTHRPREP | | Other canned and packaged prepared foods | 156.42 |
| 6 | 180611 | | Prepared salads | 23.46 |
| 6 | 180612 | | Prepared desserts * | 10.82 |
| 6 | 180620 | | Baby food * | 23.36 |
| 6 | 180710 | | Miscellaneous prepared foods | 98.30 |
| 6 | 180720 | | Vitamin supplements | 0.48 |
| 5 | 190904 | | Food prepared by consumer unit on out of town trips. | 38.85 |
| 3 | OTHRFOOD | PEG | Other food at home | 206.39 |
| 4 | SWEETS | | Sugar and other sweets | 131.14 |
| 5 | 150110 | | Candy and chewing gum * | 80.99 |
| 5 | 150211 | | Sugar * | 18.75 |
| 5 | 150212 | | Artificial sweeteners * | 5.30 |
| 5 | 150310 | | Jams, preserves, other sweets * | 26.10 |
| 4 | FATSOILS | | Fats and oils | 75.25 |
| 5 | 160110 | | Margarine * | 7.11 |
| 5 | 160211 | | Fats and oils * | 24.69 |
| 5 | 160212 | | Salad dressings * | 23.30 |
| 5 | 160310 | | Nondairy cream and imitation milk * | 10.85 |
| 5 | 160320 | | Peanut butter | 9.30 |
| 3 | NALCBEVG | PEG | Nonalcoholic beverages | 275.93 |
| 4 | 170110 | | Cola * | 81.53 |
| 4 | 170210 | | Other carbonated drinks | 46.70 |
| 4 | COFFEE | | Coffee | 40.79 |
| 5 | 170310 | | Roasted coffee * | 25.98 |
| 5 | 170410 | | Instant and freeze dried coffee | 14.81 |
| 4 | 170520 | | Tea | 19.43 |
| 4 | 170510 | | Noncarbonated fruit flavored drinks * | 16.25 |
| 4 | 200112 | | Nonalcoholic beer | 0.24 |
| 4 | 170530 | | Other nonalcoholic beverages and ice | 70.99 |
| 3 | FOODAWAY | PEG | Food away from home | 2,780.39 |
| 4 | RESTCOAO | | Meals at Restaurants, carry outs, and other | 2,386.66 |
| 5 | LUNCH | | Lunch | 837.92 |
| 6 | 190111 | | Lunch at fast food, takeout, delivery, etc. * | 413.59 |
| 6 | 190112 | | Lunch at full service restaurants * | 299.86 |
| 6 | 190113 | | Lunch at vending machines/mobile vendors | 22.44 |
| 6 | 190114 | | Lunch at employer and school cafeterias | 102.02 |
| 5 | DINNER | | Dinner | 1,100.42 |
| 6 | 190211 | | Dinner at fast food, takeout, delivery, etc. * | 391.80 |
| 6 | 190212 | | Dinner at full service restaurants * | 698.07 |
| 6 | 190213 | | Dinner at vending machines/mobile vendors | 4.57 |
| 6 | 190214 | | Dinner at employer and school cafeterias | 5.99 |
| 5 | SNKNABEV | | Snacks and nonalcoholic beverages | 205.47 |
| 6 | 190311 | | Snacks/nonalcoholic bev. at fast food, takeout, etc. *. | 118.81 |
| 6 | 190312 | | Snacks/nonalcoholic bev. at full service restaurants. | 36.59 |
| 6 | 190313 | | Snacks/nonalcoholic bev. at vending machines. | 43.22 |
| 6 | 190314 | | Snacks/nonalcoholic bev. at cafeterias | 6.84 |
| 5 | BRKFBRUN | | Breakfast and brunch | 242.85 |
| 6 | 190321 | | Breakfast/brunch at fast food, takeout, delivery, etc. *. | 119.45 |
| 6 | 190322 | | Breakfast/brunch at full service restaurants * | 107.45 |
| 6 | 190323 | | Breakfast/brunch at vending machines, etc. | 5.50 |
| 6 | 190324 | | Breakfast/brunch at cafeterias | 10.45 |
| 4 | NONRESME | | Non Restaurant Meals | 393.74 |
| 5 | 190901 | | Board (including at school) | 14.32 |
| 5 | 190902 | | Catered affairs | 52.08 |
| 5 | 190903 | | Food on out of town trips | 209.62 |
| 5 | 790430 | | School lunches | 76.88 |
| 5 | 800700 | | Meals as pay | 40.83 |
| 3 | ALCBEVG | PEG | Alcoholic beverages | 556.66 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 4 | ALCHOME | | At home | 282.69 |
| 5 | 200111 | | Beer and ale* | 180.53 |
| 5 | 200210 | | Whiskey | 8.39 |
| 5 | 200310 | | Wine* | 77.62 |
| 5 | 200410 | | Other alcoholic beverages | 16.16 |
| 4 | ALCAWAY | | Away from home | 273.97 |
| 5 | BEERNALE | | Beer and ale | 122.78 |
| 6 | 200511 | | Beer and ale at fast food, takeout, etc. | 19.42 |
| 6 | 200512 | | Beer and ale at full service restaurants* | 100.55 |
| 6 | 200513 | | Beer and ale at vending machines, etc. | 2.34 |
| 6 | 200514 | | Beer at Employer | 0.47 |
| 6 | 200515 | | Beer at Board | 0.00 |
| 6 | 200516 | | Beer and ale at catered affairs | 0.00 |
| 5 | WINE | | Wine | 34.88 |
| 6 | 200521 | | Wine at fast food, takeout, delivery, etc. | 2.22 |
| 6 | 200522 | | Wine at full service restaurants* | 32.41 |
| 6 | 200523 | | Wine at vending machines, etc. | 0.25 |
| 6 | 200524 | | Wine at Employer | 0.00 |
| 6 | 200525 | | Wine at Board | 0.00 |
| 6 | 200526 | | Wine at catered affairs | 0.00 |
| 5 | OTHALCBV | | Other alcoholic beverages | 72.43 |
| 6 | 200531 | | Other alcoholic bev. at fast food, etc. | 6.56 |
| 6 | 200532 | | Other alcoholic bev. at full service restaurants | 65.69 |
| 6 | 200533 | | Other alcoholic bev. at vending machines, etc. | 0.18 |
| 6 | 200534 | | Other Alcohol at Employer | 0.00 |
| 6 | 200535 | | Other Alcohol at Board | 0.00 |
| 6 | 200536 | | Other alcoholic beverages at catered affairs | 0.00 |
| 5 | 200900 | | Alcoholic beverages purchased on trips | 43.88 |
| 2 | SHEL&UTL | MEG | Shelter and Utilities | 22,057.19 |
| 3 | SHELTER | PEG | Shelter | 19,633.77 |
| 4 | RNTLEQ | | Rented Equivalence (estimated monthly × 12) | 15,195.09 |
| 4 | RENTXX | | Rented Dwelling (rent minus tenants ins.)* | 4,065.04 |
| 4 | 350110 | | Tenants Insurance (tenants ins × 2)* | 35.69 |
| 4 | OTHLODGE | | Other Lodging (other minus housing at school) | 337.95 |
| 3 | ENERUT | PEG | Energy Utilities* | 2,044.33 |
| 3 | WATERX | PEG | Water and other public services* | 379.09 |
| 2 | HHF&SUPP | MEG | Household Furnishings and Supplies | 3,094.33 |
| 3 | HHOPER | PEG | Household operations | 887.07 |
| 4 | HHPERSRV | | Personal services | 545.00 |
| 5 | 340210 | | Babysitting and child care* | 114.45 |
| 6 | 340211 | | Child care in own home | 43.12 |
| 6 | 340212 | | Care care outside own home | 71.33 |
| 5 | 340906 | | Care for elderly, invalids, handicapped, etc. | 49.85 |
| 5 | 340910 | | Adult daycare centers | 4.45 |
| 5 | 670310 | | Daycare centers, nursery, and preschools* | 376.25 |
| 4 | HHOTHXPN | | Other household expenses | 342.08 |
| 5 | 340310 | | Housekeeping services* | 65.73 |
| 5 | 340410 | | Gardening, lawn care service* | 106.31 |
| 5 | 340420 | | Water softening service | 7.00 |
| 5 | 340520 | | Household laundry and dry cleaning, sent out | 1.29 |
| 5 | 340530 | | Coin operated household laundry/dry cleaning | 4.97 |
| 5 | 340914 | | Services for termite/pest control | 19.74 |
| 5 | 340915 | | Home security system service fee | 22.36 |
| 5 | 340903 | | Other home services | 18.29 |
| 5 | 330511 | | Termite/pest control products | 3.01 |
| 5 | 340510 | | Moving, storage, freight express* | 52.81 |
| 5 | 340620 | | Appliance repair, including service center | 18.25 |
| 5 | 340630 | | Reupholstering, furniture repair | 6.33 |
| 5 | 340901 | | Repairs/rentals of lawn/equipment, etc. | 8.75 |
| 5 | 340907 | | Appliance rental | 2.26 |
| 5 | 340908 | | Rental of office equipment for nonbusiness use. | 0.62 |
| 5 | 340913 | | Repair of miscellaneous household equip. | 4.31 |
| 5 | 990900 | | Rental/install of dishwashers, range hoods, and garb. disposals. | 0.05 |
| 3 | HKPGSUPP | PEG | Housekeeping supplies | 578.03 |
| 4 | LAUNDRY | | Laundry and cleaning supplies | 147.39 |
| 5 | 330110 | | Soaps and detergents* | 75.97 |
| 5 | 330210 | | Other laundry cleaning products | 71.42 |
| 4 | HKPGOTHR | | Other household products | 278.54 |
| 5 | 330310 | | Cleansing & toilet tissue, paper towels/napkins*. | 85.90 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 330510 | | Miscellaneous household products | 123.76 |
| 5 | 330610 | | Lawn and garden supplies* | 68.87 |
| 4 | POSTAGE | | Postage and stationery | 152.10 |
| 5 | 330410 | | Stationery, stationery supplies, giftwrap* | 79.37 |
| 5 | 340110 | | Postage | 69.94 |
| 6 | STAMP | | Stamp* | 66.17 |
| 6 | PARPST | | Parcel Post* | 3.77 |
| 5 | 340120 | | Delivery services | 2.78 |
| 3 | TEX&RUGS | PEG | Textiles and Area Rugs | 173.96 |
| 4 | HHTXTILE | | Household textiles | 149.28 |
| 5 | 280110 | | Bathroom linens* | 20.67 |
| 5 | 280120 | | Bedroom linens* | 86.28 |
| 5 | 280130 | | Kitchen and dining room linens | 8.48 |
| 5 | 280210 | | Curtains and draperies | 16.10 |
| 5 | 280220 | | Slipcovers, decorative pillows | 7.32 |
| 5 | 280230 | | Sewing materials for slipcovers, curtains, etc. | 9.53 |
| 5 | 280900 | | Other linens | 0.91 |
| 4 | FLOORCOV | | Floor coverings | 24.67 |
| 5 | RNTCARPT | | Wall to wall carpeting (renter) | 1.42 |
| 6 | 230134 | | Wall to wall carpet (renter) | 1.01 |
| 6 | 320163 | | Wall to wall carpet (replacement) (renter) | 0.41 |
| 5 | 320111 | | Floor coverings, nonpermanent* | 23.25 |
| 3 | FURNITUR | PEG | Furniture | 495.94 |
| 4 | 290110 | | Mattress and springs* | 60.32 |
| 4 | 290120 | | Other bedroom furniture | 125.64 |
| 4 | 290210 | | Sofas | 108.40 |
| 4 | 290310 | | Living room chairs* | 49.72 |
| 4 | 290320 | | Living room tables | 19.29 |
| 4 | 290410 | | Kitchen, dining room furniture* | 53.53 |
| 4 | 290420 | | Infants' furniture | 8.96 |
| 4 | 290430 | | Outdoor furniture | 11.36 |
| 4 | 290440 | | Wall units, cabinets and other occasional furniture. | 58.72 |
| 3 | MAJAPPL | PEG | Major appliances | 126.33 |
| 4 | 230116 | | Dishwashers (built in), disposals, range hoods | 6.96 |
| 5 | 230117 | | Dishwasher (owned home) | 0.21 |
| 5 | 230118 | | Dishwasher (rented home) | 6.75 |
| 4 | 300110 | | Refrigerators, freezers* | 37.68 |
| 5 | 300111 | | Refrigerators, freezers (renter) | 3.57 |
| 5 | 300112 | | Refrigerators, freezers (owned home) | 34.11 |
| 4 | 300210 | | Washing machines* | 19.48 |
| 5 | 300211 | | Washing machines (renter) | 4.02 |
| 5 | 300212 | | Washing machines (owned home) | 15.46 |
| 4 | 300220 | | Clothes dryers | 14.95 |
| 5 | 300221 | | Clothes dryers (renter) | 3.13 |
| 5 | 300222 | | Clothes Dryer (owned home) | 11.82 |
| 4 | 300310 | | Cooking stoves, ovens* | 20.78 |
| 5 | 300311 | | Cooking stoves, ovens (renter) | 1.76 |
| 5 | 300312 | | Cooking stoves, ovens (owned home) | 19.02 |
| 4 | 300320 | | Microwave ovens | 6.10 |
| 5 | 300321 | | Microwave ovens (renter) | 1.45 |
| 5 | 300322 | | Microwave ovens (owned home) | 4.65 |
| 4 | 300330 | | Portable dishwasher | 0.59 |
| 5 | 300331 | | Portable dishwasher (renter) | 0.06 |
| 5 | 300332 | | Portable dishwasher (owned home) | 0.53 |
| 4 | 300410 | | Window air conditioners | 19.79 |
| 5 | 300411 | | Window air conditioners (renter) | 0.98 |
| 5 | 300412 | | Window air conditioners (owned home) | 3.21 |
| 5 | 320511 | | Electric floor cleaning equipment* | 11.74 |
| 5 | 320512 | | Sewing machines | 2.31 |
| 5 | 300900 | | Miscellaneous household appliances | 1.55 |
| 3 | SMAPPHWR | PEG | Small appliances, miscellaneous housewares | 79.99 |
| 4 | HOUSWARE | | Housewares | 56.50 |
| 5 | 320310 | | Plastic dinnerware | 1.57 |
| 5 | 320320 | | China and other dinnerware* | 7.98 |
| 5 | 320330 | | Flatware | 2.47 |
| 5 | 320340 | | Glassware | 8.23 |
| 5 | 320350 | | Silver serving pieces | 4.38 |
| 5 | 320360 | | Other serving pieces | 1.34 |
| 5 | 320370 | | Nonelectric cookware* | 12.08 |
| 5 | 320380 | | Tableware, nonelectric kitchenware | 18.44 |
| 4 | SMLLAPPL | | Small appliances | 23.49 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 320521 | | Small electric kitchen appliances* | 18.30 |
| 5 | 320522 | | Portable heating and cooling equipment | 5.19 |
| 3 | MISCHHEQ | PEG | Miscellaneous household equipment | 753.01 |
| 4 | 320120 | | Window coverings | 32.61 |
| 4 | 320130 | | Infants' equipment | 16.65 |
| 4 | 320140 | | Laundry and cleaning equip. | 22.31 |
| 4 | 320150 | | Outdoor equipment* | 39.39 |
| 4 | 320210 | | Clocks | 5.02 |
| 4 | 320220 | | Lamps and lighting fixtures | 15.79 |
| 4 | 320231 | | Other household decorative items | 201.60 |
| 4 | 320232 | | Telephones and accessories* | 55.51 |
| 4 | 320410 | | Lawn and garden equipment* | 71.36 |
| 4 | 320420 | | Power tools* | 99.00 |
| 4 | 320901 | | Office furniture for home use* | 10.74 |
| 4 | 320902 | | Hand tools* | 8.50 |
| 4 | 320903 | | Indoor plants, fresh flowers* | 50.43 |
| 4 | 320904 | | Closet and storage items | 16.77 |
| 4 | 340904 | | Rental of furniture | 3.09 |
| 4 | 430130 | | Luggage | 7.21 |
| 4 | 690115 | | Personal Digital Assistants (PDA) | 3.12 |
| 4 | 690116 | | Internet Svcs Away from Home | 4.40 |
| 4 | 690210 | | Telephone answering devices | 1.40 |
| 4 | 690220 | | Calculators | 0.19 |
| 4 | 690230 | | Business equipment for home use | 2.31 |
| 4 | 320430 | | Other hardware | 18.39 |
| 4 | 690242 | | Smoke alarms (owned home) | 1.29 |
| 4 | 690241 | | Smoke alarms (renter) | 0.25 |
| 4 | 690243 | | Smoke alarms (owned vacation) | 0.00 |
| 4 | 690245 | | Other household appliances (owned home) | 7.35 |
| 4 | 690244 | | Other household appliances (renter) | 2.53 |
| 4 | 320905 | | Miscellaneous household equipment and parts | 55.79 |
| 2 | APPAREL | MEG | Apparel and services | 2,183.43 |
| 3 | MENBOYS | PEG | Men and boys | 492.34 |
| 4 | MENS | | Men, 16 and over | 380.36 |
| 5 | 360110 | | Men's suits* | 18.25 |
| 5 | 360120 | | Men's sportcoats, tailored jackets | 5.42 |
| 5 | 360210 | | Men's coats and jackets | 39.74 |
| 5 | 360311 | | Men's underwear* | 21.29 |
| 5 | 360312 | | Men's hosiery | 16.59 |
| 5 | 360320 | | Men's nightwear | 1.61 |
| 5 | 360330 | | Men's accessories | 53.25 |
| 5 | 360340 | | Men's sweaters and vests | 10.05 |
| 5 | 360350 | | Men's active sportswear | 15.20 |
| 5 | 360410 | | Men's shirts* | 103.78 |
| 5 | 360511 | | Men's pants* | 76.59 |
| 5 | 360512 | | Men's shorts, shorts sets | 14.25 |
| 5 | 360901 | | Men's uniforms | 3.26 |
| 5 | 360902 | | Men's costumes | 1.04 |
| 4 | BOYS | | Boys, 2 to 15 | 111.99 |
| 5 | 370110 | | Boys' coats and jackets | 5.36 |
| 5 | 370120 | | Boys' sweaters | 2.62 |
| 5 | 370130 | | Boys' shirts* | 32.35 |
| 5 | 370211 | | Boys' underwear | 7.05 |
| 5 | 370212 | | Boys' nightwear | 4.73 |
| 5 | 370213 | | Boys' hosiery | 6.22 |
| 5 | 370220 | | Boys' accessories | 4.79 |
| 5 | 370311 | | Boys' suits, sportcoats, vests | 1.76 |
| 5 | 370312 | | Boys' pants* | 31.09 |
| 5 | 370313 | | Boys' shorts, shorts sets | 8.18 |
| 5 | 370903 | | Boys' uniforms | 3.78 |
| 5 | 370904 | | Boys' active sportswear | 3.13 |
| 5 | 370902 | | Boys' costumes | 0.91 |
| 3 | WMNSGRLS | PEG | Women and girls | 797.99 |
| 4 | WOMENS | | Women, 16 and over | 681.07 |
| 5 | 380110 | | Women's coats and jackets | 69.54 |
| 5 | 380210 | | Women's dresses* | 59.23 |
| 5 | 380311 | | Women's sportcoats, tailored jackets | 6.82 |
| 5 | 380312 | | Women's vests and sweaters* | 41.87 |
| 5 | 380313 | | Women's shirts, tops, blouses* | 135.06 |
| 5 | 380320 | | Women's skirts | 18.86 |
| 5 | 380331 | | Women's pants* | 129.29 |
| 5 | 380332 | | Women's shorts, shorts sets | 11.81 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 380340 | | Women's active sportswear | 31.42 |
| 5 | 380410 | | Women's sleepwear | 37.30 |
| 5 | 380420 | | Women's undergarments | 31.43 |
| 5 | 380430 | | Women's hosiery | 19.10 |
| 5 | 380510 | | Women's suits | 22.04 |
| 5 | 380901 | | Women's accessories* | 58.78 |
| 5 | 380902 | | Women's uniforms | 7.23 |
| 5 | 380903 | | Women's costumes | 1.28 |
| 4 | GIRLS | | Girls, 2 to 15 | 116.92 |
| 5 | 390110 | | Girls' coats and jackets | 5.87 |
| 5 | 390120 | | Girls' dresses and suits* | 10.40 |
| 5 | 390210 | | Girls' shirts, blouses, sweaters* | 33.92 |
| 5 | 390221 | | Girls' skirts and pants* | 29.54 |
| 5 | 390222 | | Girls' shorts, shorts sets | 7.28 |
| 5 | 390230 | | Girls' active sportswear | 7.45 |
| 5 | 390310 | | Girls' underwear and sleepwear | 7.14 |
| 5 | 390321 | | Girls' hosiery | 4.71 |
| 5 | 390322 | | Girls' accessories | 7.33 |
| 5 | 390901 | | Girls' uniforms | 2.32 |
| 5 | 390902 | | Girls' costumes | 0.97 |
| 3 | INFANT | PEG | Children under 2 | 70.14 |
| 4 | 410110 | | Infant coat, jacket, snowsuit | 2.40 |
| 4 | 410120 | | Infant dresses, outerwear | 19.20 |
| 4 | 410130 | | Infant underwear* | 35.41 |
| 4 | 410140 | | Infant nightwear, loungewear* | 3.65 |
| 4 | 410901 | | Infant accessories | 9.48 |
| 3 | FOOTWEAR | PEG | Footwear | 523.09 |
| 4 | 400110 | | Men's footwear* | 164.08 |
| 4 | 400210 | | Boys' footwear | 58.30 |
| 4 | 400310 | | Women's footwear* | 235.02 |
| 4 | 400220 | | Girls' footwear | 65.69 |
| 3 | OTHAPPRL | PEG | Other apparel products and services | 299.87 |
| 4 | 420110 | | Material for making clothes | 10.38 |
| 4 | 420120 | | Sewing patterns and notions | 8.59 |
| 4 | 430110 | | Watches* | 27.00 |
| 4 | 430120 | | Jewelry* | 116.98 |
| 4 | 440110 | | Shoe repair and other shoe service | 1.67 |
| 4 | 440120 | | Coinoperated apparel laundry/dry cleaning* | 61.53 |
| 4 | 440130 | | Alteration, repair and tailoring of apparel | 6.34 |
| 4 | 440140 | | Clothing rental | 2.93 |
| 4 | 440150 | | Watch and jewelry repair | 5.92 |
| 4 | 440210 | | Apparel laundry/dry cleaning not coinoperated*. | 57.91 |
| 4 | 440900 | | Clothing storage | 0.61 |
| 2 | TRANS | MEG | Transportation | 8,202.21 |
| 3 | MOTVEHCO | PEG | Motor Vehicle Costs | 3,623.71 |
| 4 | VEHPURCH | | Vehicle purchases (net outlay) | 2,839.52 |
| 5 | NEWCARS | | Cars and trucks, new | 1,408.35 |
| 6 | 450110 | | New cars* | 614.87 |
| 6 | 450210 | | New trucks | 793.48 |
| 5 | USEDCARS | | Cars and trucks, used | 1,430.27 |
| 6 | 460110 | | Used cars | 732.39 |
| 6 | 460901 | | Used trucks | 697.88 |
| 5 | OTHVEHCL | | Other vehicles | 0.90 |
| 6 | 450220 | | New motorcycles | 0.68 |
| 6 | 450900 | | New aircraft | 0.00 |
| 6 | 460902 | | Used motorcycles | 0.22 |
| 6 | 460903 | | Used aircraft | 0.00 |
| 4 | VEHFINCH | | Vehicle finance charges | 412.09 |
| 5 | 510110 | | Automobile finance charges* | 169.36 |
| 5 | 510901 | | Truck finance charges | 219.57 |
| 5 | 510902 | | Motorcycle and plane finance charges | 5.58 |
| 5 | 850300 | | Other vehicle finance charges | 17.58 |
| 4 | LEASVEH | | Leased vehicles | 206.45 |
| 5 | 450310 | | Car lease payments | 87.96 |
| 5 | 450313 | | Cash downpayment (car lease) | 5.50 |
| 5 | 450314 | | Termination fee (car lease) | 8.49 |
| 5 | 450410 | | Truck lease payments | 101.20 |
| 5 | 450413 | | Cash downpayment (truck lease) | 3.29 |
| 5 | 450414 | | Termination fee (truck lease) | 0.00 |
| 4 | VEHXP&LV | | Other Vehicle Expenses and Licenses | 165.65 |
| 5 | 520110 | | State & Local Registration* | 99.18 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 6 | 520111 | | Vehicle reg. state (as of Q20012) incl in 520110. | 91.22 |
| 6 | 520112 | | Vehicle reg. local (as of Q20012) incl in 520110. | 7.97 |
| 5 | 520310 | | Driver's license | 8.53 |
| 5 | 520410 | | Vehicle inspection (added to S&L registration)*. | 11.70 |
| 5 | PARKING | | Parking fees | 23.89 |
| 6 | 520531 | | Parking fees in home city, excluding residence | 19.35 |
| 6 | 520532 | | Parking fees, outoftown trips | 4.54 |
| 5 | 520541 | | Tolls | 12.60 |
| 5 | 520542 | | Tolls on outoftown trips | 4.56 |
| 5 | 520550 | | Towing charges | 5.17 |
| 5 | 520560 | | GPSS Services | 0.59 |
| 5 | 620113 | | Automobile service clubs | 18.89 |
| 3 | GASOIL | PEG | Gasoline and motor oil | 1,992.28 |
| 4 | 470111 | | Gasoline* | 1,837.20 |
| 4 | 470112 | | Diesel fuel | 32.93 |
| 4 | 470113 | | Gasoline on outoftown trips | 111.06 |
| 4 | 470114 | | Gasohol | 0.00 |
| 4 | 470211 | | Motor oil | 9.97 |
| 4 | 470212 | | Motor oil on outoftown trips | 1.12 |
| 3 | CARP&R | PEG | Maintenance and repairs | 809.20 |
| 4 | CARPAR | | Maintenance and Repair Parts | 188.70 |
| 5 | 470220 | | Coolant, additives, brake, transmission fluids | 5.12 |
| 5 | 480110 | | Tires purchased, replaced, installed* | 118.24 |
| 5 | 480213 | | Parts, equipment, and accessories* | 54.27 |
| 5 | 480214 | | Vehicle audio equipment, excluding labor | 4.15 |
| 5 | 480212 | | Vehicle products | 5.74 |
| 5 | 480215 | | Vehicle Video Equipment | 1.18 |
| 4 | CARREP | | Maintenance and Repair Service* | 620.50 |
| 5 | 490000 | | Misc. auto repair, servicing | 50.15 |
| 5 | 490110 | | Body work and painting | 30.90 |
| 5 | 490211 | | Clutch, transmission repair | 58.32 |
| 5 | 490212 | | Drive shaft and rearend repair | 10.33 |
| 5 | 490221 | | Brake work, including adjustments | 61.65 |
| 5 | 490231 | | Repair to steering or frontend | 20.21 |
| 5 | 490232 | | Repair to engine cooling system | 25.52 |
| 5 | 490311 | | Motor tuneup | 48.48 |
| 5 | 490312 | | Lube, oil change, and oil filters | 79.17 |
| 5 | 490313 | | Frontend alignment, wheel balance and rotation. | 14.14 |
| 5 | 490314 | | Shock absorber replacement | 4.10 |
| 5 | 490316 | | Gas tank repair, replacement | 0.00 |
| 5 | 490318 | | Repair tires and other repair work | 43.73 |
| 5 | 490319 | | Vehicle air conditioning repair | 18.06 |
| 5 | 490411 | | Exhaust system repair | 12.87 |
| 5 | 490412 | | Electrical system repair | 26.34 |
| 5 | 490413 | | Motor repair, replacement | 81.57 |
| 5 | 490900 | | Auto repair service policy | 15.49 |
| 3 | 500110 | PEG | Vehicle insurance* | 1,168.76 |
| 3 | RENTVEH | PEG | Rented vehicles | 0.00 |
| 3 | PUBTRANS | PEG | Public transportation | 608.26 |
| 4 | 530110 | | Airline fares* | 388.53 |
| 4 | 530210 | | Intercity bus fares | 16.99 |
| 4 | 530510 | | Intercity train fares | 35.38 |
| 4 | 530901 | | Ship fares | 29.65 |
| 4 | LOCTRANS | | Local Transportation | 137.73 |
| 5 | 530311 | | Intracity mass transit fares | 85.04 |
| 5 | 530312 | | Local trans. on outoftown trips | 15.77 |
| 5 | 530411 | | Taxi fares and limousine service on trips | 9.26 |
| 5 | 530412 | | Taxi fares and limousine service* | 25.98 |
| 5 | 530902 | | School bus | 1.67 |
| 2 | MEDICAL | MEG | Medical | 2,750.36 |
| 3 | HEALTINS | PEG | Health insurance* | 1,619.00 |
| 4 | COMHLTIN | | Commercial health insurance | 306.16 |
| 5 | 580111 | | Traditional fee for service health plan (not BCBS). | 105.77 |
| 5 | 580113 | | Preferred provider health plan (not BCBS) | 200.39 |
| 4 | BCBS | | Blue Cross, Blue Shield | 457.97 |
| 5 | 580112 | | Traditional fee for service health plan (BCBS) | 68.28 |
| 5 | 580114 | | Preferred provider health plan (BCBS) | 186.34 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 580312 | | Health maintenance organization (BCBS) | 152.08 |
| 5 | 580904 | | Commercial Medicare supplement (BCBS) | 48.35 |
| 5 | 580906 | | Other health insurance (BCBS) | 2.92 |
| 4 | 580311 | | Health maintenance organization (not BCBS) | 346.16 |
| 4 | 580901 | | Medicare payments | 307.37 |
| 4 | COMEDOTH | | Commercial Medicare supplements and other health insurance. | 168.70 |
| 5 | 580903 | | Commercial Medicare supplement (not BCBS) | 124.90 |
| 5 | 580905 | | Other health insurance (not BCBS) | 43.80 |
| 4 | 580400 | | Long Term Care Insurance | 32.65 |
| 3 | MEDSERVS | PEG | Medical services | 674.66 |
| 4 | 560110 | | Physician's services* | 165.27 |
| 4 | 560210 | | Dental services* | 234.66 |
| 4 | 560310 | | Eyecare services | 37.72 |
| 4 | 560400 | | Service by professionals other than physician | 47.33 |
| 4 | 560330 | | Lab tests, xrays | 41.62 |
| 4 | 570111 | | Hospital Room and Services* | 124.44 |
| 4 | 570240 | | Medical care in retirement community | 0.29 |
| 4 | 570220 | | Care in convalescent or nursing home | 6.32 |
| 4 | 570902 | | Repair of medical equipment | 0.96 |
| 4 | 570230 | | Other medical care services | 16.05 |
| 3 | DRUGS&ME | PEG | Drugs and Medical Supplies | 456.70 |
| 4 | DRUGS | | Drugs | 353.88 |
| 5 | 550210 | | Nonprescription drugs* | 45.75 |
| 5 | 550410 | | Nonprescription vitamins | 31.96 |
| 5 | 540000 | | Prescription drugs* | 276.17 |
| 4 | MEDSUPPL | | Medical supplies | 102.82 |
| 5 | 550110 | | Eyeglasses and contact lenses* | 51.50 |
| 5 | 550340 | | Hearing aids | 13.73 |
| 5 | 550310 | | Topicals and dressings* | 28.87 |
| 5 | 550320 | | Medical equipment for general use | 4.59 |
| 5 | 550330 | | Supportive and convalescent medical equip. | 3.13 |
| 5 | 570901 | | Rental of medical equipment | 0.32 |
| 5 | 570903 | | Rental of supportive, convalescentequipment | 0.67 |
| 2 | RECREATN | MEG | Recreation | 2,571.77 |
| 3 | FEESADM | PEG | Fees and admissions | 672.71 |
| 4 | 610900 | | Recreation expenses, outoftown trips | 29.76 |
| 4 | 620111 | | Social, recreation, civic club membership* | 129.68 |
| 4 | 620121 | | Fees for participant sports* | 103.59 |
| 4 | 620122 | | Participant sports, outoftown trips | 28.95 |
| 4 | 620211 | | Movie, theater, opera, ballet* | 149.26 |
| 4 | 620212 | | Movie, other admissions, outoftown trips | 59.69 |
| 4 | 620221 | | Admission to sporting events | 39.85 |
| 4 | 620222 | | Admission to sports events, outoftown trips | 19.89 |
| 4 | 620310 | | Fees for recreational lessons* | 82.29 |
| 4 | 620903 | | Other entertainment services, outoftown trips | 29.76 |
| 3 | TVAUDIO | PEG | Television, radios, sound equipment | 419.47 |
| 4 | 310140 | | Televisions* | 130.01 |
| 4 | 310311 | | Radios | 5.28 |
| 4 | 310312 | | Phonographs | 0.00 |
| 4 | 310313 | | Tape recorders and players | 5.48 |
| 4 | 620930 | | On Line Gaming Services | 0.00 |
| 4 | 310210 | | VCR's and video disc players* | 26.83 |
| 4 | 310331 | | Miscellaneous sound equipment | 1.09 |
| 4 | 310332 | | Sound equipment accessories | 6.84 |
| 4 | 310220 | | Video cassettes, tapes, and discs* | 58.76 |
| 4 | 310230 | | Video game hardware and software | 37.13 |
| 4 | 310240 | | Streaming Downloading Audio | 0.58 |
| 4 | 340610 | | Repair of TV, radio, and sound equipment | 3.47 |
| 4 | 340902 | | Rental of televisions | 0.88 |
| 4 | 310314 | | Personal Digital Audio Players | 10.46 |
| 4 | 310320 | | Sound components and component systems* | 13.36 |
| 4 | 310334 | | Satellite dishes | 1.27 |
| 4 | 310340 | | CDs Records & Audio Tapes* | 48.65 |
| 4 | 310350 | | Streaming Downloading Audio | 2.24 |
| 4 | 340905 | | Rental of VCR, radio, and sound equipment | 0.27 |
| 4 | 610130 | | Musical instruments and accessories | 18.71 |
| 4 | 620904 | | Rental and repair of musical instruments | 6.21 |
| 4 | 620912 | | Rental of video cassettes, tapes, & discs* | 41.95 |
| 3 | PETSPLAY | PEG | Pets, toys, and playground equipment | 447.82 |
| 4 | PETS | | Pets | 338.42 |
| 5 | 610310 | | Pet food* | 144.28 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 5 | 610320 | | Pet purchase, supplies, medicine | 73.38 |
| 5 | 620410 | | Pet services | 25.64 |
| 5 | 620420 | | Vet services * | 95.12 |
| 4 | 610110 | | Toys, games, hobbies, and tricycles * | 99.22 |
| 4 | 610140 | | Stamp & Coin Collecting | 7.65 |
| 4 | 610120 | | Playground equipment | 2.53 |
| 3 | ENTEROTH | PEG | Other entertainment supplies, equipment, and services. | 231.57 |
| 4 | UNMTRBOT | | Unmotored recreational vehicles | 47.53 |
| 5 | 600121 | | Boat without motor and boat trailers | 1.65 |
| 5 | 600122 | | Trailer and other attachable campers | 45.88 |
| 4 | PWRSPVEH | | Motorized recreational vehicles | 60.97 |
| 5 | 600141 | | Purchase of motorized camper | 32.79 |
| 5 | 600142 | | Purchase of other vehicle * | 10.79 |
| 5 | 600132 | | Purchase of boat with motor | 17.38 |
| 4 | RNTSPVEH | | Rental of recreational vehicles | 2.19 |
| 5 | 520904 | | Rental noncamper trailer | 0.03 |
| 5 | 520907 | | Boat and trailer rental outoftown trips | 0.37 |
| 5 | 620909 | | Rental of campers on outoftown trips | 0.00 |
| 5 | 620919 | | Rental of other vehicles on outoftown trips | 1.41 |
| 5 | 620906 | | Rental of boat | 0.01 |
| 5 | 620921 | | Rental of motorized camper | 0.00 |
| 5 | 620922 | | Rental of other RV's | 0.37 |
| 4 | 600110 | | Outboard motors | 0.65 |
| 4 | 520901 | | Docking and landing fees | 1.33 |
| 4 | RECEQUIP | | Sports, recreation and exercise equipment | 70.67 |
| 5 | 600210 | | Athletic gear, game tables, exercise equip. * | 31.84 |
| 5 | 600310 | | Bicycles | 6.84 |
| 5 | 600410 | | Camping equipment | 8.17 |
| 5 | 600420 | | Hunting and fishing equipment | 14.51 |
| 5 | 600430 | | Winter sports equipment | 1.21 |
| 5 | 600901 | | Water sports equipment | 3.52 |
| 5 | 600902 | | Other sports equipment | 3.47 |
| 5 | 600903 | | Global Positioning Services | 0.00 |
| 5 | 620908 | | Rental and repair of mis. sports equipment | 1.12 |
| 4 | PHOTOEQ | | Photographic equipment, supplies and services. | 41.56 |
| 5 | 610210 | | Film * | 5.46 |
| 5 | 610220 | | Other photographic supplies | 0.32 |
| 5 | 620330 | | Film processing * | 10.53 |
| 5 | 620905 | | Repair and rental of photographic equipment | 0.11 |
| 5 | 610230 | | Photographic equipment | 17.21 |
| 5 | 620320 | | Photographer fees | 7.93 |
| 4 | 610901 | | Fireworks | 2.91 |
| 4 | 610902 | | Souvenirs | 0.72 |
| 4 | 610903 | | Visual goods | 1.17 |
| 4 | 620913 | | Pinball, electronic video games | 1.87 |
| 3 | PERSPROD | PEG | Personal care products | 335.09 |
| 4 | 640110 | | Hair care products * | 58.89 |
| 4 | 640120 | | Nonelectric articles for the hair | 7.16 |
| 4 | 640130 | | Wigs and hairpieces | 2.78 |
| 4 | 640210 | | Oral hygiene products, articles | 37.59 |
| 4 | 640220 | | Shaving needs | 18.55 |
| 4 | 640310 | | Cosmetics, perfume, bath preparation * | 159.33 |
| 4 | 640410 | | Deodorants, feminine hygiene, misc pers. Care. | 38.60 |
| 4 | 640420 | | Electric personal care appliances | 12.19 |
| 3 | PERSSERV | PEG | Personal care services | 302.58 |
| 4 | 650310 | | Personal care service * | 302.58 |
| 4 | 650900 | | Repair of personal care appliances | 0.00 |
| 3 | READING | PEG | Reading | 88.23 |
| 4 | 590310 | | Newspapers, Magazines by Subscription * | 64.93 |
| 4 | 590410 | | Newspapers, Magazines at Newstand * | 23.30 |
| 3 | 590900 | PEG | Newsletters | 0.00 |
| 3 | 590220 | PEG | Books thru book clubs | 7.98 |
| 3 | 590230 | PEG | Books not thru book clubs * | 64.38 |
| 3 | 660310 | PEG | Encyclopedia and other sets of reference books. | 1.95 |
| 2 | EDU&COMM | MEG | Education and Communication | 2,875.29 |
| 3 | EDUCATN | PEG | Education | 126.68 |
| 4 | 670210 | | Elementary and high school tuition * | 100.75 |
| 4 | 660210 | | School books, supplies for elementary and H.S. | 25.93 |

[Asterisks show Detailed Expenditure Categories (DECs) for which OPM surveyed items.]

| Level | Code | Group | Category name | Expenditures |
|---|---|---|---|---|
| 3 | COMMICAT | PEG | Communications | 1,840.72 |
| 4 | PHONE | | Telephone services | 1,599.90 |
| 5 | 270101 | | Telephone services in home city, excluding car*. | 865.86 |
| 5 | 270102 | | Telephone services for mobile car phones* | 695.39 |
| 5 | 270103 | | Pager service | 2.59 |
| 5 | 270104 | | Phone cards | 36.06 |
| 4 | 690114 | | Computer information services* | 240.81 |
| 3 | 270310 | PEG | Community antenna or cable/satellite TV* | 680.92 |
| 3 | COMP&SVC | PEG | Computers and Computer Services | 226.97 |
| 4 | 690113 | | Repair of computer systems for nonbusiness use. | 7.56 |
| 4 | 690111 | | Computers and computer hardware nonbusiness use*. | 192.72 |
| 4 | 690112 | | Computer software and accessories for nonbusiness use. | 26.69 |
| 2 | MISCMEG | MEG | Miscellaneous | 7,659.59 |
| 3 | TOBACCO | PEG | Tobacco products and smoking supplies | 250.30 |
| 4 | 630110 | | Cigarettes* | 231.80 |
| 4 | 630210 | | Other tobacco products | 16.78 |
| 4 | 630220 | | Smoking accessories | 1.72 |
| 3 | MISC | PEG | Miscellaneous | 931.02 |
| 4 | 620925 | | Miscellaneous fees | 4.07 |
| 4 | 620926 | | Lotteries and parimutuel losses | 115.49 |
| 4 | 680110 | | Legal fees* | 132.58 |
| 4 | 680140 | | Funeral expenses* | 69.06 |
| 4 | 680210 | | Safe deposit box rental | 4.48 |
| 4 | 680220 | | Checking accounts, other bank service charges. | 23.98 |
| 4 | 680901 | | Cemetery lots, vaults, maintenance fees | 23.72 |
| 4 | 680902 | | Accounting fees | 50.18 |
| 4 | 680903 | | Miscellaneous personal services | 49.33 |
| 4 | 680904 | | Dating services | 0.59 |
| 4 | 710110 | | Credit card interest and annual fees* | 266.12 |
| 4 | 900002 | | Occupational expenses* | 40.97 |
| 4 | 790600 | | Expenses for other properties | 141.97 |
| 4 | 880210 | | Interest paid, home equity line of credit (other property). | 0.18 |
| 4 | 620115 | | Shopping club membership fees | 8.31 |
| 3 | INSPENSN | PEG | Personal insurance and pensions | 6,478.27 |
| 4 | LIFEINSR | | Life and other personal insurance* | 486.20 |
| 5 | 700110 | | Life, endowment, annuity, other personal insurance. | 469.05 |
| 5 | 002120 | | Other nonhealth insurance | 17.15 |
| 4 | PENSIONS | | Pensions and Social Security | 5,992.07 |
| 5 | 800910 | | Deductions for government retirement* | 94.65 |
| 5 | 800920 | | Deductions for railroad retirement | 4.43 |
| 5 | 800931 | | Deductions for private pensions | 488.08 |
| 5 | 800932 | | Nonpayroll deposit to retirement plans | 442.06 |
| 5 | 800940 | | Deductions for Social Security | 4,962.85 |

**Appendix 3—COLA Survey Items and Descriptions**

*Adhesive Bandages.* One box of 30 adhesive bandages. Assorted sizes. Clear or flexible okay to use. (**Note**: in Virginia, add tax to this item.) *Use:* Band Aid.

*Airfare Los Angeles.* Lowest cost round trip ticket to Los Angeles, CA, 3-week advance reservation, departing and returning midweek and including Saturday night stay. Price non-refundable ticket. Disregard restrictions, super-saver fares, and special promotions. In reference area, price flights from Baltimore Washington International for Maryland, Reagan National for the District of Columbia, and Dulles for Virginia. Price all flights via Internet on same day during the DC area survey. *Use:* Major carrier.

*Airfare Miami.* Lowest cost round trip ticket to Miami, FL, 3-week advance reservation, departing and returning midweek and including Saturday night stay. Price non-refundable ticket. Disregard restrictions, super-saver fares, and special promotions. In reference area, price flights from Baltimore Washington International for Maryland, Reagan National for the District of Columbia, and Dulles for Virginia. Price all flights via Internet on same day during the DC area survey. *Use:* Major carrier.

*Airfare Seattle.* Lowest cost round trip ticket to Seattle, WA, 3-week advance reservation, departing and returning midweek and including Saturday night stay. Price non-refundable ticket. Disregard restrictions, super-saver fares, and special promotions. In reference area, price flights from Baltimore Washington International for Maryland, Reagan National for the District of Columbia, and Dulles for Virginia. Price all flights via Internet on same day during the DC area survey. *Use:* Major carrier.

*Airfare St. Louis.* Lowest cost round trip ticket to St. Louis, MO, 3-week advance reservation, departing and returning midweek and including Saturday night stay. Price non-refundable ticket. Disregard restrictions, super-saver fares, and special promotions. In reference area, price flights from Baltimore Washington International for Maryland, Reagan National for the District of Columbia, and Dulles for Virginia. Price all flights via Internet on same day during the DC area survey. *Use:* Major carrier.

*Alternator (Ford).* Price of a remanufactured 95 Amp alternator for a 1998

Ford Explorer 4.0L fuel injected V6 with A/C and automatic transmission to the consumer at a dealership. Report price net of core charge (i.e., price after core is returned). Report core charge in comments. If only new alternator available, report new price as match. If price varies whether dealer installs, assume dealer installs but do not price labor. *Use:* Dealer recommended brand.

*Alternator (Toyota).* Price of a remanufactured alternator for a 1998 Toyota Corolla LE sedan, 4 door, 1.8 liter, 4 cylinder, 16 valve, automatic transmission, to the consumer at a dealership. Report price net of core charge (i.e., price after core is returned). Report core charge in comments. If only new alternator available, report new price as match. If price varies whether dealer installs, assume dealer installs but do not price labor. *Use:* Dealer recommended brand.

*Antacid.* Ninety-six count size of extra strength tablets. *Use:* Tums EX 96 tablets.

*Antibacterial Ointment.* One ounce and ½ ounce tubes of antibacterial ointment. *Use:* Neosporin Original.

*Apples.* Price per pound, loose (not bagged) apples. If only bagged apples available, report bag weight. *Use:* Red Delicious.

*Area Rug.* Approximately 8 foot by 11 foot oval braided rug, flat woven, 3-ply yarn, wool/nylon/rayon blend, with multi-colored accents. Include sales tax and shipping and handling. *Use:* American Traditions. JC Penney catalog number: A751–0449.

*Artificial Sweetener.* Fifty-count package of artificial sweetener. *Use:* Equal.

*Aspirin.* Fifty tablets of regular strength aspirin. *Use:* Bayer, Regular Strength.

*ATV, Honda.* All terrain sports vehicle with 250–300cc engine. Electric start. *Use:* Honda 2007 Sportrax 300EX.

*ATV, Yamaha.* All terrain sports vehicle with 350cc engine. Electric start. *Use:* Yamaha Warrior.

*Auto Finance Rate.* Interest rate for a 4-year loan on a new car with a down payment of 20 percent. Assume the loan applicant is a current bank customer who will make payments by cash/check and not by automatic deduction from the account. Enter 7.65 percent as $7.650. If bank needs to know type of car, use specified Ford. Obtain interest rate and verify phone number. *Use:* Interest percentage rate.

*Baby Food.* Four ounce jar strained vegetables or fruit. *Use:* Gerber 2nd.

*Babysitter.* Minimum hourly wage appropriate to area. *Use:* Government wage data.

*Baking Dish 8 x 8.* Glass baking dish, 8 inch square glass, clear or tinted. Exclude baking dish with cover or lid. *Use:* Martha Stewart (K-Mart) and Anchor Hocking (Wal-Mart).

*Baking Dish 9 x 13.* Glass baking dish, 9 inch by 13 inch glass, clear or tinted. Exclude baking dish with cover or lid. *Use:* Pyrex.

*Bananas.* Price per pound of bananas. If sold by bunch, report price and weight of average sized bunch. *Use:* Available brand.

*Bath Towel.* Approximately 56 inch x 30 inch wide, 100 percent cotton, medium weight. Side hem is woven selvage. Bottom hem may be folded. *Use:* Springmaid (Wal-Mart) and Martha Stewart 3 Star (K-Mart).

*Beer at Home (Cans).* Six-pack of 12 ounce cans. Do not price refrigerated beer unless that is the only type available. *Use:* Budweiser.

*Beer Away.* All restaurant types. One glass of beer, draft if available. Check sales tax and include in price. *Use:* Budweiser.

*Board Game.* Price standard edition, not deluxe. *Use:* Sorry.

*Book, Paperback.* Store price (not publisher's list price unless that is the store price) for top selling fiction, paperback book. Also price via Amazon.com during the DC area survey. *Use:* Chesapeake Blue, by Nora Roberts and The King of Torts, by John Grisham.

*Bowling.* One game of open (or non-league) 10-pin bowling on a weekday (Monday-Friday) between the hours of 10 a.m.–5 p.m. Exclude shoe rental. If priced by the hour, report hourly rate divided by 5 (*i.e.*, estimated number of games per hour) and note hourly rate in comments. Do not price duck-pin bowling. *Use:* Bowling.

*Boy's Jeans.* Relaxed fit, size range 9 to 14, pre-washed jeans, not bleached, stone-washed or designer jeans. *Use:* Levis 550 Relaxed Fit.

*Boy's Polo Shirt.* Knit polo-type short sleeve shirt with collar, solid color, cotton/polyester, size range 8 to 14. *Use:* Ralph Lauren (Macys) and Lands End (Sears).

*Boy's T-Shirt.* Screen-printed t-shirt for boys ages 8 thru 10 (sizes 7 to 14). Pullover with crew neck, short sleeves and polyester/cotton blend. Do not price team logo shirts. *Use:* Green Dog Blues (Macys) and Canyon River Blues (Sears).

*Bread, Wheat.* Loaf of sliced wheat bread, 16 ounces. Do not price store brand. *Use:* Roman Meal 16 oz.

*Bread, Wheat, Butter Top.* Loaf of sliced wheat bread, 20–24 ounces. Do not price store brand. *Use:* Home Pride. Love's Home Pride is an equivalent brand.

*Bread, White.* Loaf of sliced white bread, 22–24 ounces. Do not price store brand. *Use:* Wonder giant loaf. Love's is an equivalent brand.

*Breakfast Full Service.* Approximately two strips of bacon or two sausages, two eggs, toast, hash browns, coffee, and juice. Check sales tax and include in price. *Use:* Bacon and eggs breakfast.

*Cable TV, Analog Service.* One month of cable service. Include converter and universal remote fees. Do not price value packages or premium channels; i.e., Showtime, HBO, Cinemax. Do not report hook-up charges. Itemize taxes and fees as percent rates or amounts and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Local provider.

*Camera Film.* Four-pack, 35 millimeter, 24 exposure, 400 ASA (speed). *Use:* Kodak Max 400.

*Candy Bar.* One regular size candy bar-weight approximately 1.55 to 2.13 ounces. Do not price king-size or multi-pack. *Use:* Snickers.

*Canned Chopped Ham.* Twelve ounce can of processed luncheon meat. Do not price turkey, light, or smoked varieties. *Use:* SPAM.

*Canned Green Beans.* Fourteen to 15 ounce can of plain-cut green beans. *Use:* Del Monte.

*Canned Peaches.* Fifteen to 16 ounce can of peaches. *Use:* Del Monte.

*Canned Soup.* Regular size (approx. 10.7 ounce) can of condensed soup. Not hearty, reduced fat, or salt free varieties. *Use:* Campbell's Chicken Noodle Soup.

*Canned Tuna.* Chunk light tuna, packed in spring water (6.0 to 6.13 ounces). Do not price fancy style or albacore. *Use:* Star Kist.

*Cellular Phone 500 Minute Plan.* Cellular phone service with 500 anytime minutes per month. Price via internet, all areas at the same time during the DC area survey. Call for fee information. Itemize taxes and fees and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Major provider.

*Cellular Phone 600 Minute Plan.* Cellular phone service with 600 anytime minutes per month. Price via internet, all areas at the same time during the DC area survey. Call for fee information. Itemize taxes and fees and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Major provider.

*Cellular Phone 800 Minute Plan.* Cellular phone service with 800 anytime minutes per month. Price via internet, all areas at the same time during the DC area survey. Call for fee information. Itemize taxes and fees and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Major provider.

*Cereal.* Raisin bran cereal, approximately 20 ounce box. *Use:* Post Raisin Bran.

*Charcoal Grill.* Charcoal grill, heavy gauge, porcelain-enameled, steel lid, approximately 22.5 inches diameter, model 741001. *Use:* Weber 1 Touch Silver 22½″.

*Charcoal Grill.* Charcoal grill, heavy gauge, porcelain-enameled, steel lid, approximately 18.5 inches diameter, model 441001. *Use:* Weber 1 Touch Silver 18.5″.

*Cheese.* Twelve ounce package cheese, 16 slices. Okay to price two percent milk-reduced fat singles, but do not price fat free variety. *Use:* Kraft Singles, American.

*Chicken Breast, Skinless, Boneless.* Price per pound of USDA grade boneless, skinless, fresh chicken breasts. Price store brand if available, otherwise record brand. **Note:** Most ''fresh'' (*i.e.*, not frozen) chicken is ''chilled'' to almost freezing. *Use:* Store brand.

*Chicken, Whole Fryer, Fresh.* Price per pound of USDA graded, whole fryer, fresh chicken. If multiple brands available, match the lowest priced item and note in comments. If frozen chicken available, price as substitute. **Note**: Most ''fresh'' (i.e., not frozen) chicken is ''chilled'' to almost freezing. *Use:* Available brand.

*Chrysler.* Purchase price of a 2007 Chrysler Sebring sedan, 4 door, 2.4 liter, 4 cylinder, 16 valve, four-speed automatic transmission. Please note the price of any special option packages. *Use:* Chrysler Sebring sedan.

*Chrysler License, Registration, Taxes, & Inspection.* License, registration, periodic taxes (*e.g.*, road or personal property tax, but NOT one-time taxes such as sales tax), and inspection (e.g., safety and emissions) on the Chrysler specified for survey. *Use:* Specified Chrysler.

*Chuck Roast, Boneless.* Price per pound, fresh (not frozen or previously frozen) boneless beef chuck pot roast. Price USDA Select or un-graded if available. If not available, note USDA grade in comments.

Use average size package; i.e., not family-pack, value-pack, super-saver pack, or equivalent. If multiple brands available (e.g., Angus), match the lowest priced item and note in comments. *Use:* Available brand.

*Cigarettes.* One pack filter kings. Include State and/or Federal tobacco tax in price if normally part of the price. Report sales tax in the same manner as any other taxable item. *Use:* Marlboro.

*Coffee, Ground.* Thirteen ounce can. Do not price decaffeinated or special roasts. *Use:* Folger's.

*Compact Disc.* Current best-selling CD. Do not price double CD's. *Use:* Norah Jones, *Feels Like Home* or Beyonce, *Dangerously In Love.*

*Contact Lenses.* One box of disposable contact lenses, three pairs in the box. A pair lasts 2 weeks. *Use:* Bausch & Lomb or Acuvue.

*Cookies.* Approximately sixteen ounce package of chocolate chip cookies. *Use:* Nabisco Chips Ahoy.

*Cooking Oil.* Forty-eight fluid ounce plastic bottle of vegetable oil. *Use:* Crisco.

*Cordless Phone 2.4 GHz.* Cordless phone, 2.4 GHz with Caller ID and Digital Answering Machine. Color: Black. *Use:* GE 2.4 GHz (27998GE6).

*Cordless Phone 900 MHz.* Cordless phone, 900MHz with Caller ID and Digital Answering Machine. *Use:* GE (26992GE1).

*Credit Card Interest & Annual Fees.* Obtain credit card interest rate of gold and platinum cards and apply it to the national average balance ($8,562) plus any annual fees charged by the bank. Obtain interest rate and charges and verify phone number. *Use:* Gold and platinum VISA/Master Card.

*Cremation.* Direct cremation. Includes removal of remains, local transportation to crematory, necessary body care and minimal services of the staff. Include crematory fee. Do not include price of urn. Ask if crematory fee, Medical Examiner fee, and minimum basic container is included. Ask if anything other than basic service, such as a funeral service, is included. *Use:* Cremation.

*Cured Ham, Boneless.* Price per pound of a boneless cured ham. If multiple brands available, match the lowest priced item and note in comments. *Use:* Hormel, Cure 81.

*Day Care.* One month of day care for a 3-year old child, 5 days a week, about 10 hours per day. If monthly rate is not available, (1) obtain weekly rate, (2) record rate in the comments section, and (3) multiply weekly rate by 4.33 to obtain monthly rate. *Use:* Day care.

*Dental Clean and Check-Up.* Current adult patient charge for routine exam, including two bite-wing x-rays and cleaning of teeth with light scaling and polishing. No special treatment of gums or teeth. Do not price an initial visit or specialist or oral surgeon. (Dental codes: 0120, 0272, 1110.) *Use:* Dentist.

*Dental Crown.* Cost of a full crown on a lower molar, porcelain fused to a high noble metal. Include price of preparation or restoration of tooth to accept crown. Price for an adult. (Dental code: 2750.) *Use:* Dentist.

*Dental Filling.* Lower molar, two surfaces resin-based composite filling. Price for an adult. (Dental code: 2392.) *Use:* Dentist.

*Dining Table Set.* Solid hardwood butcher-block top dining table with 6 coordinating slat-back chairs (2 bonus side chairs for a penny). Table measures 42 x 60″, expands to a 60″ square with butterfly leaf, 29½″ high. Chairs have an 18″ seat height. Include sales tax and shipping and handling. *Use: 5-piece casual dining set from JC Penney catalog number:* A796–1323.

*Dinner Full Service—Filet Mignon.* Extra fine dining, fine dining, and Outback-type restaurants. Filet mignon (6 to 10 ounce) with 1 or 2 small side dishes (e.g., rice or potato), salad and coffee. Do not include tip. Check sales tax and include in price. *Use:* Filet mignon.

*Dinner Full Service—Steak, Large.* Extra fine dining, fine dining, and Outback-type restaurants. Steak (10 to 16 ounce) with 1 or 2 small side dishes (e.g., rice or potato), salad and coffee. Do not include tip. Check sales tax and include in price. *Use:* Steak dinner, large.

*Dinner Full Service—Steak, Medium.* Casual and pancake house restaurants. Approximately 8 to 12 ounce steak, with 1 or 2 small side dishes (e.g., rice or potato), side salad or salad bar, and coffee. Meal should not include dessert. If 8–12 ounce unavailable, price closest size and note in comments. Check sales tax and include in price. *Use:* Steak dinner, medium.

*Dish Set.* Patterned tableware, 20-piece set. Includes: 4 dinner plates, 4 luncheon plates, 4 bowls, 4 cups, and 4 saucers. *Use:* Corelle, Chutney.

*Disposable Diapers.* Grocery and discount stores. Pampers: Forty-eight count package, Stage 2 (child 12–18 lbs), Jumbo disposable diapers with koala fit grips. If Stage 2 is not available price a different stage Pampers Jumbo diaper, report as match, and note stage in comments. Huggies: Forty-eight count package, Step 2 (child 12–18 lbs), Jumbo, Ultratrim disposable diapers with stretch waist. If Step 2 is not available price a different step Huggies Jumbo diaper, report as match, and note step in comments. *Use:* Pampers, Baby Dry, Jumbo, Stage 2; Huggies, Ultratrim, Jumbo, Step 2.

*Doctor Office Visit.* Typical fee for office visit for an adult when medical advice or simple treatment is needed. Do not price initial visit. Exclude regular physical examination, injections, medications, or lab tests. Use general practitioner not pediatrician or other specialist. *Medical Code:* 99213. *Use:* Doctor.

*Drill, Cord.* Variable speed, ⅜ inch, reversible electric drill, approximately 5 amp. *Use:* Black & Decker DR200, Craftsman Model 10104 (Sears).

*Drill, Cord (Extra Features).* Variable speed, ⅜ inch, reversible electric drill, approximately 5 amp, keyless chuck, double gear reduction, built-in level. *Use:* Black & Decker DR201K.

*Drill, Cordless.* Variable speed, reversible, ⅜ inch keyless ratcheting chuck, 14.4 volt, electric drill with fast recharge, with battery charger. *Use:* DeWalt DW928K–2 (Sears item number 00926842000).

*Dry Clean Man's Suit.* Dry cleaning of a two-piece man's suit of typical fabric. Do not price for silk, suede or other unusual materials. *Use:* Dry cleaning.

*DVD Movie.* Current best-selling DVD movie. Do not price double DVDs. *Use: Bruce Almighty* or *Seabiscuit.*

*DVD Player.* Progressive scan 1-disc MP3/CD/DVD player. *Use:* Sony DVPNS425P and Sony DVP–NS725P; RCA DRC230N (K-Mart); RCA DRC212N (Wal-Mart).

*Education, Private 6–12.* Cost of tuition. Note if books and uniforms are included. If price varies by grade, record in comments price for each grade. Note any annual, recurring fees; i.e., registration, computer, activity, etc. If pricing at church-affiliated schools, note any rate differences for church members versus others. *Use:* Private school 6–12, private school K–12, private school K–8.

*Eggs (White, Large).* One dozen large white Grade A eggs. If multiple brands available, match the lowest priced item and note in comments. *Use:* Available brand.

*Electric Bill.* Total utility rates for electricity from utility function model, including all taxes and surcharges, etc. Use utility worksheets to collect data. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Local provider.

*Electric Broom.* Electric broom style vacuum cleaner with 2 amp motor. *Use:* K-Mart: Eureka The Boss Bagless 164; *Wal-Mart:* Eureka The Boss Bagless 169.

*Eye Round Roast, Boneless.* Price per pound, fresh (not frozen or previously frozen) boneless eye round roast. Price USDA Select or un-graded if available. If not available, note USDA grade in comments. Use average size package, i.e., not family-pack, value-pack, super-saver pack, or equivalent. If multiple brands available (e.g. Angus), match the lowest priced item and note in comments. *Use:* Available brand.

*Fast Food Breakfast.* Egg McMuffin value meal, includes hash browns and coffee. Price medium size. Check sales tax and include in price. *Use:* Egg McMuffin Value Meal (Med.).

*Fast Food Dinner Burger.* Big Mac value meal, includes fries and soda. Price medium size. Check sales tax and include in price. *Use:* Big Mac Value Meal (Med.).

*Fast Food Dinner Pizza.* Medium cheese pizza (without extra cheese) with salad and small soft drink. Check sales tax and include in price. *Use:* Medium Cheese Pizza.

*Fast Food Lunch Burger.* Big Mac value meal, includes fries and soda. Price medium size. Check sales tax and include in price. *Use:* Big Mac Value Meal (Med.).

*Fast Food Lunch Pizza.* Personal size cheese pizza (without extra cheese) or one slice of cheese pizza. Include price of a small soft drink. Do not include price of salad or other side dishes. Check sales tax and include in price. *Use:* Cheese Pizza.

*FEGLI (Life Insurance).* Federal life insurance. This item is not surveyed locally because it is constant across all areas. *Use:* Federal Employees' Group Life Insurance.

*FEHB Insurance.* Self only and family. This item is not surveyed locally. OPM provides premiums and enrollment data from Central Personnel Data File. *Use:* Federal Employees Health Benefits Insurance.

*FERS/CSRS Contributions.* Federal retirement contributions. This item is not surveyed locally because it is constant across all areas. *Use:* Federal Employees' Retirement System and Civil Service Retirement System.

*Filing Cabinet*. Metal, two-drawer, vertical file cabinet, approximately 24 x 14 x 18 inches. File drawer accommodates hanging files. *Use:* K-Mart: ISD Classic File 150; Wal-Mart: Space Solutions Ready File 10002.

*Film Processing 1 Hour*. One-hour color film processing for 24 exposure, 35 mm, with either 3 x 5 or 4 x 6 inch single prints. *Use:* In-store processing.

*Ford Explorer 4WD*. Purchase price of a 2007 Ford Explorer XLT, 4x4, 4 door, 4.0 liter, 6 cylinder, 5-speed automatic overdrive transmission. Please note the price of any special option packages. *Use:* Ford Explorer XLT.

*Ford License, Registration, Taxes, and Inspection*. License, registration, periodic taxes (e.g., road or personal property tax, but NOT one-time taxes such as sales tax), and inspection (e.g., safety and emissions) on the Ford specified for survey. *Use:* Specified Ford.

*Fresh Mahi-Mahi*. Price per pound of fresh Mahi-Mahi fillet. Do not price previously frozen (PF) or specially prepared varieties. Do not price family-pack, value-pack, super-save pack, or equivalent. If multiple brands available, match the lowest priced item and note in comments. *Use:* Available brand.

*Fresh Tuna Steak, Yellowfin (Ahi)*. Price one pound of tuna steak, yellowfin (Ahi), fresh. Do not price previously frozen (PF) or specially prepared varieties. Do not price family-pack, value-pack, super-save pack, or equivalent. If multiple brands available, match the lowest priced item and note in comments. *Use:* Available brand.

*Frozen Fish Fillet*. Price of one box (10 count) of frozen ocean whitefish breaded fillets. *Use:* Gorton's Lemon Herb flavor, approximately 18 ounce (if unavailable, price traditional crunchy as a substitute); Van de Kamp 10 count, approximately 21 to 25 ounce.

*Frozen Orange Juice*. Twelve fluid ounce can of orange juice concentrate (makes 48 fl ounces). Do not price calcium fortified, pulp free, country style, etc. *Use:* Minute Maid.

*Frozen Peas*. Sixteen ounce package of frozen petite or baby peas, no sauce or onions. *Use:* C&W Petite peas.

*Frozen TV Dinner*. One 11.75 ounce (approximate size) frozen dinner with vegetable and/or other condiment. Do not price Hungry Man or equivalent extra-portion sizes. *Use:* Swanson Roasted Carved Turkey Breast, Swanson Angus Beef Salisbury Steak.

*Frozen Waffles*. Ten count box of frozen waffles per package. Do not price fat-free or whole wheat varieties. *Use:* Eggo (10 ct).

*Fruit Drink*. Ten pack of fruit drink, not juice, any flavor. *Use:* Hi C fruit punch drink 10 pack.

*Fruit Juice*. Forty-eight ounce glass or plastic bottle of cranberry juice. *Use:* Ocean Spray Cranberry Juice.

*Gas*. Price per gallon for self-service unleaded regular gasoline. *Use*: Major brand.

*Gelatin*. Three ounce box gelatin dessert. *Use:* JELL-O.

*General Admission Evening Film*. Adult price for evening showing, current-release (currently advertised on television). Report weekend evening price if different from weekday. *Use:* Movie.

*Girl's Dress*. Girls print dress, softly colored floral-print blue chiffon dress. Scoop neck, split sleeves. Polyester chiffon; lining is polyester, washable. Include sales tax and shipping and handling. *Use:* Hype print dress, JC Penney catalog number: A380–9973.

*Girl's Jeans*. Slim fit in the seat and thighs with flared legs and traditional 5-pocket styling, for girls ages 8 to 10 (size 7 to 14). *Use:* Ralph Lauren (Macys), Levis 517 (Sears).

*Girl's Polo Type Top*. Girl's polo cotton blend, striped or solid pattern. Price sizes 7 to 14 or S, M, and L in girls sizes. *Use:* Ralph Lauren (Macys), Lands End (Sears).

*Girl's Polo Type Top (Catalog)*. Girl's polo cotton/polyester blend, striped or solid pattern, straight bottom hem, 2-button front placket, with ribbed collar and cuffs; washable. Price sizes 7 to 14 or S, M, and L in girls sizes. JC Penney catalog number: A373–0302. Include sales tax and shipping and handling. *Use:* Ruling Class.

*Golf, Non Resort*. Eighteen holes of golf on weekend with cart, tee-time approximately 2 p.m. Do not price par 3 courses. If only nine holes available, double price. If only daily rate available (unlimited number of holes), report the Saturday or Sunday rate. Price local resident fee. *Use:* Golf, non-resort.

*Golf, Resort*. Eighteen holes of golf on weekend with cart, tee-time approximately 2 p.m. Do not price par 3 courses. If only nine holes available, double price. If only daily rate available (unlimited number of holes), report the Saturday or Sunday rate. Price local resident fee (not hotel guest fee). Price outside of local jurisdiction if necessary. *Use:* Golf, resort.

*Ground Beef*. Price per pound, fresh (not frozen or previously frozen) ground beef or ground chuck. Price USDA Select or un-graded if available. If not available, note USDA grade in comments. Use average size package, i.e., not family-pack, value-pack, super-saver pack, or equivalent. If multiple brands available (e.g. Angus), match the lowest priced item and note in comments. *Use:* Available brand, 7% fat and 20% fat.

*Hamburger Buns*. Eight-count package of sliced enriched white hamburger buns. Do not price store brand. *Use:* Wonder. Love's is an equivalent brand.

*Hand-Held Vacuum*. Cordless, hand-held, vacuum with upholstery brush and crevice tool. *Use:* Black & Decker DustBuster 7.2 volt V7210 (K-Mart and Wal-Mart); 9.6 volt V9610 (Wal-Mart).

*Health Club Membership*. One-year regular, individual membership for existing member. Do not price special offers. If no yearly rate, price month and prorate. Service must include free weights, cardiovascular equipment, and aerobic classes. Note if pool, tennis, racquet ball, or other service included. *Use:* Gold's Gym type.

*Hospital Room*. Daily charge for a private and semi-private room. Include food and routine care. Exclude cost of operating room, surgery, medicine, lab fees, etc. Do not price specialty rooms; e.g., those in cardiac care units. *Use:* Private room and semi-private room.

*Hot Dogs, Beef Franks*. Sixteen ounce package, 10 count, USDA graded, all beef franks. Do not price chicken, turkey, extra lean, or fat free frankfurters. *Use:* Oscar Mayer Beef Franks.

*Hot Dogs, Wieners*. Sixteen ounce package, 10 count, USDA graded, meat (e.g., turkey and pork) wieners. Do not price extra lean or fat free varieties. *Use:* Oscar Mayer Wieners.

*Housekeeping (Hourly Wage)*. Local hourly wage for a housekeeper or janitor. BLS code 37–2012. *Use:* Government wage data.

*Ice Cream*. One-half gallon vanilla flavored ice cream. Do not price ice milk, fat free, sugar free, or frozen yogurt. *Use:* Breyers.

*Ice Cream Cup*. One scoop, vanilla ice cream in a cup. Do not price frozen yogurt or soft-serve ice cream. *Use:* Baskin Robbins type.

*Ice Cream Cup (Gourmet)*. One scoop, vanilla ice cream in a cup. Do not price frozen yogurt or soft-serve ice cream. *Use:* Ben & Jerry's type.

*Infant's Sleeper*. One-piece sleeping garment with legs, covering the body including the feet. Stretch cotton/polyester terry. Washable. Can be packaged or hanging. Size: Newborn. *Use:* Carters Starters.

*Insurance, Auto*. Annual premium for Chrysler, Ford, and Toyota surveyed; 35-year old married male, currently insured, no accidents/violations. Commuting 15 miles one-way/day, annual 15,000 miles. Bodily injury 100/300; property damage 25; medical 15 or personal injury protection 50; uninsured motorist 100/300; comprehensive deductible 100; and collision deductible 250. If this level of coverage is not available, price the policy with the closest coverage. In Guam, price optional typhoon coverage. Car values: Chrysler-$19,560; Ford-$32,045; Toyota-$16,095. *Use:* National company if available.

*Internet Service Cable*. Monthly charge for unlimited cable Internet access. Itemize taxes and fees and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Local cable provider.

*Internet Service DSL*. Monthly charge for unlimited DSL Internet access. Itemize taxes and fees and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Local DSL provider.

*Jelly*. Eighteen ounce jar of grape jelly or jam. *Use:* Welch's.

*Jewelry Earring Set*. A box set of fake diamond earrings and necklace. *Use:* Store brand.

*Ketchup*. Twenty-four ounce plastic squeeze bottle. *Use:* Heinz.

*Kitchen Range (Electric coil)*. Thirty inch free standing, self-cleaning, electric range with coil burners and standard size (small) glass window on oven door. Model numbers may vary slightly by dealer. *Use:* General Electric JBP24BBWH or CT, Kenmore model 22–92812, and Frigidaire FEF352AW.

*Laptop Computer*. Laptop with Mobile Intel Pentium 4 processor, 2.6 GHz, 512 MB, 40GB Hard Drive, 24x/10x/24x CDRW and 8x DVD combo, 15-inch monitor. Include tax and shipping and handling. *Use:* Gateway M350S.

*Laundry Soap*. Eighty fluid ounce of liquid household laundry detergent. *Use:* Cheer with Colorguard.

*Lawn Care (Hourly Wage)*. Local wage for gardener/grounds keeper. BLS code 37–3011. *Use:* Government wage data.

*Lawn Mower, Self Propelled*. Twenty-one to 22 inch, self-propelled 6.5–6.75 HP gas lawn mower. *Use:* Craftsman 37849, Toro 20017, and Troy-Bilt 200 (12A566N063).

*Lawn Trimmer, Gas*. Gas powered 25cc 2-cycle engine, 17–18 inch wide cut. Straight or curved shaft okay. Bump or automatic line feed. **Note:** Model numbers may vary slightly by dealer. *Use:* Craftsman 79554, Homelite UT20778, and Troy-Bilt TB15CS (31cc).

*LD Call Chicago*. Cost of a 10-minute call using regional carrier, received on a weekday in Chicago at 8 p.m. (Chicago time); direct dial. Itemize taxes and fees and add to price. *Use:* AT&T.

*LD Call Los Angeles*. Cost of a 10-minute call using regional carrier, received on a weekday in Los Angeles at 8 p.m. (LA time); direct dial. Itemize taxes and fees and add to price. *Use:* AT&T.

*LD Call New York*. Cost of a 10-minute call using regional carrier, received on a weekday in New York at 8 p.m. (NY time); direct dial. Itemize taxes and fees and add to price. *Use:* AT&T.

*Lettuce, Leaf, Red or Green*. One each of red or green leaf lettuce. Note average weight in comments. *Use:* Available brand.

*Lettuce, Romaine*. Price one pound of romaine lettuce. If only sold by each, note an average weight in comments. *Use:* Available brand.

*Lipstick*. One tube, any color. *Use:* Revlon Super Lustrous and Maybelline.

*Living Room Chair*. Padded microsuede rocker/recliner. Polyester fabric. 36½ x32½ x 41½″. 20″ seat height. Include sales tax and shipping and handling. *Use:* Microsuede Rocker/Recliner, JC Penney catalog number A792–1069.

*Lunch Full Service*. Pancake house and casual restaurants. Cheeseburger platter with fries and small soft drink. Check sales tax and include in price. *Use:* Cheeseburger platter.

*Lunch Meat, All Beef*. Eight-ounce package, all-beef variety, sliced bologna. *Use:* Oscar Mayer Beef Bologna.

*Lunch Meat, Regular*. Eight-ounce package, meat (i.e., chicken and pork) sliced bologna. *Use:* Oscar Mayer Meat Bologna.

*Magazine*. Store price (not publisher's list price unless that is the store price) for a single copy. *Use:* People.

*Magazine Subscription*. One-year home delivery price of a magazine. This is priced during the DC area survey via the Internet. *Use:* Time.com.

*Man's Athletic Shoe (Shoe Store)*. Man's walking shoe, soft leather upper. Full-length Phylon midsole with low-pressure Air-Sole units in heel and forefoot. Composition rubber outsole. *Use:* Reebok Classic.

*Man's Dress Shirt*. White or solid color long sleeve button cuff plain collar dress shirt, 100 percent cotton. *Use:* Ralph Lauren (Macys) and Lands End (Sears).

*Man's Dress Shoe Leather Sole*. Full leather lining, oak tanned/buffed leather outsoles, polished leather uppers, steel shank. *Use:* Bostonian Akron (Macys).

*Man's Dress Shoe Rubber Sole*. Leather oxford with cushioned insole and heel pad. Shoe has combination leather and rubber sole. *Use:* Rockport (Macys).

*Man's Dress Shoe, Catalog*. Full-grain leather captoe oxford, leather upper, leather outsole, with leather lining and a comfort heel cup. Slip-resistant sole. Include sales tax and shipping and handling. *Use:* Florsheim Lexington Captoe, JC Penney catalog number A014–9043.

*Man's Jacket*. Man's lightweight nylon jacket with drawstring hood and zip front, two front pockets with self-adhesive closure, elastic cuffs, drawcord bottom with polyester mesh lining; washable. Price regular size. Include sales tax and shipping and handling. *Use:* Woodlake Nylon Jacket, JC Penney catalog number A518–5055.

*Man's Jeans*. Relaxed-fit jeans. *Use:* Levis Red Tab 550.

*Man's Khaki Pants*. Man's casual khakis, any color, relaxed-fit or classic fit, no wrinkle, flat-front or pleated, cotton twill. Do not price expandable waistband. *Use:* Dockers.

*Man's Khakis Stain Defender*. Man's khaki with stain-repellant fabric, no wrinkles and permanent creases, cuffed hems, cotton/micro polyester fabric, washable, regular size. *Use:* Dockers Go Khaki Stain Defender.

*Man's Regular Haircut*. Regular haircut for short to medium length hair. *Use:* Unisex hair salon.

*Man's Sport Watch*. Digital compass, 100-hour chronograph, INDIGLO night-light, water-resistant up to 100 meters, digital display, alarm, countdown timer. Strap/watch colors may vary. Different models represent different color of face or strap. *Use:* K-Mart: Timex Expedition (47512). If available, price same watch without digital compass as a substitute. Wal-Mart: Timex Expedition (77862).

*Man's Suit*. Six-button, double-breasted worsted wool suit coat, flap pockets, chest pocket, dry clean only. Regular size with full acetate lining. Price coat as a separate, not combo with trousers. Include sales tax and shipping and handling. *Use:* Stafford Suit Coat, JC Penney catalog number A957–0249.

*Man's Undershirt*. One package of three men's v-neck T-shirts, White, 100 percent cotton undershirts with short sleeves, regular size. *Use:* Jockey (Macys) and Hanes (Sears).

*Margarine*. One pound (4 sticks) regular margarine. If stick not available, price tub as a match. Do not price reduced fat variety. *Use:* Parkay and Fleischmann's.

*Mattress and Foundation*. Full-size mattress and foundation. Plush Sealy fiber quilted on top of a thick layer of Sealy foam and convoluted foam. Mattress thickness: 12″. Foundations consist of ''Shock Abzzorber'' wood slats over steel center rails. Include sales tax and shipping and handling. *Use:* Sealy Posturepedic Plush, JC Penney catalog numbers A799–5702 and A799–5703.

*Mayonnaise*. Thirty-two ounce jar of mayonnaise. Do not price light or fat free. *Use:* Kraft.

*Measuring Tape*. Twenty-five foot tape measure with powerlock. *Use:* Stanley (33–425).

*Milk, Two Percent*. One gallon, two percent milk. If multiple brands available, match the lowest priced item and note in comments. *Use:* Available brand.

*Motor Scooter, Honda*. Motor scooter, moped-legal, 49cc liquid-cooled single-cylinder four-stroke engine. *Use:* Honda 2007 CHF50P Metropolitan II.

*Motor Scooter, Yamaha*. Motor scooter, moped-legal, 49cc fan-cooled single-cylinder four-stroke engine. *Use:* Yamaha 2007 Vino.

*Mover Driver (Hourly Wage)*. Local government hourly rate for truck driver light. BLS code 53–3033. *Use:* Government wage data.

*Moving (Hourly Wage)*. Local hourly wage for a mover/material handler. BLS code 53–7062. *Use:* Government wage data.

*Newspaper Subscription, Local*. One-year of home delivery of the largest selling daily local paper (including Sunday edition) distributed in the area. Do not include tip. *Use:* Major local newspaper.

*Newspaper, Newsstand, Local*. Price of a local newspaper at a newsstand (in box), weekday issue. If a newsstand box is not available, price at a newsstand and indicate whether price includes tax. *Use:* Newspaper, newsstand, local.

*Newspaper, Newsstand, National*. Price of a New York Times newspaper, weekday issue, at a newsstand. *Use:* NY Times (newsstand).

*Non-Aspirin Pain Reliever*. Acetaminophen 500 mg. *Use:* Tylenol Extra Strength Geltabs 50-count and 100-count.

*Oranges*. Price per pound of loose, large, navel oranges. If only bagged oranges are available, also report the weight of the bag. *Use:* Available brand.

*Parcel Post*. Cost to mail a 5 pound package to Chicago, Los Angeles, and New York using regular mail delivery service. *Use:* United States Postal Service.

*Pen*. Ten-pack round stick medium point pen. Do not price crystal or clear type pens. *Use:* BIC (K–Mart) and Paper Mate (Wal–Mart).

*Pet Food*. Adult dry dog food. *Use:* Iams Chunks 8 lb. and 20 lb., and Purina O.N.E., 20 lb.

*Piano Lessons*. Monthly fee for half hour beginner private piano lessons for an adult, one lesson per week. Price through a music studio if possible. If only per lesson price is available, prorate using ½ hour lesson × 52 / 12. If only 1 hour lesson is available prorate accordingly. *Use:* Piano lessons.

*Plant Food*. Twenty-four ounce container of granulated all purpose plant food. *Use:* Miracle-Gro.

*Pork Chops Center Cut, Boneless*. Price per pound, fresh (not frozen or previously frozen) pork chops, center cut, boneless, loin chops. Use average size package, i.e., not family-pack, value-pack, super-saver pack, or equivalent. If multiple brands available, match the lowest priced item and note in comments. *Use:* Available brand.

*Portable CD Player*. Portable CD player, AM/FM–TV, weather bands, electronic skip protection, CD–R/RW compatible, with headphones. *Use:* Sony Walkman (D–FJ–210).

*Potato Chips*. One 5.2 to 6 ounce container of regular potato chips. Do not price fat free. *Use:* Pringles.

*Potatoes*. Price per pound of loose potatoes. If only bag potatoes available, report smallest size bag as substitute and note weight. *Use:* Russet or Idaho baking.

*Prescription Drug 1*. Nexium, 30 capsules 20 mg. Do not price generic. *Use:* Nexium.

*Prescription Drug 2*. Generic Amoxicil (i.e., Amoxicillin), 30 capsules, 250 mg. *Use:* Amoxicillin.

*Printer, Color, Photo*. Color inkjet printer, 5760 x 720 optimized dpi, 8 color ppm, USB

connection. USB cable is not included. Include tax and shipping and handling. *Use:* Gateway, Epson Stylus Photo 825.

*Red Roses*. One dozen long stemmed, fresh cut red roses wrapped in floral paper, purchased in store—not delivered. Do not price boxed or roses arranged in vase. *Use:* Dozen red roses.

*Refrigerator (Side-by-Side)*. Side-by-side refrigerator, approximately 25 to 26 cubic feet, with ice and water dispenser, and up-front temperature controls. *Use:* GE GSS25JFPWW, Frigidaire FRS26HF6BW, Frigidaire FRS26R2AW, and GE GSL25JFP.

*Rental Data*. Rental index from hedonic regressions. *Use:* Rental data.

*Renter Insurance*. One year of renters insurance (HO–4) coverage for $25,000 (low), $30,000 (middle), and $35,000 (upper) of contents. Policy must cover hurricane, earthquake, and other catastrophic damage. Note amount of liability coverage in comments; price minimum liability coverage if it varies. In Guam, assume concrete structure. *Use:* Major carrier.

*Rice*. Enriched white rice. *Use:* Mahatma 5-lb bag, extra long grain; Uncle Ben's Original 1-lb and 2-lb boxes, parboiled converted long grain.

*Rip Claw Hammer*. Twenty ounce, rip claw hammer with jacketed graphite handle and nylon vinyl grip. *Use:* Estwing E3–20S and Stanley 51–508.

*Salt*. Twenty-six ounce box of iodized salt. *Use:* Morton.

*Shampoo*. Fifteen ounce bottle for normal hair. *Use:* VO5.

*Sheets*. Sheets, 250 and 300 thread count cotton or cotton polyester blend. Queen size fitted or flat sheet, not a set. *Use:* Martha Stewart Everyday 4 Star, 250 thread count (K–Mart) and Springmaid, 300 thread count (Wal–Mart).

*Shop Rate*. Hourly shop rate for a mechanic at Chrysler, Ford, and Toyota dealerships. (Use auto dealer worksheet.) *Use:* Dealer shop rate.

*Sirloin Steak, Boneless*. Price per pound, fresh (not frozen or previously frozen) boneless beef top sirloin steak. Price USDA Select or un-graded if available. If not available, note USDA grade in comments. Use average size package; i.e., not family-pack, value-pack, super-saver pack, or equivalent. If multiple brands available (e.g., Angus), match the lowest priced item and note in comments. *Use:* Available brand.

*Sliced Bacon*. Sixteen ounce package USDA grade, regular slice. Do not price Canadian bacon, extra thick sliced, or extra lean bacon. *Use:* Oscar Mayer.

*Snack Cake*. One box (10 to a box) cream-filled type cake deserts. Not fresh baked desserts, individual servings, or larger family-style containers. *Use:* Hostess Twinkies.

*Soft Drink*. Twelve-pack of soft drink in 12 ounce cans. *Use:* Coca-Cola 12-pack (cans).

*Spaghetti, Dry (National Brand)*. Sixteen ounce box or bag of pasta spaghetti. *Use:* Barilla.

*Stamp*. Cost of mailing a one ounce letter first class. *Use:* United States Postal Service.

*Stand Mixer*. Stand mixer with tilt-up head, 10-speeds, and 4½ quart stainless steel bowl. Includes flat beater, dough hook, wire whip, and power hub for additional attachments. Last two characters of model number denote color. *Use:* KitchenAid Ultra Power Series 300 watt KSM90WH (Macys and Sears) and KitchenAid Classic Series 250 watt K45SSWH (Wal–Mart).

*Sugar*. Five pound bag of granulated cane or beet name brand sugar. Do not price superfine, store brand, or generic. *Use:* National brand. C&H brand is an equivalent.

*Tax Preparation*. Flat rate for preparing individual tax Federal 1040 (long form), Schedule A, plus State or local equivalents. (Note: Some areas only have local income taxes.) Note number of forms in comments. Assume typical itemized deductions. If only hourly rate available, obtain estimate of the time necessary to prepare forms, prorate, and report as a substitute. *Use:* H&R Block type.

*Taxi Fare*. Cab fare, one way, from major airport to destination 5 miles away. Price fare for one passenger with two suitcases. In reference area, price rides from Baltimore Washington International for Maryland, Reagan National for the District of Columbia, and Dulles for Virginia. *Use:* Taxi fare.

*Telephone Service*. Monthly cost for unmeasured touchtone service. Exclude options such as call waiting, call forwarding or fees for equipment rental. Itemize taxes and fees and add to price. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Local provider.

*Television 27'' flat-screen*. Flat-screen, 27 inch, stereo, color, with remote. Note: Model numbers may vary slightly by dealer. *Use:* Sony Trinitron WEGA (KV–27FS100) and RCA 27F530T and Sanyo DS–27930 (Wal–Mart).

*Tennis Balls*. One can, 3 pressurized tennis balls designed for recreational play. Do not price premium type balls. *Use:* Wilson Championship.

*Tire Regular (Chrysler)*. One tire, size P205/65R15 service description 92T, ''original equipment'' quality, black sidewall for the 2001 Chrysler Sebring sedan. Do not include mounting, balancing, or road hazard warranty. *Use:* Goodyear Regatta, Goodyear Eagle LS, Goodyear Integrity, Goodyear WeatherHandler LS (Sears), Michelin Symmetry, and Michelin WeatherWise (Sears).

*Tire Regular (Ford)*. One tire, size P235/75 R15 service description 105S load rating SL, ''original equipment'' quality, black sidewall for the 2001 Ford Explorer XLT. Do not include mounting, balancing, or road hazard warranty. *Use:* Goodyear Wrangler RT/S and Michelin XCX–APT.

*Tire Regular (Toyota)*. One tire, size P185/65R14 service description 85S, ''original equipment'' quality, black sidewall for a 2001 Toyota Corolla LE sedan. Do not include mounting, balancing, or road hazard warranty. *Use:* Goodyear Regatta, Goodyear Integrity, Goodyear WeatherHandler LS (Sears), Michelin Symmetry, and Michelin WeatherWise (Sears).

*Toilet Tissue*. Twelve-count single-roll type. *Use:* Angel Soft.

*Tomatoes*. Price per pound of medium-size tomatoes. If only available in cellophane pack, note price and weight of average size package. Do not price organic, 'hydro', plum, or extra fancy tomatoes. *Use:* Available brand.

*Top Round Steak, Boneless*. Price per pound, fresh (not frozen or previously frozen) boneless beef top round steak. Price USDA Select or un-graded if available. If not available, note USDA grade in comments. Use average size package; i.e., not family-pack, value-pack, super-saver pack, or equivalent. If multiple brands available (e.g., Angus), match the lowest priced item and note in comments. *Use:* Available brand.

*Toyota*. Purchase price of a 2007 Toyota Corolla LE sedan, 4 door, 1.8 liter, 4 cylinder, 16 valve, automatic transmission. Please note the price of any special option packages. *Use:* Toyota Corolla LE sedan.

*Toyota License, Registration, Taxes, & Inspection*. License, registration, periodic taxes (e.g., road or personal property tax, but NOT one-time taxes such as sales tax), and inspection (e.g., safety and emissions) on the Toyota specified for survey. *Use:* Specified Toyota.

*Veterinary Services*. Routine annual exam for a small dog (approximately 25 to 30 pounds). Do not price booster shots, medication, or other extras such as nail clipping, ear cleaning, etc. *Use:* Veterinary services.

*Video Rental*. Minimum rental rate for VHS movie, rented on a Saturday night. *Use:* Spider-Man VHS.

*Wash, Single Load*. One load, regular size wash using a front loading washing machine. Approximate capacity: 2.8 cubic foot or 18 pounds. Exclude cost of drying. *Use:* Coin laundry.

*Washing Machine, Front Load*. White 3.34 cubic feet, 27 inch, front load washer with LED touchpad controls. *Use:* Maytag Neptune (MAH5500B).

*Washing Machine, Top Load*. Top loader, 5 water levels, 7 temperature settings, 4 rinse options. *Use:* Kenmore 24–9523.

*Water Bill*. Average monthly consumption in gallons and dollars (e.g. cost for first __ gallons; cost for over __ gallons), sewage and related charges, and customer service charge. Also try to obtain a bill from a local resident for comparison purposes. *Use:* Water bill.

*Will Preparation*. Hourly rate for a lawyer (not a paralegal) to prepare a simple will. If only flat rate available, record flat rate amount and divide by average amount of hours it would take to prepare will and note in comments. *Use:* Legal service.

*Wine at Home*. Chardonnay wine, 750 ml. any vintage. *Use:* Turning Leaf.

*Wine Away*. Casual, fine dining, extra fine dining, and Outback type restaurants. One glass of house white wine. Check sales tax and include in price. *Use:* House wine.

*Woman's Athletic Shoe (Shoe store)*. Woman's walking shoe, soft leather upper. Full-length Phylon midsole with low-pressure Air-Sole units in heel and forefoot. Composition rubber outsole. *Use:* Reebok Classic.

*Woman's Blouse*. Long sleeve, button front blouse with minimum or no trim. Washable. May or may not have shoulder pads. Price regular size. Do not price in Woman's or Plus size. Note brand in comments. *Use:* Charter Club long sleeve, 100 percent cotton (Macys) and Laura Scott short sleeve, 100 percent polyester (Sears).

*Woman's Blue Jeans*. Blue jeans. Machine washable, five pocket with zipper fly, loose

fit, straight leg or tapered. Price regular size. Do not price in Woman's or Plus size sections. Do not price elastic waist. *Use:* Calvin Klein (Macys) and Lee original relaxed fit (Sears).

*Woman's Casual Khakis*. Woman's casual khakis, any color, flat-front or pleated pants, machine washable, all cotton. Price regular size. Do not price in Woman's or Plus size sections. *Use:* Style & Company (Macys) and Lands End (Sears).

*Woman's Cut and Style*. Wash, cut, and styled blow dry for medium length hair. Exclude curling iron if extra. Price hair salons in major department stores and malls. *Use:* Medium length hair.

*Woman's Dress (Cold Water Creek)*. Silk georgette layered over polyester georgette; two-piece look with elasticized waist. Dry clean. Include sales tax and shipping and handling. *Use:* Tropical Print Dress. Cold Water Creek catalog number R29827.

*Woman's Dress (Spiegel)*. Pink and rose-colored flower patterned, rayon, dry clean only, misses floral print dress. Misses: 4–16. Include sales tax and shipping and handling. *Use:* Misses Floral Print Dress. Spiegel catalog number A90 628 8417.

*Woman's Jacket*. Woman's denim jacket with classic styling, slim-fit and adjustable side tabs, chest pockets, 100 percent cotton or cotton/Lycra spandex; washable. Price regular size. Include sales tax and shipping and handling. *Use:* Levi's Weekend Denim Jacket. JC Penney catalog number A844–8105.

*Woman's Pump Shoes*. Plain pump (not open toed or open back style) with tapered approximately 1.5–2 inch heel. Heel color matches shoe color (e.g., not stacked/wooden type). Shoe has leather uppers. Rest is man-made materials. No extra ornamentation or extra thick heels. Do not price leather sole shoe. *Use:* Naturalizer, Easy Spirit (Macys) and Laura Scott (Sears).

*Woman's Sweater*. Short sleeve sweater, no buttons or collar, 100 percent cotton or cotton blend. Price regular size. Do not price in Woman's or Plus size. *Use:* Style & Company (Macys) and Sag Harbor (Sears).

*Woman's Wallet*. Clutch/checkbook style wallet, split-grain cowhide leather. Do not price eel skin, snake skin or other varieties. *Use:* Kenneth Cole Reaction (Macys) and Buxton (Sears).

**Appendix 4—COLA Rental Survey Data Collection Elements**

| Data element | Description of data |
|---|---|
| Survey year | Year of the survey. |
| Comparable identification code | A 5-character code that is unique to each comparable and structured as follows: Position 1 is the letter corresponding to the area in which the comparable is located. For example, ''G'' corresponds to the Washington, DC, area. Position 2 is a letter corresponding to the comparable's location within an area. For example, ''A'' corresponds to Southwest DC. Position 3 is the letter corresponding to the class of housing. The housing classes are listed below. Position 4/5 is a sequence number 01 through 99 that identifies the order in which that comparable was collected relative to other comparables of the same class in the same location and area.<br>The housing classes are: A—Four-bedroom, single family unit not to exceed 3200 square feet. B—Three-bedroom, single family unit not to exceed 2600 square feet. C—Two-bedroom, single family unit not to exceed 2200 square feet. D—Three-bedroom apartment unit not to exceed 2000 square feet. E—Two-bedroom apartment unit not to exceed 1800 square feet. F—One-bedroom apartment unit not to exceed 1400 square feet. |
| Comparable's address | The complete location address (not Post Office box) of the comparable address including ZIP code, in which the rental unit is located. When reporting the address of multiple apartment units within the same structure or complex, report the same address for each such unit, even though the units may have different mailing addresses. For example, if three-, two-, and one-bedroom apartments are surveyed in Woodburn Apartments, report all as having the same address. |
| How identified | How the rental unit was located: Owner Publication, Owner Drive-by, Owner Internet, Agent Publication, Agent Drive-by, Agent Internet, or Other. If Other, describe in Comments. |
| Person providing information | Name and title of person providing information about the comparable. Examples of title: agent, landlord, tenant. This information need not be provided if the respondent so requests. |
| Address, etc. of person providing information. | Complete mailing address, phone number(s), and e-mail address, as appropriate, of person providing information about the comparable. This information need not be provided if the respondent so requests. |
| Location name | Name of location in which the comparable is located. |
| Community/complex name | Name of the community or complex in which the comparable is located, if applicable. Otherwise enter ''None.'' |
| Year built | Year rental unit was built. |
| Finished space | Total square feet of finished space including finished and partially finished basements and attics. For finished spaces where the headroom varies (e.g., attics), include only the estimated portion of the room that is usable. |
| Basement | A basement has one wall the top of which is at or essentially at ground level.''Essentially at ground level'' is designed to include basements that have one or more small windows—windows too small for a person to crawl through. Exception: For structures built on a slope where the top of one wall of a lower level(s) is at or essentially at ground level but another wall(s) is fully above ground level and has a window(s) and a door(s), that lower level(s) may be called a lower floor rather than a basement. Finished, Partially Finished, Unfinished, None. |
| Bedrooms | Number of bedrooms. A bedroom must have at least one closet, one window large enough for someone to crawl through, and sufficient headroom to be included as part of finished space. |
| Bathrooms | Number of bathrooms. Report number of full baths and half baths separately. A full bath has a toilet, sink, and tub and/or shower. A half bath has a toilet and sink only. Record three-quarter baths (e.g., toilet, sink, and shower) as full baths. |
| Balcony | An elevated structure, sometimes called a ''terrace,'' that is usually made of wood or cement. It is distinguished from a deck because a balcony does not have a ground-level exit. Covered, uncovered, none. |
| Deck | A wooden structure that is elevated or at ground level. An elevated deck is distinguished from a balcony because a deck has a ground-level exit (e.g., stairs). A deck cannot be primarily used as a walkway. Covered, uncovered, none. |
| Patio | A cement, brick, or stone structure built at ground level. A ground-level wooden structure is a deck, not a patio. A patio cannot be primarily used as a walkway. Covered, uncovered, none. |

| Data element | Description of data |
|---|---|
| External condition | The external condition of the rental unit or the structure in which the rental unit is located. Above average condition means the unit is new or like new condition (e.g., built, remodeled, refurbished, or restored within the past 3 years). Average condition means the unit shows signs of age but is in good repair (e.g., no peeling paint, no broken windows, sagging fences, or missing gutters; the yard is normally well maintained; and there are no disabled cars, appliances, or other unusual quantities of trash around the property). Below average condition means the unit is habitable but needs repair and the property needs significant maintenance and/or trash removal. Above average, average, below average. |
| Neighborhood condition | The condition of the neighborhood in which the comparable is located. An above average neighborhood generally has above average and average homes. Commercial services are separate (e.g., clustered in strip malls or business parks although some above average apartment complexes have businesses on the ground floor for the convenience of the tenants). There are parks and/or open public spaces. Roads and parks are well-maintained and clean. An average neighborhood generally has homes in average condition with a balance of homes in above average and below average condition. Commercial services are separate. Roads and parks are in good condition but may need cleaning or maintenance. A below average neighborhood generally has homes in poor condition. Commercial units may be intermingled with residential units. Roads are often poorly maintained and have litter. There are few parks and/or parks are poorly maintained. Above average, average, below average. |
| Central air conditioning | Central air is a ducted system designed to cool all or essentially all of a house or apartment. Yes/no. |
| Multi-room air conditioning | Multi-room air conditioning is a non-window unit designed to cool more than one room but not usually all of a house or apartment. Yes/No. If yes, report number of multi-room units. |
| Window air conditioning | An air conditioning unit designed to cool one room, usually installed in a window. Yes/No. If yes, report number of window-type air conditioning units. |
| Garage | A covered area attached to or near the rental unit that can be secured for parking one or more cars. A large, covered parking area for apartment tenants is not a garage. If the landlord charges an extra fee for garage parking, report the monthly parking fee separately and note in comments. Single, double, triple (or more), or none. |
| Heated garage | A garage that typically is heated during the winter. Yes/No. |
| Carport | A covered area attached to or near the house that cannot be secured for parking one or more cars. A large, covered parking area for apartment tenants is not a carport. If the landlord charges an extra fee for carport parking, report the monthly parking fee separately and note in comments. Yes/No. |
| Reserved parking | A specific parking space assigned to a rental unit. The space may be located outside or in a large covered common parking area. If the landlord charges an extra fee for reserved parking, report the monthly parking fee separately and note in comments. Yes/No. |
| Security | Security measures relating to the rental unit. A gated community usually has one entry into the housing area and prominent walls (brick, block, fencing, wire, or other type barriers) that delineate the borders of the community. Access control restricts pedestrian and/or vehicular access via key, keypad, barcode, or other entry device to the community or apartment building. Guards are security personnel who monitor entrance/exit of vehicular and pedestrian traffic in/out of the community or apartment building. Alarm systems are security systems that may or may not be monitored by an outside company. Yes, if any of the above exist, else No (i.e., one variable, not four). |
| Type of unit | Type of unit. Unit types are related to classes. Classes are divided into two types: single family units/dwellings (SFDs) and apartments, also called multiple family dwellings (MFDs). An SFD has at least two entrances at or that lead directly to the ground level. A sliding glass door is considered a doorway entrance if it allows direct access to the outdoors and to ground level. An MFD has only one entrance at or that leads directly to the ground level. Such access may be through a lobby, hallway, shared stairwell, or other common area but cannot be through the living area of other units. Sliding glass doors on balconies are not doorway entrances. Ground level units in an MFD structure are MFD units even if they have two or more ground level entrances. MFD units have their own bathroom and kitchen facilities. Units in an operating motel are not apartment units, even if they do contain their own bathroom and kitchen facilities.<br>The unit types are: A (SFD)—Detached single-family house. B (SFD)—Duplex: One of two single-family units in a freestanding building. C (SFD)—Triplex or Quadplex: One of three or four single-family units in a freestanding building. D (SFD)—Town or Row House: One of five or more single-family units in a freestanding building. E (MFD)—In-Home Apartment: An apartment in a private residence. F (MFD)—Garden or Walk-Up Apartment: An apartment in a structure of three stories or less. G (MFD)—High Rise Apartment: An apartment in a structure of four stories or more. H (MFD)—An apartment with 2 or more units in the structure but not a typical walk-up or high rise apartment. I (Unknown)—Other type of unit, e.g., a structure with a mix of SFD and MFD units within it. Describe in comments. |
| Number of units in structure | The number of rental units in the structure. For unit types H and I only. Coded one through nine, where nine means there are nine or more units in the structure. |
| Number of floors | Number of floors in the structure. For unit types of F, G, and H only. |
| Elevator | Whether there is an elevator in the structure. For unit types F, G, and H only. Yes/No. |
| Lot size | Approximate square footage of the lot. Required for unit type A only. |
| Furnished | Whether the landlord provides furnishings for the unit at no additional cost. Report partially furnished units as furnished if more than 50 percent of the rooms in the unit are furnished. Yes/No. |
| Appliances | Whether the landlord provides at no additional cost a refrigerator, range, oven, microwave oven, dishwasher, clothes washer, and/or clothes dryer, and/or freezer. Yes/No for each type of appliance. |

| Data element | Description of data |
|---|---|
| Services paid by landlord | Whether the landlord provides at no additional cost water, sewer (includes septic), garbage collection, lawn care, cable television, satellite dish, electricity, heating fuel, firewood, snow removal. Yes/No for each type of service. |
| Water source | For the Caribbean/DC Area surveys only, the source of the unit's water. If none, explain in comments because the assumption is the unit is not habitable and therefore is not a comparable. Public, well, cistern, n/a. |
| Fireplace | Whether the unit has a wood-burning or gas fireplace. Yes/No. |
| Recreation facilities | Whether there is a pool, tennis court, clubhouse, exercise room, and/or other facilities (e.g., playground) available to the tenant at no additional charge. Yes, if any of the above exist, else No (i.e., one variable, not five). |
| Pets | Whether the landlord allows dogs and/or cats. If the landlord charges an extra monthly fee, report pet fee separately and note in comment. Also note any deposits in comments, but do not report deposits as part of pet fees. |
| Exceptional view | Whether the unit has a view of a park, ocean, mountain, valley, golf course, etc. that is unusually beautiful for the area and may increase the rental value of the property. Note: Properties with direct access to such an amenity (e.g., are on a beach or golf course) are not to be surveyed. Yes/No. |
| Rent | Rental or lease amount per month. If various rental rates are available, assume a 1-year lease. If properties are available for rent for period less than one month, note in comments. Do not include deposits or any fee reported separately, e.g., parking, homeowner association, and pet fees. |
| Date of listing | Date the rental data for the unit were collected, or if for a different time period, the date associated with the data and rent. |
| Other fees and charges | Additional periodic fees or charges that the tenant pays separately, e.g., condo fees if paid separately. If annual fee, prorate to monthly. Do not report deposits, first/last month's rent, utilities, tenant's insurance, or discretionary fees (e.g., cable TV, community pool membership). |
| Tax code | If a tax record is available. |
| Geographic location | Latitude and longitude of the unit accurate to within approximately seven meters. Latitude and longitude are reported in separate fields as decimal degrees (e.g., 30.5012), not as degrees, minutes and seconds. When reporting the geographic location of multiple apartment units (i.e., Classes D, E, and F) within the same structure or complex, report the same geographic location for each such unit, even though the units may have slightly different longitudes and latitudes. For example, if three-, two-, and one-bedroom apartments are surveyed in Woodburn Apartments, report all as having the same geographic location. |
| State or equivalent FIPS code | The two-digit Federal Information Processing Standards (FIPS) code for the State, commonwealth, or territory in which the unit is located. For example, the FIPS code for Alaska is ''02.'' |
| County or equivalent FIPS code | The three-digit FIPS code for the county, municipio, or equivalent in which the unit is located. For example, the FIPS code for Anchorage is ''020.'' |
| Census tract code | The six-digit census tract code. Add trailing zeroes for four-digit census tract (e.g., 0061 becomes 006100). Remove decimals from any census tract with a decimal (e.g., 0063.02 becomes 006302). |
| Comment | Additional information that helps clarify above data elements as they apply to the comparable. |

**Appendix 5—Utility Usage And Calculations: Energy Requirements And Prices**

TABLE A5–1—HONOLULU

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Jan | 1,940 | $345.16 |
| Feb | 1,805 | 318.77 |
| Mar | 2,318 | 418.32 |
| Apr | 2,367 | 455.54 |
| May | 2,673 | 529.77 |
| Jun | 2,756 | 552.49 |
| Jul | 3,024 | 618.92 |
| Aug | 2,947 | 607.70 |
| Sep | 2,772 | 572.34 |
| Oct | 2,668 | 546.17 |
| Nov | 2,237 | 432.69 |
| Dec | 1,916 | 357.45 |
| Annual | 29,423 | $5,755.33 |

TABLE A5–2—HAWAII COUNTY

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Jan | 1,912 | $525.20 |
| Feb | 1,618 | 469.10 |
| Mar | 2,190 | 641.71 |
| Apr | 2,176 | 623.38 |
| May | 2,536 | 745.60 |
| Jun | 2,546 | 751.84 |
| Jul | 2,778 | 902.11 |
| Aug | 2,761 | 873.10 |
| Sep | 2,606 | 820.24 |
| Oct | 2,527 | 772.79 |
| Nov | 2,003 | 591.14 |
| Dec | 1,804 | 522.13 |
| Annual | 27,457 | $8,238.33 |

TABLE A5–3—KAUAI

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Jan | 1,854 | $581.35 |
| Feb | 1,587 | 453.56 |
| Mar | 2,096 | 618.64 |

TABLE A5–3—KAUAI—Continued

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Apr | 2,080 | 655.96 |
| May | 2,396 | 787.85 |
| Jun | 2,389 | 841.87 |
| Jul | 2,598 | 898.61 |
| Aug | 2,579 | 876.76 |
| Sep | 2,439 | 839.48 |
| Oct | 2,374 | 786.62 |
| Nov | 1,914 | 560.48 |
| Dec | 1,756 | 518.53 |
| Annual | 6,062 | $8,419.72 |

TABLE A5–4—MAUI

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Jan | 2,038 | $545.36 |
| Feb | 1,897 | 483.36 |
| Mar | 2,489 | 648.14 |
| Apr | 2,557 | 660.95 |
| May | 2,922 | 772.20 |
| Jun | 3,053 | 823.27 |

TABLE A5–4—MAUI—Continued

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Jul | 3,361 | 965.84 |
| Aug | 3,273 | 960.10 |
| Sep | 3,076 | 903.56 |
| Oct | 2,946 | 836.66 |
| Nov | 2,435 | 687.38 |
| Dec | 2,025 | 522.82 |
| Annual | 32,072 | $8,809.65 |

TABLE A5–5—GUAM

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Jan | 3,010 | $528.72 |
| Feb | 2,790 | 517.43 |
| Mar | 2,953 | 548.77 |
| Apr | 3,067 | 509.43 |
| May | 3,261 | 574.39 |
| Jun | 3,237 | 570.02 |
| Jul | 3,076 | 540.73 |
| Aug | 3,025 | 531.45 |

TABLE A5–5—GUAM—Continued

[All Electric Home]

| Month | KWH | Cost |
|---|---|---|
| Sep | 3,814 | 517.98 |
| Oct | 3,078 | 541.09 |
| Nov | 2,886 | 506.15 |
| Dec | 2,928 | 513.80 |
| Annual | 36,262 | $6,399.95 |

TABLE A5–6—WASHINGTON, DC AREA

| Electric heat | | | Gas heat | | | | | Oil heat | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Month | KWH | Cost | Therms | Cost | Elec. KWH [1] | Elec. cost | Total cost | Gallons | Cost | Elec. KWH [1] | Elec. cost | Total cost |
| Jan | 3,326 | $335.08 | 126 | $194.84 | 362 | $42.14 | $236.98 | 72 | $179.90 | 1007 | $106.58 | $286.47 |
| Feb | 2,688 | 272.89 | 101 | 158.91 | 320 | 37.86 | 196.77 | 56 | 139.92 | 891 | 97.13 | 237.05 |
| Mar | 1,812 | 185.41 | 68 | 104.25 | 322 | 37.74 | 141.99 | 27 | 67.46 | 938 | 100.78 | 168.24 |
| Apr | 966 | 88.98 | 34 | 63.37 | 316 | 36.60 | 99.98 | 2 | 5.00 | 909 | 84.52 | 89.52 |
| May | 1,170 | 105.49 | 34 | 56.39 | 544 | 52.48 | 108.87 | ..... | 0.00 | 1166 | 105.07 | 105.07 |
| Jun | 1,377 | 158.51 | 32 | 47.82 | 784 | 90.78 | 138.60 | ..... | 0.00 | 1369 | 157.61 | 157.61 |
| Jul | 1,648 | 189.64 | 34 | 49.94 | 1,022 | 118.05 | 167.99 | ..... | 0.00 | 1636 | 188.28 | 188.28 |
| Aug | 1,566 | 181.57 | 33 | 47.99 | 957 | 111.41 | 159.40 | ..... | 0.00 | 1555 | 180.31 | 180.31 |
| Sep | 1,246 | 146.79 | 32 | 50.62 | 653 | 77.76 | 128.38 | ..... | 0.00 | 1241 | 146.22 | 146.22 |
| Oct | 975 | 111.01 | 35 | 54.91 | 315 | 38.62 | 93.53 | 1 | 2.50 | 941 | 107.46 | 109.95 |
| Nov | 1,797 | 182.41 | 67 | 100.44 | 311 | 36.36 | 136.80 | 28 | 69.96 | 911 | 97.39 | 167.35 |
| Dec | 2,797 | 279.73 | 106 | 165.93 | 344 | 39.84 | 205.77 | 58 | 144.92 | 952 | 101.81 | 246.73 |
| Totals | 21,368 | ..... | 702 | ..... | 6,250 | ..... | ..... | 244 | ..... | 13,516 | ..... | ..... |
| Annual Cost | ..... | $2,237.52 | ..... | $1,095.40 | ..... | $719.64 | $1,815.04 | ..... | $609.65 | ..... | $1,473.17 | $2,082.82 |
| Relative Usage | ..... | 33.20% | ..... | ..... | ..... | ..... | 60.74% | ..... | ..... | ..... | ..... | 6.06% |
| Weighted Avg Cost [2] | ..... | $742.86 | ..... | ..... | ..... | ..... | $1102.45 | ..... | ..... | ..... | ..... | $126.22 |
| Total Energy Utility Cost (sum of the weighted average cost of Electric + Gas + Oil Heat) | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | $1,971.53 |

[1] KWH required for lighting, appliances, and furnace. Model used gas for stove and oven with gas heat.
[2] Annual cost times relative usage.

**Appendix 6—Hedonic Rental Data Equations and Results**

```
libname colarent
'P:\SWSD\COLA\Survey2007\Rental
    Data\SAS Files and
    Programs\FinalSASRentalData';
proc format;
value $unittype
  'A'='SINGLE FAMILY DETACHED'
  'B','C','E','H'='PLEXED UNITS AND IN
    HOME APTS AND OTHER APTS'
  'D'='ROWHOUSE OR TOWNHOUSE'
  'F'='APARTMENT—GARDEN/WALKUP'
  'G'='APARTMENT—HIGH RISE';
value $survey_area
  'A'='GUAM' 'B'='KAUAI'
  'C'='KONA' 'D'='HILO'
  'E'='MAUI' 'F'='HONOLULU'
  'G'='WASHINGTON DC';
value $basefmt
  'A'-'C'='Y'
  'D'='N';
value $class
  'A'='4 bedroom single family'
  'B'='3 bedroom single family'
  'C'='2 bedroom single family'
  'D'='3 bedroom apartment'
  'E'='2 bedroom apartment'
  'F'='1 bedroom apartment';
value $balcon
  'A'-'B'='Y'
  'C'='N';
value $deck
  'A'-'B'='Y'
  'C'='N';
value $extrcond
  'B'-'C'='AVERAGE OR BELOW'
  'A'='ABOVE AVERAGE';
value $garage
  'A'-'C'='Y'
  'D'='N';
value $neighcond
  'B'-'C'='AVERAGE OR BELOW'
  'A'='ABOVE AVERAGE';
value $patio
  'A'-'B'='Y'
  'C'='N';
value $listsource
  'A—2007'='Owner Publication (2007)'
  'B—2007'='Owner Drive-By (2007)'
  'C—2007'='Owner Internet (2007)'
  'D—2007'='Agent Publication (2007)'
  'E—2007'='Agent Drive-By (2007)'
  'F—2007'='Agent Internet (2007)'
  'G—2007'='Other (2007)'
  'A—2006'='Local Newspaper/Publication
    (2006)'
  'B—2006'='Internet (2006)'
  'C—2006'='Agent/Broker (2006)'
  'D—2006'='Drive-By/Sign Posted (2006)'
  'E—2006'='Other (2006)';
  run;
*** the following prevents a possible error
    from using a prior temp file in proc glm;
data temp;
a=1;
run;
data temp;
  set colarent.opmsvyfactors;
if use='Yes' and size='Yes' and unittype ne
'I';
weight=1;
if substr(compnumber,1,1)='G' then
weight=.5;
location=substr(compnumber,1,1);
survey_year=0;
if surveyyr=2006 then survey_year=1;
survey_area='XX';
if location='A' then survey_area='GU';
if location='B' then survey_area='KA';
if location='C' then survey_area='KO';
if location='D' then survey_area='HI';
```

```
if location='E' then survey_area='MA';
if location='F' then survey_area='HO';
if location='G' then survey_area='WA';
*Deal with Missing Values in Guam;
if medianincome=. then
medianincomendx=.;
if pctallba=. then pctbandx=.;
if pctrenteroccupied=. then pctrenterindex=.;
if pctschoolage=. then pctschoolagendx=.;
if pctpoverty=. then pctpovertyndx=.;
if pctage65=. then pctage65ndx=.;
age=2007-yrbuilt;
agesq=age*age;
sqfootagesq=sqfootage*sqfootage;
baths=fullbaths+halfbaths*.5;
hasbalcony=0;
if balcony in ('A','B') then hasbalcony=1;
cooling=0;
if (centrlcool='Y' or multicool='Y' or
(windowunits > bedrooms))
then cooling=1;
hasdeck=0;
if deck in ('A','B') then
hasdeck=1;
haselec=0;
if elec='Y' then haselec=1;
hasfurniture=0;
if furniture='Y' then hasfurniture=1;
Neighbor_Cond=0;
if neighcond='A' then Neighbor_Cond=1;
if pets eq 'Y' and petfees le 0 then petsOK=1;
PlexInHomeOther=0;
if unittype in ('B','C','E','H') then
PlexInHomeOther=1;
Walkup=0;
if unittype eq 'F' then Walkup= 1;
Townrow=0;
if unittype eq 'D' then Townrow= 1;
HiRise=0;
if unittype eq 'G' then HiRise= 1;
hasfullkitchen=0;
if refrig='Y' then
hasfullkitchen=hasfullkitchen+.5;
if (range='Y' or oven='Y') then
hasfullkitchen=hasfullkitchen+.5;
*Detached=0;
*if unittype='A' then Detached=1;
*omitting the above makes it the base
condition;
SqftXPlexInHomeOther=0;
if unittype in ('B', 'C', 'E','H') then
SqftXPlexInHomeOther=sqfootage;
SqftXWalkup= 0;
if unittype eq 'F' then SqftXWalkup=
sqfootage;
SqftXHiRise= 0;
if unittype eq 'G' then SqftXHiRise=
sqfootage;
SqftXTownRow=0;
if unittype='D' then SqftXTownRow=
sqfootage;
SqftXDetached=0;
if unittype ='A' then SqftXDetached=
sqfootage;
watersewer=0;
if water eq 'Y' or sewer eq 'Y' then
watersewer=1;
Honolulu=0;
if survey_area='HO' then Honolulu=1;
Hilo=0;
if survey_area='HI' then Hilo=1;
Kona=0;
if survey_area='KO' then Kona=1;
Kauai=0;
if survey_area='KA' then Kauai=1;
Maui=0;
if survey_area='MA' then Maui=1;
Guam=0;
if survey_area='GU' then Guam=1;
Wash_DC=0;
lrent=log(rent+hoafees);
run;
title1 '2007 Pacific COLA Area Rental Data';
title2 '2007 Final Model';
PROC REG DATA=temp;weight weight;
   MODEL lrent=age
agesq baths bedrooms hasfullkitchen
haselec hasfurniture pctbandx
pctschoolagendx pctpovertyndx
sqfootagesq HiRise townrow Walkup
PlexInHomeOther Neighbor_Cond
SqftXHiRise SqftXPlexInHomeOther
SqftXWalkup SqftXTownRow SqftXDetached
survey_year
Honolulu Hilo Kona Kauai Maui Guam;
TITLE1 '2007 PACIFIC RENTAL DATA';
Title2 'RENTAL ANALYSIS Federal Register
MODEL';
Footnote '';
```

2007 PACIFIC RENTAL DATA
RENTAL ANALYSES MODEL
THE REG PROCEDURE
MODEL: MODEL1
DEPENDENT VARIABLE: IRENT

| | |
|---|---|
| Number of Observations Read | 3665 |
| Number of Observations Used | 3652 |
| Number of Observations with Missing Values | 12 |

WEIGHT: WEIGHT
ANALYSIS OF VARIANCE

| Source | DF | Sum of squares | Mean square | F value | Pr > F |
|---|---|---|---|---|---|
| Model | 28 | 281.55194 | 10.05543 | 343.11 | <.0001 |
| Error | 3623 | 106.17846 | 0.02931 | | |
| Corrected Total | 3651 | 387.73040 | | | |

| | |
|---|---|
| Root MSE | 0.17119 |
| R-Square | 0.7262 |
| Dependent Mean | 7.38990 |
| Adj R-Sq | 0.7240 |
| Coeff Var | 2.31657 |

| Variable | Label | DF | Parameter estimate | Standard error | t value | Pr > [t] |
|---|---|---|---|---|---|---|
| Intercept | Intercept | 1 | 6.49477 | 0.07379 | 88.02 | <.0001 |
| age | | 1 | -0.00691 | 0.00056794 | -12.16 | <.0001 |
| agesq | | 1 | 0.00007641 | 0.00000602 | 12.69 | <.0001 |
| baths | | 1 | 0.09478 | 0.00771 | 12.30 | <.0001 |
| Bedrooms | Bedrooms | 1 | 0.06929 | 0.00719 | 9.64 | <.0001 |
| hasfullkitchen | | 1 | 0.22429 | 0.05355 | 4.19 | <.0001 |
| haselec | | 1 | 0.07833 | 0.01218 | 6.43 | <.0001 |

| Variable | Label | DF | Parameter estimate | Standard error | t value | Pr > [t] |
|---|---|---|---|---|---|---|
| hasfurniture | | 1 | 0.22254 | 0.02354 | 9.45 | <.0001 |
| PctBANdx | PctBANdx | 1 | 0.19713 | 0.01198 | 16.46 | <.0001 |
| PctSchoolAgeNdx | PctSchoolAgeNdx | 1 | ·0.16025 | 0.01761 | ·9.10 | <.0001 |
| PctPovertyNdx | PctPovertyNdx | 1 | 0.03710 | 0.00606 | 6.12 | <.0001 |
| sqfootagesq | | 1 | ·8.46604E–8 | 1.280806E–8 | ·6.61 | <.0001 |
| HiRise | | 1 | ·0.27912 | 0.04131 | ·6.76 | <.0001 |
| Townrow | | 1 | 0.05122 | 0.03984 | 1.29 | 0.1987 |
| Walkup | | 1 | ·0.22643 | 0.04129 | ·5.48 | <.0001 |
| PlexInHomeOther | | 1 | ·0.16272 | 0.03949 | ·4.12 | <.0001 |
| Neighbor_Cond | | 1 | 0.11656 | 0.01840 | 6.34 | <.0001 |
| SqftXHiRise | | 1 | 0.00070615 | 0.00004566 | 15.47 | <.0001 |
| SqftXPlexInHomeOther | | 1 | 0.00055474 | 0.00004622 | 12.00 | <.0001 |
| SqftXWalkup | | 1 | 0.00052046 | 0.00004713 | 11.04 | <.0001 |
| SqftXTownRow | | 1 | 0.00037414 | 0.00005030 | 7.44 | <.0001 |
| SqftXDetached | | 1 | 0.00047792 | 0.00004664 | 10.25 | <.0001 |
| survey_year | | 1 | ·0.07867 | 0.01066 | ·7.38 | <.0001 |
| Honolulu | | 1 | 0.14162 | 0.01173 | 12.07 | <.0001 |
| Hilo | | 1 | ·0.53636 | 0.01666 | ·32.20 | <.0001 |
| Kona | | 1 | ·0.12475 | 0.01799 | ·6.93 | <.0001 |
| Kauai | | 1 | ·0.12030 | 0.01902 | ·6.33 | <.0001 |
| Maui | | 1 | ·0.03067 | 0.01550 | ·1.98 | 0.0479 |
| Guam | | 1 | ·0.19812 | 0.01330 | ·14.90 | <.0001 |

**Appendix 7–Final Living-Cost Results for the Pacific COLA Areas**

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | **HONOLULU COUNTY, HI** | | | | |
| 1. Food | | 11.25 | | | 124.98 |
| | Cereals and bakery products | 0.74 | 6.54 | 160.63 | |
| | Meats, poultry, fish, and eggs | 1.38 | 12.24 | 119.77 | |
| | Dairy products | 0.62 | 5.48 | 145.22 | |
| | Fruits and vegetables | 0.71 | 6.32 | 144.06 | |
| | Processed foods | 1.22 | 10.81 | 136.06 | |
| | Other food at home | 0.36 | 3.17 | 125.44 | |
| | Nonalcoholic beverages | 0.48 | 4.23 | 144.38 | |
| | Food away from home | 4.80 | 42.67 | 112.13 | |
| | Alcoholic beverages | 0.96 | 8.54 | 118.38 | |
| | PEG Total | | 100.00 | | |
| 2. Shelter and Utilities | | 38.09 | | | 131.54 |
| | Shelter | 33.90 | 89.01 | 115.892 | |
| | Energy utilities | 3.53 | 9.27 | 289.58 | |
| | Water and other public services | 0.65 | 1.72 | 89.70 | |
| | PEG Total | | 100.00 | | |
| 3. Household Furnishings and Supplies | | 5.34 | | | 103.09 |
| | Household operations | 1.53 | 28.67 | 92.48 | |
| | Housekeeping supplies | 1.00 | 18.68 | 112.71 | |
| | Textiles and area rugs | 0.30 | 5.62 | 121.99 | |
| | Furniture | 0.86 | 16.03 | 99.58 | |
| | Major appliances | 0.22 | 4.08 | 108.34 | |
| | Small appliances, misc. housewares | 0.14 | 2.59 | 116.85 | |
| | Misc. household equipment | 1.30 | 24.34 | 103.81 | |
| | PEG Total | | 100.00 | | |
| 4. Apparel and Services | | 3.77 | | | 102.26 |
| | Men and boys | 0.85 | 22.55 | 100.69 | |
| | Women and girls | 1.38 | 36.55 | 89.41 | |
| | Children under 2 | 0.12 | 3.21 | 119.16 | |
| | Footwear | 0.90 | 23.96 | 103.97 | |
| | Other apparel products and services | 0.52 | 13.73 | 132.11 | |
| | PEG Total | | 100.00 | | |
| 5. Transportation | | 14.16 | | | 108.89 |
| | Motor vehicle costs | 6.26 | 44.18 | 101.41 | |
| | Gasoline and motor oil | 3.44 | 24.29 | 105.17 | |
| | Maintenance and repairs | 1.40 | 9.87 | 110.00 | |
| | Vehicle insurance | 2.02 | 14.25 | 93.71 | |
| | Public transportation | 1.05 | 7.42 | 193.26 | |
| | PEG Total | | 100.00 | | |
| 6. Medical | | 4.75 | | | 85.88 |
| | Health insurance | 2.80 | 58.87 | 72.55 | |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | Medical services | 1.17 | 24.53 | 106.48 | |
| | Drugs and medical supplies | 0.79 | 16.61 | 102.70 | |
| | PEG Total | | 100.00 | | |
| 7. Recreation | | 4.44 | | | 107.42 |
| | Fees and admissions | 1.20 | 26.94 | 87.64 | |
| | Television, radios, sound equipment | 0.75 | 16.80 | 112.97 | |
| | Pets, toys, and playground equipment | 0.80 | 17.93 | 135.71 | |
| | Other entertainment supplies, etc. | 0.41 | 9.27 | 116.74 | |
| | Personal care products | 0.60 | 13.42 | 105.35 | |
| | Personal care services | 0.54 | 12.12 | 97.81 | |
| | Reading | 0.16 | 3.53 | 104.58 | |
| | PEG Total | | 100.00 | | |
| 8. Education and Communication | | 4.97 | | | 103.74 |
| | Education | 0.29 | 5.77 | 159.48 | |
| | Communications | 4.16 | 83.88 | 100.38 | |
| | Computers and computer services | 0.51 | 10.34 | 99.94 | |
| | PEG Total | | 100.00 | | |
| 9. Miscellaneous | | 13.23 | | | 101.45 |
| | Tobacco products, etc. | 0.43 | 3.27 | 135.87 | |
| | Miscellaneous | 1.61 | 12.15 | 91.43 | |
| | Personal insurance and pensions | 11.19 | 84.58 | 101.56 | |
| | PEG Total | | 100.00 | | |
| | MEG Total | 100.00 | | | |
| Overall Price Index | | | | | 116.37 |
| Plus Adjustment Factor | | | | | 5.00 |
| Index Plus Adjustment Factor | | | | | 121.37 |
| **HILO AREA, HI** | | | | | |
| 1. Food | | 11.25 | | | 119.99 |
| | Cereals and bakery products | 0.74 | 6.54 | 159.12 | |
| | Meats, poultry, fish, and eggs | 1.38 | 12.24 | 116.51 | |
| | Dairy products | 0.62 | 5.48 | 136.58 | |
| | Fruits and vegetables | 0.71 | 6.32 | 156.35 | |
| | Processed foods | 1.22 | 10.81 | 134.37 | |
| | Other food at home | 0.36 | 3.17 | 140.12 | |
| | Nonalcoholic beverages | 0.48 | 4.23 | 124.35 | |
| | Food away from home | 4.80 | 42.67 | 103.39 | |
| | Alcoholic beverages | 0.96 | 8.54 | 112.60 | |
| | PEG Total | | 100.00 | | |
| 2. Shelter and Utilities | | 38.09 | | | 91.82 |
| | Shelter | 33.90 | 89.01 | 58.977 | |
| | Energy utilities | 3.53 | 9.27 | 414.51 | |
| | Water and other public services | 0.65 | 1.72 | 52.45 | |
| | PEG Total | | 100.00 | | |
| 3. Household Furnishings and Supplies | | 5.34 | | | 98.06 |
| | Household operations | 1.53 | 28.67 | 81.91 | |
| | Housekeeping supplies | 1.00 | 18.68 | 110.41 | |
| | Textiles and area rugs | 0.30 | 5.62 | 112.93 | |
| | Furniture | 0.86 | 16.03 | 99.10 | |
| | Major appliances | 0.22 | 4.08 | 121.03 | |
| | Small appliances, misc. housewares | 0.14 | 2.59 | 108.69 | |
| | Misc. household equipment | 1.30 | 24.34 | 98.49 | |
| | PEG Total | | 100.00 | | |
| 4. Apparel and Services | | 3.77 | | | 101.27 |
| | Men and boys | 0.85 | 22.55 | 104.38 | |
| | Women and girls | 1.38 | 36.55 | 96.29 | |
| | Children under 2 | 0.12 | 3.21 | 110.20 | |
| | Footwear | 0.90 | 23.96 | 97.72 | |
| | Other apparel products and services | 0.52 | 13.73 | 113.52 | |
| | PEG Total | | 100.00 | | |
| 5. Transportation | | 14.16 | | | 115.74 |
| | Motor vehicle costs | 6.26 | 44.18 | 106.40 | |
| | Gasoline and motor oil | 3.44 | 24.29 | 110.53 | |
| | Maintenance and repairs | 1.40 | 9.87 | 116.95 | |
| | Vehicle insurance | 2.02 | 14.25 | 96.29 | |
| | Public transportation | 1.05 | 7.42 | 224.26 | |
| | PEG Total | | 100.00 | | |
| 6. Medical | | 4.75 | | | 83.29 |
| | Health insurance | 2.80 | 58.87 | 71.97 | |
| | Medical services | 1.17 | 24.53 | 102.01 | |
| | Drugs and medical supplies | 0.79 | 16.61 | 95.74 | |
| | PEG Total | | 100.00 | | |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| 7. Recreation | | 4.44 | | | 95.43 |
| | Fees and admissions | 1.20 | 26.94 | 80.35 | |
| | Television, radios, sound equipment | 0.75 | 16.80 | 103.39 | |
| | Pets, toys, and playground equipment | 0.80 | 17.93 | 103.84 | |
| | Other entertainment supplies, etc. | 0.41 | 9.27 | 114.85 | |
| | Personal care products | 0.60 | 13.42 | 104.31 | |
| | Personal care services | 0.54 | 12.12 | 80.59 | |
| | Reading | 0.16 | 3.53 | 95.97 | |
| | PEG Total | | 100.00 | | |
| 8. Education and Communication | | 4.97 | | | 99.07 |
| | Education | 0.29 | 5.77 | 79.56 | |
| | Communications | 4.16 | 83.88 | 100.27 | |
| | Computers and computer services | 0.51 | 10.34 | 100.16 | |
| | PEG Total | | 100.00 | | |
| 9. Miscellaneous | | 13.23 | | | 100.64 |
| | Tobacco products, etc. | 0.43 | 3.27 | 127.68 | |
| | Miscellaneous | 1.61 | 12.15 | 99.66 | |
| | Personal insurance and pensions | 11.19 | 84.58 | 99.74 | |
| | PEG Total | | 100.00 | | |
| | MEG Total | 100.00 | | | |
| Overall Price Index | | | | | 100.35 |
| Plus Adjustment Factor | | | | | 7.00 |
| Index Plus Adjustment Factor | | | | | 107.35 |
| **KAILUA KONA/WAIMEA AREA, HI** | | | | | |
| 1. Food | | 11.25 | | | 134.80 |
| | Cereals and bakery products | 0.74 | 6.54 | 171.95 | |
| | Meats, poultry, fish, and eggs | 1.38 | 12.24 | 128.06 | |
| | Dairy products | 0.62 | 5.48 | 148.20 | |
| | Fruits and vegetables | 0.71 | 6.32 | 166.88 | |
| | Processed foods | 1.22 | 10.81 | 139.76 | |
| | Other food at home | 0.36 | 3.17 | 136.62 | |
| | Nonalcoholic beverages | 0.48 | 4.23 | 167.11 | |
| | Food away from home | 4.80 | 42.67 | 123.34 | |
| | Alcoholic beverages | 0.96 | 8.54 | 118.03 | |
| | PEG Total | | 100.00 | | |
| 2. Shelter and Utilities | | 38.09 | | | 118.60 |
| | Shelter | 33.90 | 89.01 | 89.069 | |
| | Energy utilities | 3.53 | 9.27 | 414.51 | |
| | Water and other public services | 0.65 | 1.72 | 52.45 | |
| | PEG Total | | 100.00 | | |
| 3. Household Furnishings and Supplies | | 5.34 | | | 100.11 |
| | Household operations | 1.53 | 28.67 | 93.87 | |
| | Housekeeping supplies | 1.00 | 18.68 | 108.53 | |
| | Textiles and area rugs | 0.30 | 5.62 | 104.13 | |
| | Furniture | 0.86 | 16.03 | 99.10 | |
| | Major appliances | 0.22 | 4.08 | 109.78 | |
| | Small appliances, misc. housewares | 0.14 | 2.59 | 114.88 | |
| | Misc. household equipment | 1.30 | 24.34 | 97.52 | |
| | PEG Total | | 100.00 | | |
| 4. Apparel and Services | | 3.77 | | | 112.89 |
| | Men and boys | 0.85 | 22.55 | 132.19 | |
| | Women and girls | 1.38 | 36.55 | 99.62 | |
| | Children under 2 | 0.12 | 3.21 | 119.49 | |
| | Footwear | 0.90 | 23.96 | 96.13 | |
| | Other apparel products and services | 0.52 | 13.73 | 144.23 | |
| | PEG Total | | 100.00 | | |
| 5. Transportation | | 14.16 | | | 114.51 |
| | Motor vehicle costs | 6.26 | 44.18 | 104.73 | |
| | Gasoline and motor oil | 3.44 | 24.29 | 112.79 | |
| | Maintenance and repairs | 1.40 | 9.87 | 118.70 | |
| | Vehicle insurance | 2.02 | 14.25 | 96.29 | |
| | Public transportation | 1.05 | 7.42 | 207.80 | |
| | PEG Total | | 100.00 | | |
| 6. Medical | | 4.75 | | | 89.68 |
| | Health insurance | 2.80 | 58.87 | 71.97 | |
| | Medical services | 1.17 | 24.53 | 120.09 | |
| | Drugs and medical supplies | 0.79 | 16.61 | 107.52 | |
| | PEG Total | | 100.00 | | |
| 7. Recreation | | 4.44 | | | 106.00 |
| | Fees and admissions | 1.20 | 26.94 | 100.28 | |
| | Television, radios, sound equipment | 0.75 | 16.80 | 110.49 | |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | Pets, toys, and playground equipment | 0.80 | 17.93 | 117.17 | |
| | Other entertainment supplies, etc. | 0.41 | 9.27 | 114.28 | |
| | Personal care products | 0.60 | 13.42 | 100.09 | |
| | Personal care services | 0.54 | 12.12 | 98.99 | |
| | Reading | 0.16 | 3.53 | 96.31 | |
| | PEG Total | | 100.00 | | |
| 8. Education and Communication | | 4.97 | | | 102.05 |
| | Education | 0.29 | 5.77 | 107.04 | |
| | Communications | 4.16 | 83.88 | 101.94 | |
| | Computers and computer services | 0.51 | 10.34 | 100.16 | |
| | PEG Total | | 100.00 | | |
| 9. Miscellaneous | | 13.23 | | | 100.07 |
| | Tobacco products, etc. | 0.43 | 3.27 | 129.51 | |
| | Miscellaneous | 1.61 | 12.15 | 94.48 | |
| | Personal insurance and pensions | 11.19 | 84.58 | 99.74 | |
| | PEG Total | | 100.00 | | |
| | MEG Total | 100.00 | | | |
| Overall Price Index | | | | | 113.44 |
| Plus Adjustment Factor | | | | | 7.00 |
| Index Plus Adjustment Factor | | | | | 120.44 |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | Hilo area indexes | Kona/Waimea area indexes | MEG index |
|---|---|---|---|---|---|
| **HAWAII COUNTY, HI** | | | | | |
| Employment Weights | Hilo: 66.7 percent. Kona/Waimea: 33.3 percent. | | | | |
| 1. Food | | 11.25 | 119.99 | 134.80 | |
| | Cereals and bakery products | | 159.12 | 171.95 | 163.39 |
| | Meats, poultry, fish, and eggs | | 116.51 | 128.06 | 120.36 |
| | Dairy products | | 136.58 | 148.20 | 140.45 |
| | Fruits and vegetables | | 156.35 | 166.88 | 159.85 |
| | Processed foods | | 134.37 | 139.76 | 136.16 |
| | Other food at home | | 140.12 | 136.62 | 138.95 |
| | Nonalcoholic beverages | | 124.35 | 167.11 | 138.59 |
| | Food away from home | | 103.39 | 123.34 | 110.03 |
| | Alcoholic beverages | | 112.60 | 118.03 | 114.41 |
| | PEG Total. | | | | |
| 2. Shelter and Utilities | | 38.09 | 91.82 | 118.60 | |
| | Shelter | | 58.98 | 89.07 | 69.00 |
| | Energy utilities | | 414.51 | 414.51 | 414.51 |
| | Water and other public services | | 52.45 | 52.45 | 52.45 |
| | PEG Total. | | | | |
| 3. Household Furnishings and Supplies | | 5.34 | 98.06 | 100.11 | 98.74 |
| | Household operations | | 81.91 | 93.87 | 85.89 |
| | Housekeeping supplies | | 110.41 | 108.53 | 109.79 |
| | Textiles and area rugs | | 112.93 | 104.13 | 110.00 |
| | Furniture | | 99.10 | 99.10 | 99.10 |
| | Major appliances | | 121.03 | 109.78 | 117.29 |
| | Small appliances, misc. housewares | | 108.69 | 114.88 | 110.75 |
| | Misc. household equipment | | 98.49 | 97.52 | 98.17 |
| | PEG Total. | | | | |
| 4. Apparel and Services | | 3.77 | 101.27 | 112.89 | 105.14 |
| | Men and boys | | 104.38 | 132.19 | 113.64 |
| | Women and girls | | 96.29 | 99.62 | 97.40 |
| | Children under 2 | | 110.20 | 119.49 | 113.30 |
| | Footwear | | 97.72 | 96.13 | 97.19 |
| | Other apparel products and services | | 113.52 | 144.23 | 123.75 |
| | PEG Total. | | | | |
| 5. Transportation | | 14.16 | 115.74 | 114.51 | 115.33 |
| | Motor vehicle costs | | 106.40 | 104.73 | 105.84 |
| | Gasoline and motor oil | | 110.53 | 112.79 | 111.28 |
| | Maintenance and repairs | | 116.95 | 118.70 | 117.54 |
| | Vehicle insurance | | 96.29 | 96.29 | 96.29 |
| | Public transportation | | 224.26 | 207.80 | 218.78 |
| | PEG Total. | | | | |
| 6. Medical | | 4.75 | 83.29 | 89.68 | 85.41 |
| | Health insurance | | 71.97 | 71.97 | 71.97 |
| | Medical services | | 102.01 | 120.09 | 108.03 |
| | Drugs and medical supplies | | 95.74 | 107.52 | 99.66 |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | Hilo area indexes | Kona/ Waimea area indexes | MEG index |
|---|---|---|---|---|---|
| | PEG Total. | | | | |
| 7. Recreation | | 4.44 | 95.43 | 106.00 | 98.95 |
| | Fees and admissions | | 80.35 | 100.28 | 86.99 |
| | Television, radios, sound equipment | | 103.39 | 110.49 | 105.76 |
| | Pets, toys, and playground equipment | | 103.84 | 117.17 | 108.27 |
| | Other entertainment supplies, etc. | | 114.85 | 114.28 | 114.66 |
| | Personal care products | | 104.31 | 100.09 | 102.91 |
| | Personal care services | | 80.59 | 98.99 | 86.72 |
| | Reading | | 95.97 | 96.31 | 96.08 |
| | PEG Total. | | | | |
| 8. Education and Communication | | 4.97 | 99.07 | 102.05 | 100.06 |
| | Education | | 79.56 | 107.04 | 88.71 |
| | Communications | | 100.27 | 101.94 | 100.83 |
| | Computers and computer services | | 100.16 | 100.16 | 100.16 |
| | PEG Total. | | | | |
| 9. Miscellaneous | | 13.23 | 100.64 | 100.07 | 100.45 |
| | Tobacco products, etc. | | 127.68 | 129.51 | 128.29 |
| | Miscellaneous | | 99.66 | 94.48 | 97.93 |
| | Personal insurance and pensions | | 99.74 | 99.74 | 99.74 |
| Overall Price Index | | | | | 104.71 |
| Plus Adjustment Factor | | | | | 7.00 |
| Index Plus Adjustment Factor | | | | | 111.71 |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | **KAUAI COUNTY, HI** | | | | |
| 1. Food | | 11.25 | | | 123.69 |
| | Cereals and bakery products | 0.74 | 6.54 | 162.33 | |
| | Meats, poultry, fish, and eggs | 1.38 | 12.24 | 121.00 | |
| | Dairy products | 0.62 | 5.48 | 145.09 | |
| | Fruits and vegetables | 0.71 | 6.32 | 172.84 | |
| | Processed foods | 1.22 | 10.81 | 136.43 | |
| | Other food at home | 0.36 | 3.17 | 126.21 | |
| | Nonalcoholic beverages | 0.48 | 4.23 | 131.80 | |
| | Food away from home | 4.80 | 42.67 | 106.60 | |
| | Alcoholic beverages | 0.96 | 8.54 | 112.22 | |
| | PEG Total | | 100.00 | | |
| 2. Shelter and Utilities | | 38.09 | | | 119.96 |
| | Shelter | 33.90 | 89.01 | 89.513 | |
| | Energy utilities | 3.53 | 9.27 | 423.64 | |
| | Water and other public services | 0.65 | 1.72 | 59.34 | |
| | PEG Total | | 100.00 | | |
| 3. Household Furnishings and Supplies | | 5.34 | | | 100.28 |
| | Household operations | 1.53 | 28.67 | 82.24 | |
| | Housekeeping supplies | 1.00 | 18.68 | 116.65 | |
| | Textiles and area rugs | 0.30 | 5.62 | 116.26 | |
| | Furniture | 0.86 | 16.03 | 99.10 | |
| | Major appliances | 0.22 | 4.08 | 113.98 | |
| | Small appliances, misc. housewares | 0.14 | 2.59 | 112.73 | |
| | Misc. household equipment | 1.30 | 24.34 | 102.44 | |
| | PEG Total | | 100.00 | | |
| 4. Apparel and Services | | 3.77 | | | 103.01 |
| | Men and boys | 0.85 | 22.55 | 112.41 | |
| | Women and girls | 1.38 | 36.55 | 92.11 | |
| | Children under 2 | 0.12 | 3.21 | 121.64 | |
| | Footwear | 0.90 | 23.96 | 99.10 | |
| | Other apparel products and services | 0.52 | 13.73 | 119.00 | |
| | PEG Total | | 100.00 | | |
| 5. Transportation | | 14.16 | | | 111.11 |
| | Motor vehicle costs | 6.26 | 44.18 | 100.90 | |
| | Gasoline and motor oil | 3.44 | 24.29 | 111.13 | |
| | Maintenance and repairs | 1.40 | 9.87 | 104.18 | |
| | Vehicle insurance | 2.02 | 14.25 | 91.43 | |
| | Public transportation | 1.05 | 7.42 | 218.95 | |
| | PEG Total | | 100.00 | | |
| 6. Medical | | 4.75 | | | 84.68 |
| | Health insurance | 2.80 | 58.87 | 72.61 | |
| | Medical services | 1.17 | 24.53 | 98.94 | |
| | Drugs and medical supplies | 0.79 | 16.61 | 106.41 | |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | PEG Total | | 100.00 | | |
| 7. Recreation | | 4.44 | | | 98.63 |
| | Fees and admissions | 1.20 | 26.94 | 77.82 | |
| | Television, radios, sound equipment | 0.75 | 16.80 | 115.26 | |
| | Pets, toys, and playground equipment | 0.80 | 17.93 | 122.95 | |
| | Other entertainment supplies, etc. | 0.41 | 9.27 | 107.99 | |
| | Personal care products | 0.60 | 13.42 | 97.05 | |
| | Personal care services | 0.54 | 12.12 | 78.04 | |
| | Reading | 0.16 | 3.53 | 106.81 | |
| | PEG Total | | 100.00 | | |
| 8. Education and Communication | | 4.97 | | | 97.46 |
| | Education | 0.29 | 5.77 | 98.03 | |
| | Communications | 4.16 | 83.88 | 97.08 | |
| | Computers and computer services | 0.51 | 10.34 | 100.16 | |
| | PEG Total | | 100.00 | | |
| 9. Miscellaneous | | 13.23 | | | 100.66 |
| | Tobacco products, etc. | 0.43 | 3.27 | 129.69 | |
| | Miscellaneous | 1.61 | 12.15 | 99.30 | |
| | Personal insurance and pensions | 11.19 | 84.58 | 99.74 | |
| | PEG Total | | 100.00 | | |
| | MEG Total | 100.00 | | | |
| Overall Price Index | | | | | 111.14 |
| Plus Adjustment Factor | | | | | 7.00 |
| Index Plus Adjustment Factor | | | | | 118.14 |
| **MAUI COUNTY, HI** | | | | | |
| 1. Food | | 11.25 | | | 129.38 |
| | Cereals and bakery products | 0.74 | 6.54 | 165.52 | |
| | Meats, poultry, fish, and eggs | 1.38 | 12.24 | 123.11 | |
| | Dairy products | 0.62 | 5.48 | 154.50 | |
| | Fruits and vegetables | 0.71 | 6.32 | 173.92 | |
| | Processed foods | 1.22 | 10.81 | 135.32 | |
| | Other food at home | 0.36 | 3.17 | 126.95 | |
| | Nonalcoholic beverages | 0.48 | 4.23 | 150.17 | |
| | Food away from home | 4.80 | 42.67 | 115.31 | |
| | Alcoholic beverages | 0.96 | 8.54 | 114.99 | |
| | PEG Total | | 100.00 | | |
| 2. Shelter and Utilities | | 38.09 | | | 129.64 |
| | Shelter | 33.90 | 89.01 | 97.734 | |
| | Energy utilities | 3.53 | 9.27 | 443.26 | |
| | Water and other public services | 0.65 | 1.72 | 90.63 | |
| | PEG Total | | 100.00 | | |
| 3. Household Furnishings and Supplies | | 5.34 | | | 102.45 |
| | Household operations | 1.53 | 28.67 | 93.17 | |
| | Housekeeping supplies | 1.00 | 18.68 | 115.95 | |
| | Textiles and area rugs | 0.30 | 5.62 | 109.09 | |
| | Furniture | 0.86 | 16.03 | 99.10 | |
| | Major appliances | 0.22 | 4.08 | 107.30 | |
| | Small appliances, misc. housewares | 0.14 | 2.59 | 117.36 | |
| | Misc. household equipment | 1.30 | 24.34 | 101.27 | |
| | PEG Total | | 100.00 | | |
| 4. Apparel and Services | | 3.77 | | | 107.80 |
| | Men and boys | 0.85 | 22.55 | 111.16 | |
| | Women and girls | 1.38 | 36.55 | 104.82 | |
| | Children under 2 | 0.12 | 3.21 | 124.64 | |
| | Footwear | 0.90 | 23.96 | 98.23 | |
| | Other apparel products and services | 0.52 | 13.73 | 122.98 | |
| | PEG Total | | 100.00 | | |
| 5. Transportation | | 14.16 | | | 112.80 |
| | Motor vehicle costs | 6.26 | 44.18 | 100.64 | |
| | Gasoline and motor oil | 3.44 | 24.29 | 115.68 | |
| | Maintenance and repairs | 1.40 | 9.87 | 104.70 | |
| | Vehicle insurance | 2.02 | 14.25 | 100.14 | |
| | Public transportation | 1.05 | 7.42 | 210.88 | |
| | PEG Total | | 100.00 | | |
| 6. Medical | | 4.75 | | | 88.22 |
| | Health insurance | 2.80 | 58.87 | 72.14 | |
| | Medical services | 1.17 | 24.53 | 118.90 | |
| | Drugs and medical supplies | 0.79 | 16.61 | 99.92 | |
| | PEG Total | | 100.00 | | |
| 7. Recreation | | 4.44 | | | 104.74 |
| | Fees and admissions | 1.20 | 26.94 | 88.08 | |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | Television, radios, sound equipment | 0.75 | 16.80 | 106.89 | |
| | Pets, toys, and playground equipment | 0.80 | 17.93 | 124.61 | |
| | Other entertainment supplies, etc. | 0.41 | 9.27 | 113.65 | |
| | Personal care products | 0.60 | 13.42 | 97.82 | |
| | Personal care services | 0.54 | 12.12 | 111.28 | |
| | Reading | 0.16 | 3.53 | 101.18 | |
| | PEG Total | | 100.00 | | |
| 8. Education and Communication | | 4.97 | | | 98.27 |
| | Education | 0.29 | 5.77 | 81.32 | |
| | Communications | 4.16 | 83.88 | 99.21 | |
| | Computers and computer services | 0.51 | 10.34 | 100.16 | |
| | PEG Total | | 100.00 | | |
| 9. Miscellaneous | | 13.23 | | | 101.72 |
| | Tobacco products, etc. | 0.43 | 3.27 | 131.78 | |
| | Miscellaneous | 1.61 | 12.15 | 107.46 | |
| | Personal insurance and pensions | 11.19 | 84.58 | 99.74 | |
| | PEG Total | | 100.00 | | |
| | MEG Total | 100.00 | | | |
| Overall Price Index | | | | | 116.62 |
| Plus Adjustment Factor | | | | | 7.00 |
| Index Plus Adjustment Factor | | | | | 123.62 |
| **GUAM AND THE NORTHERN MARIANA ISLANDS** | | | | | |
| 1. Food | | 11.25 | | | 116.31 |
| | Cereals and bakery products | 0.74 | 6.54 | 144.07 | |
| | Meats, poultry, fish, and eggs | 1.38 | 12.24 | 102.22 | |
| | Dairy products | 0.62 | 5.48 | 146.63 | |
| | Fruits and vegetables | 0.71 | 6.32 | 169.38 | |
| | Processed foods | 1.22 | 10.81 | 126.41 | |
| | Other food at home | 0.36 | 3.17 | 131.73 | |
| | Nonalcoholic beverages | 0.48 | 4.23 | 127.33 | |
| | Food away from home | 4.80 | 42.67 | 102.66 | |
| | Alcoholic beverages | 0.96 | 8.54 | 100.85 | |
| | PEG Total | | 100.00 | | |
| 2. Shelter and Utilities | | 38.09 | | | 104.88 |
| | Shelter | 33.90 | 89.01 | 82.574 | |
| | Energy utilities | 3.53 | 9.27 | 322.02 | |
| | Water and other public services | 0.65 | 1.72 | 89.10 | |
| | PEG Total | | 100.00 | | |
| 3. Household Furnishings and Supplies | | 5.34 | | | 102.54 |
| | Household operations | 1.53 | 28.67 | 57.50 | |
| | Housekeeping supplies | 1.00 | 18.68 | 137.31 | |
| | Textiles and area rugs | 0.30 | 5.62 | 112.52 | |
| | Furniture | 0.86 | 16.03 | 98.28 | |
| | Major appliances | 0.22 | 4.08 | 123.19 | |
| | Small appliances, misc. housewares | 0.14 | 2.59 | 108.79 | |
| | Misc. household equipment | 1.30 | 24.34 | 125.29 | |
| | PEG Total | | 100.00 | | |
| 4. Apparel and Services | | 3.77 | | | 108.76 |
| | Men and boys | 0.85 | 22.55 | 131.94 | |
| | Women and girls | 1.38 | 36.55 | 88.08 | |
| | Children under 2 | 0.12 | 3.21 | 142.67 | |
| | Footwear | 0.90 | 23.96 | 101.85 | |
| | Other apparel products and services | 0.52 | 13.73 | 129.85 | |
| | PEG Total | | 100.00 | | |
| 5. Transportation | | 14.16 | | | 135.40 |
| | Motor vehicle costs | 6.26 | 44.18 | 107.95 | |
| | Gasoline and motor oil | 3.44 | 24.29 | 109.28 | |
| | Maintenance and repairs | 1.40 | 9.87 | 91.07 | |
| | Vehicle insurance | 2.02 | 14.25 | 102.27 | |
| | Public transportation | 1.05 | 7.42 | 507.04 | |
| | PEG Total | | 100.00 | | |
| 6. Medical | | 4.75 | | | 127.22 |
| | Health insurance | 2.80 | 58.87 | 149.40 | |
| | Medical services | 1.17 | 24.53 | 87.29 | |
| | Drugs and medical supplies | 0.79 | 16.61 | 107.60 | |
| | PEG Total | | 100.00 | | |
| 7. Recreation | | 4.44 | | | 101.11 |
| | Fees and admissions | 1.20 | 26.94 | 77.17 | |
| | Television, radios, sound equipment | 0.75 | 16.80 | 121.74 | |
| | Pets, toys, and playground equipment | 0.80 | 17.93 | 118.19 | |
| | Other entertainment supplies, etc. | 0.41 | 9.27 | 119.85 | |

| Major Expenditure Group (MEG) | Primary Expenditure Group (PEG) | MEG weight (percent) | PEG weight (percent) | PEG index | MEG index |
|---|---|---|---|---|---|
| | Personal care products | 0.60 | 13.42 | 109.74 | |
| | Personal care services | 0.54 | 12.12 | 75.03 | |
| | Reading | 0.16 | 3.53 | 106.26 | |
| | PEG Total | | 100.00 | | |
| 8. Education and Communication | | 4.97 | | | 114.25 |
| | Education | 0.29 | 5.77 | 166.18 | |
| | Communications | 4.16 | 83.88 | 112.26 | |
| | Computers and computer services | 0.51 | 10.34 | 101.45 | |
| | PEG Total | | 100.00 | | |
| 9. Miscellaneous | | 13.23 | | | 98.20 |
| | Tobacco products, etc. | 0.43 | 3.27 | 90.21 | |
| | Miscellaneous | 1.61 | 12.15 | 89.65 | |
| | Personal insurance and pensions | 11.19 | 84.58 | 99.74 | |
| | PEG Total | | 100.00 | | |
| | MEG Total | 100.00 | | | |
| Overall Price Index | | | | | 110.98 |
| Plus Adjustment Factor | | | | | 9.00 |
| Index Plus Adjustment Factor | | | | | 119.98 |

[FR Doc. E8–28833 Filed 12–8–08; 8:45 am]

**BILLING CODE 6325–39–P**

Federal Register

Tuesday,
December 9, 2008

# Part IV

# Department of Health and Human Services

## Administration for Children and Families

45 CFR Parts 301, 302, 303 and 304
Child Support Enforcement Program; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**45 CFR Parts 301, 302, 303 and 304**

**RIN 0970–AC24**

**Child Support Enforcement Program**

**AGENCY:** Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF), Department of Health and Human Services

**ACTION:** Final rules.

**SUMMARY:** These rules implement provisions of title IV–D of the Social Security Act (the Act) as amended by the Deficit Reduction Act of 2005, Public Law 109–171 (DRA). The rules address use of the Federal tax refund offset program to collect past-due child support on behalf of children who are not minors, mandatory review and adjustment of child support orders for families receiving Temporary Assistance for Needy Families (TANF), reduction of the Federal matching rate for laboratory costs incurred in determining paternity, States' option to pay more child support collections to former-assistance families, and the mandatory annual $25 fee in certain child support enforcement (IV–D) cases in which the State has collected and disbursed at least $500 of support to the family. The rules also make other conforming changes necessary to implement changes to the distribution and disbursement requirements.

**DATES:** *Effective Dates:* These rules are effective February 9, 2009.

**FOR FURTHER INFORMATION CONTACT:** Paige Hausburg, Policy Specialist, OCSE, 202–401–5635, e-mail: *paige.hausburg@acf.hhs.gov.* Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. eastern time.

**SUPPLEMENTARY INFORMATION:**

## I. Statutory Authority

These final rules are published under the authority granted to the Secretary of the U.S. Department of Health and Human Services (the Secretary) by section 1102 of the Act, 42 U.S.C. 1302. Section 1102 authorizes the Secretary to publish rules that may be necessary for the efficient administration of the functions for which he is responsible under the Act. The Deficit Reduction Act of 2005 (DRA), Title VII, Subtitle C—Child Support, sections 7301–7311 amends title IV–D of the Act.

Section 7301(b) of the DRA amends section 457 of the Act and the requirements for distribution of support payments to allow States to opt to increase child support payments to families and simplify child support distribution rules. We made minor conforming changes to the distribution requirements in these rules.

Section 7301(f) of the DRA amends section 464 of the Act to eliminate the restriction of access to the Federal tax refund offset program to disabled adult children and to allow States to collect past-due child support certified for offset to the Secretary of the Treasury on behalf of all children in the IV–D program who are not minors.

Section 7302 of the DRA amends section 466(a)(10) of the Act to require States to review and, if appropriate, adjust child support orders in cases receiving TANF at least once every three years. Previously, States needed only to review orders and adjust them, if appropriate, upon the request of either parent or, if there is an assignment of rights, upon the request of the State agency.

Section 7308 of the DRA amends section 455(a)(1)(C) of the Act to reduce the Federal reimbursement for the costs of genetic testing incurred in determining paternity from 90 percent to 66 percent of State IV–D program expenditures, effective October 1, 2006.

Section 7310 of the DRA amends section 454(6)(B) of the Act to require States to impose an annual fee of $25 in the case of an individual who has never received assistance under a State program funded under title IV–A of the Act and for whom the State has collected at least $500 of support. These rules also excludes from the fee those individuals who are receiving or have received Tribal IV–A assistance. This will have a minor impact on the program and it is consistent with the intent of the $25 fee that it not be imposed on the families who are the most at risk, *i.e.*, those who have received assistance under title IV–A of the Act. As discussed later in this preamble, Tribal IV–A assistance is not explicitly mentioned in the statute but is authorized under title IV–A of the Act. In addition, we amended these rules to prohibit collection of the $25 annual fee from individuals who are required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at 7 CFR 273.11(o) and (p). In these cases, the fee would need to be collected from the non-Food Stamp eligible parent or to be paid by the State.

## II. Summary Description of Regulatory Provisions and Changes Made in Response to Comments

The following is a summary of the regulatory provisions included in this final rule. The Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** on January 24, 2007 (72 FR 3093). The comment period ended March 26, 2007.

Changes made in response to comments are discussed in more detail under the Response to Comments section of this preamble.

### PART 301—STATE PLAN APPROVAL AND GRANT PROCEDURES

*Section 301.1—General Definitions*

Under § 301.1, the definition of *past-due support* and *qualified child* were amended. The changes in the definitions implement revised section 464(c) of the Act to eliminate the restriction of access to the Federal tax refund offset program to disabled adult children and to allow States to collect past-due child support certified for offset to the Secretary of the Treasury on behalf of all children in the IV–D program who are not minors. The definition of *past-due support* now reads: ''Past-due support means the amount of support determined under a court order or an order of an administrative process established under State law for support and maintenance of a child, or of a child and the parent with whom the child is living, which has not been paid. Through September 30, 2007, for purposes of referral for Federal tax refund offset of support due an individual who is receiving services under § 302.33 of this chapter, past-due support means support owed to or on behalf of a qualified child, or a qualified child and the parent with whom the child is living if the same support order includes support for the child and the parent.''

The definition of *qualified child* now reads: ''*Qualified child*, through September 30, 2007, means a child who is a minor or who, while a minor, was determined to be disabled under title II or XVI of the Act, and for whom a support order is in effect.''

### PART 302—STATE PLAN APPROVAL REQUIREMENTS

*Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency*

These rules make conforming changes to language in § 302.32 for consistency with certain changes made to sections 454 and 457 of the Act. Under new

section 454(34) of the Act, effective October 1, 2009, or up to a year earlier at State option, States have a choice to distribute collections first to satisfy support owed to families in IV–D cases. The rules make technical changes in §§ 302.32(b)(2)(iv) and (3)(ii) to delete reference to a specific statutory requirement for payments to families to simplify the language.

*Section 302.33—Services to Individuals Not Receiving IV–A Assistance*

Section 7310 of the DRA adds a new requirement in section 454(6)(B)(iii) of the Act to require States to impose an annual fee of $25 in the case of an individual who has never received assistance under a State program funded under title IV–A of the Act and for whom the State has collected at least $500 of support.

Under the proposed rule, § 302.33(e)(1) required that in the case of an individual who has never received assistance under a State or Tribal program funded under title IV–A of the Act and for whom the State has collected at least $500 of support in any given Federal fiscal year, an annual fee of $25 for each case in which services are furnished be imposed by the State. The structure of paragraph (e)(1) has been changed for clarity and a number of changes were made to (e)(1) in response to comments. We clarified in paragraph (e)(1)(i) that the first condition for the fee requirement is that the State has ''collected and'' disbursed at least $500 of support to the family. The proposed rule at § 302.33(e) did not specify that the State ''collected'' the money prior to disbursement to the family. In response to comments, we clarified in § 302.33(e)(1)(ii) that ''assistance'' includes former AFDC program assistance, assistance under a State TANF program as defined in the TANF rules at 45 CFR 260.31, and assistance under a Tribal TANF program is defined in the TANF rules at 45 CFR 286.10.

We also amended these rules at § 302.33(e)(3)(i) to prohibit collection of the $25 annual fee from a foreign obligee in an international case receiving IV–D services under section 454(32)(C) of the Act and individuals who are required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at 7 CFR 273.11(o) and (p). In response to comments that the Federal statute allows a fee, charged to the noncustodial parent, to be retained from the collection, we revised paragraph (e)(3)(i) to cross-reference § 302.51(a)(5) which specifies the conditions under which the noncustodial parent may be charged the fee and the fee retained from a child support collection. Therefore, with respect to the collection of the $25 fee, a noncustodial parent need not have designated a portion of the support payment as the fee. We also amended § 302.33(e)(3)(ii) and (iii) to prohibit collection of the fee from individuals who are required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at 7 CFR 273.11(o) and (p).

*Section 302.51—Distribution of Support Collections*

Section 7301(b) of the DRA amended section 457(a)(3) of the Act to require a State to pay to a family that has never received assistance under a title IV–A or IV–E program the portion of the amount collected that remains after withholding any $25 annual fee. This statutory requirement is addressed in this final rule by an amendment to § 302.51(a)(1) and by adding paragraph (a)(5).

The State plan requirement in section 454(34) of the Act concerning collection and distribution of support payments by the IV–D agency that requires a State to certify which option for distribution it chooses for collections in former-assistance cases is in the final rule at § 302.51(a)(3)(i) and (ii). In response to comments concerning an exemption from the fee for certain individuals required to cooperate with the IV–D program as a condition of Food Stamp eligibility, and the change to the rules at § 302.33(e)(3) to allow an annual $25 fee to be charged to the noncustodial parent and retained from a support collection under certain circumstances, we also revised the language in proposed § 302.51(a)(5) for consistency.

*Section 302.70—Required State Laws*

Section 7302 of the DRA amended section 466(a)(10) of the Act to require States to enact laws requiring the use of procedures to review and, if appropriate, adjust at least once every three years, child support orders for families receiving TANF in which there is an assignment of support under title IV–A of the Act. For consistency with section 466(a)(10) of the Act, these rules revise § 302.70(a)(10), under which the State must have in effect laws providing for the review and adjustment of child support orders. The requirements in current §§ 302.70(a)(10)(i) and (ii) are rendered obsolete by this final rule.

## PART 303—STANDARDS FOR PROGRAM OPERATIONS

*Section 303.7—Provision of Services in Interstate Title IV–D Cases*

Section 454(6) of the Act as amended by section 7201 of the DRA does not specifically address which State is to impose and collect the $25 annual fee in accordance with the new requirement at § 302.33(e) in an interstate title IV–D case. Using the Secretary's rulemaking authority in section 1102 of the Act, this final rule amends § 303.7(e) to require that the title IV–D agency in the initiating State impose the annual $25 fee in accordance with the new requirement in § 302.33(e). The change is necessary to ensure consistency in the collection of the mandatory annual $25 fee in interstate cases.

*Section 303.8—Review and adjustment of child support orders*

Section 7302 of the DRA revised section 466(a)(10) of the Act to require States to review and, if appropriate, adjust orders in State title IV–A cases at least once every three years. In response to comments we amended these rules at § 303.8(b)(1) to clearly indicate that the time frame for the review of the order begins with the establishment of the order or the most recent review of the order, whichever is later.

*Section 303.72—Request for Collection of Past-Due Support by Federal Tax Refund Offset*

Section 7301(f) of the DRA amended the definition of ''past-due support'' at section 464(c) of the Act to allow, effective October 1, 2007, arrearages owed to adult children to be submitted for Federal tax refund offset. We amended the regulatory language at § 303.72(a)(3)(i), with respect to past-due support owed in cases in which the IV–D agency is providing services under § 302.33, to allow support owed to or on behalf of a child, or a child and a parent with whom the child is living if the same support order includes support for the child and the parent, to be submitted for Federal tax refund offset effective October 1, 2007. Therefore, the prior restriction from submitting past-due support owed to adult children is no longer in effect.

Section 7301(b)(2)(C) of the DRA amended section 454(34) of the Act, with respect to distribution options, to allow a State to choose either to apply amounts collected, including amounts offset from Federal tax refunds, to satisfy any support owed to the family first or to continue to distribute Federal tax refund offset amounts, as under current section 457(a)(2)(B)(iv), to

satisfy any past-due support assigned to the State first. This final rule revises § 303.72(h)(1) to refer simply to distribution in accordance with section 457 of the Act, and effective October 1, 2009, or up to a year earlier at State option, in accordance with section 454(34) of the Act, under which States elect which distribution priority in former-assistance cases to use under their IV–D programs.

In response to comments, proposed § 303.72(h)(3)(i) is revised to continue the requirement that a IV–D agency, except as provided in paragraph (ii), must inform individuals receiving services under § 302.33 in advance that amounts offset will be applied to satisfy any past-due support which has been assigned to the State and submitted for Federal tax refund offset. States may opt to continue to distribute in this manner with respect to collections made as a result of Federal tax refund offset. However, a State may opt, under section 454(34) of the Act, to apply amounts offset first to satisfy any current and past-due support which is owed to the family. Therefore, the regulatory language at § 303.72(h)(3)(ii), was changed to make clear that States are not required to send such notices if the State chooses the distribution option allowed under 454(34) of the Act.

## PART 304—FEDERAL FINANCIAL PARTICIPATION

*Section 304.20—Availability and Rate of Federal Financial Participation*

Section 7308 of the DRA amends section 455(a)(1)(C) of the Act by reducing the previously enhanced Federal matching rate for laboratory costs to determine paternity from 90 percent to 66 percent, effective October 1, 2006. Accordingly, we revised § 304.20(d) to reflect the reduction in the matching rate for genetic testing costs for the determination of paternity.

Response to Comments

We received 28 letters from States, Tribes, advocacy groups, and other interested individuals. Below is a summary of the comments and our responses.

General Comments

1. *Comment:* One commenter said that the proposed rules are detrimental to the children and families that are being served by the IV–D program and that they are contradictory to the public policy of improving the lives of children and families.

*Response:* These rules reflect the statutory requirements of the DRA. We believe that the mandates and authorities in the DRA will have positive effects for families receiving child support enforcement services in that the changes in the law build on the successes of the 1996 welfare reform law, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), in strengthening families and promoting responsibility. The DRA provisions reflect the need for responsible deficit reduction while still retaining generous Federal funding of the child support enforcement program.

2. *Comment:* One commenter requested that an updated version of Action Transmittal 06–01, *Child Support Provision in the Deficit Reduction Act of 2005 (DRA),* dated May 7, 2006, be provided with Federal guidance on all of the DRA provisions. For example, section 7302 of the DRA which addresses assignment and distribution, has many aspects on which States need Federal guidance. Another commenter urged OCSE to provide guidance on distribution changes.

*Response:* We do not believe updating AT–06–01 is appropriate. We have worked diligently since March of 2006 to provide guidance to States in an effort to assist them in implementing the mandates of the DRA.

3. *Comment:* Two commenters asked how long States will have after the publication of these final rules to align IV–D computer data system designs to comply with the final Federal rules.

*Response:* The requirements of these final rules are effective 60 days from the date of publication.

There is no specific mandate that these statutory provisions be automated. With respect to the DRA requirements, States must meet the statutory effective date for each provision, subject to the authorized delay date: If the State requires legislation to meet the requirements imposed by the mandates of the DRA, the effective date of the amendments shall be 3 months after the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that began after the date of the enactment of the DRA (February 8, 2006). In the case of a State that has a 2-year legislative session, each year of the session shall be considered to be a separate regular session of the State legislature. We recommend that should a State need to make changes to its automated system, those changes be made as soon as possible.

4. *Comment:* One commenter asked if OCSE will impose specific automated systems programming requirements on States that choose to pay the annual $25 fee themselves.

*Response:* OCSE is not imposing specific programming requirements on States that choose to pay the fee themselves. When these rules are published in final, States will already be imposing the $25 annual fee. Any changes to the way the State is imposing the fee that are required as a result of publication of the final rules should be made consistent with the effective date of the rules. States will not be penalized for systems changes for fee procedures they implement prior to issuance of these final rules that are reasonable and consistent with the statutory fee language. However, the effective date of these rules is 60 days from the date of publication in the **Federal Register** .

5. *Comment:* One commenter asked if the Secretary's rulemaking authority permits the Secretary to convert a mandatory fee assessed on the custodial parent, noncustodial parent, applicant, or State to a mandatory fee on the State in light of the fact that the State must pay the Federal portion of the fee to the Federal government if it is not collected through other means. The commenter said that Executive Order 12612, section three limits Federal action to instances where Constitutional authority for the action is clear and certain. The final rules should include the bases on which the Administration claims the Congressional intent behind the mandatory assessment of a fee translates to a requirement for a State to pay a program fee to the Federal government that was otherwise not collected.

*Response:* The Federal responsibility is to ensure that Congressional intent is met. Requiring a State to charge the fee, but allowing a State to assert that collection efforts were unsuccessful would contravene the intent of the mandate.

6. *Comment:* One commenter stated that the Federal funding cuts imposed by the DRA are likely to tax the State IV–D agencies to such an extent that services and outreach to employers will suffer.

*Response:* The Federal funding of the IV–D program is generous and we expect that services to families and outreach to employers will not suffer. The Federal OCSE has an office that specifically works to provide outreach to employers. To access the internet site with information relevant to employers, please go to: *http://www.acf.hhs.gov/programs/cse/newhire/employer/home.htm*.

## PART 301—STATE PLAN APPROVAL AND GRANT PROCEDURES

*Section 301.1—General Definitions*

1. *Comment:* One commenter said that in the discussion of § 301.1 of the proposed rule, the preamble says: ''this amendment will allow collection of past-due child support * * * on behalf of individuals who were owed child support as children but then aged out of the system without having collected the full amount of support owed to them'' and implies that the now emancipated child has the right to collect past-due support through the Federal tax refund offset program, not the custodial parent to whom the support was ordered to be paid.

*Response:* The provision allows IV–D cases with arrearages owed to emancipated minors to benefit from the highly successful Federal tax refund offset program. It does not impact the payee under the support order.

2. *Comment:* The wording of the definition of ''past-due support'' suggests the law change applies to cases where the children are minors as of October 1, 2007, and the authority for States to intercept arrearages for emancipated children only applies to children that reach majority after October 1, 2007. If this isn't the case, we suggest: ''*Effective October 1, 2007, past-due support accrued under a valid order for a qualified child can be submitted for FITRO [Federal Income Tax Refund Offset] until the past-dues support is paid in full.*''

*Response:* We have not changed the definition as suggested by the commenter. As drafted, the only limitation was with respect to past-due support submitted for offset until September 30, 2007. Subsequent to that date the definition of past-due support is no longer limited to support owed to a ''qualified child'' in a non-assistance case. A ''qualified child'' was, through September 30, 2007, a child who is a minor or who, while a minor, was determined to be disabled under title II or XVI of the Act, and for whom a support order is in effect.

3. *Comment:* One commenter asked that OCSE confirm that there is no requirement to distinguish between cases referred for tax refund offset under rules effective until September 30, 2007, and those referred for offset after October 1, 2007, because of the change to the definition of ''past-due support.'' Two commenters questioned whether the definition could be interpreted to mean that persons owed child support for non-minor children may apply for IV–D services to gain access to the Federal tax refund offset program without having received IV–D services when the child was a qualified child.

*Response:* There is no requirement to distinguish between cases referred for tax refund offset under rules effective until September 30, 2007, and those referred for offset after October 1, 2007, because of the change to the definition of ''past-due support.''

As of October 1, 2007, States may submit past-due support for any case that meets submittal requirements regardless of whether the past-due support is owed on behalf of a minor. The statute defines ''past-due support'' as the amount of a delinquency, determined under a court order, or an order of administrative process established under State law, for support and maintenance of a child (whether or not a minor), or of a child (whether or not a minor) and the parent with whom the child is living. The statute does not limit referral for Federal tax refund offset to past-due support owed in pre-existing IV–D cases or to cases in which IV–D services were provided while the obligee was a minor. Past-due support in a IV–D case may be submitted for Federal tax refund offset if it otherwise meets existing criteria in § 303.72(a).

4. *Comment:* One commenter asked if allocation, distribution, and disbursement could be defined in § 301.1, rather than in the preamble to § 302.32.

*Response:* We have not adopted the commenter's suggestion. We do not believe it is appropriate to add definitions of these terms in this final rule without allowing the public an opportunity to first comment on proposed definitions. However, as discussed in the preamble to the NPRM, the term ''distribution'' refers to how a support collection is allocated between families and the State and Federal government in accordance with Federal requirements. The term ''disbursement'' refers to the act of paying, by check or electronic transfer, support collections to families. The term ''allocation'' was never defined in the preamble to the NPRM, but was used in describing distribution. In that context, ''allocated'' refers to the apportionment of collections between or among different IV–D cases, or among various obligations within a support order (for example, withheld income between two income withholding orders for the same employee, or within the same case, child support and medical support, or child support and spousal support.)

5. *Comment:* One commenter stated that depending on how the Internal Revenue Service (IRS) will amend its rule of the definition of *qualified child* at 31 CFR 285.3, OCSE should delete the qualified child definition and restructure the past-due support definition to read: *Past-due support means the amount of the support determined under a court order or an order of an administrative process established under State law for support and maintenance of a child, or of a child and the parent with whom the child is living, that has not been paid. For purposes of cases referred prior to October 1, 2007, for Federal income tax refund offset of support due an individual who is receiving services under § 302.33 of this chapter, past-due support means support owed to or on behalf of a child who is a minor or who, while a minor was determined to be disabled under title II or XVI of the Act, and for whom a support order is in effect.*

*Response:* We believe it is appropriate to include the definition of qualified child in IV–D program rules because States and families are familiar with that term.

The Department of Treasury's Financial Management Service amended rules at 31 CFR 285.3 in accordance with section 7301(f) of the DRA by removing the definition of ''qualified child''. The rules were published in the **Federal Register** on October 22, 2007 (72 FR 59480), *http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-5175.pdf.*

6. *Comment:* One commenter supported the definition to allow use of the Federal tax refund offset program to collect past-due child support on behalf of children who are not minors. The commenter estimates that in his State an additional 3,631 cases will be eligible for offset and projects that this will generate over $2 million in collections in the caseload with emancipated children. Other commenters supported the changes that allow a State to continue to intercept Federal tax refunds in cases where children are no longer minors and where there are still arrearages owed to the custodial parent and/or the child.

*Response:* We agree that this change will garner much needed support for families not able to use this enforcement technique in the past and appreciate the support of the commenter. States have certified over 900,000 additional cases for Federal Tax Refund Offset, providing a tremendous boost to support collections for families for years to come. We expect to receive an additional $200 million in collections during processing year 2008.

## PART 302—STATE PLAN APPROVAL REQUIREMENTS

*Section 302.32—Collection and Disbursement of Support Payments by the IV–D Agency*

1. *Comment:* Do States under proposed § 303.72 have the option to continue to keep the exception that allows Federal tax refund offsets to be applied first to satisfy any past-due support which has been assigned to the State or to choose to distribute the money in accordance with the rules under section 457 of the Act as amended by the DRA, which would allow the offset to be paid to the family first?

*Response:* Yes. Under current section 457(a)(2)(B)(iv) of the Act governing distribution of offsets in former-assistance cases, Federal tax refund offset collections must be distributed to arrearages only, and must be applied first to any arrearages assigned to the State to reimburse public assistance paid to the family. If a States chooses the new distribution sequence for former-assistance cases under revised section 457 of the Act, the State must distribute Federal tax refund offset collections to satisfy any unpaid current support and arrearages owed to families first before retaining offset amounts to satisfy arrearages assigned to the State.

States will be required to update State Plan Pre-Print page 2.4, *Collection and Distribution of Support Payments,* to indicate which option for distribution in former-assistance cases the State has adopted. The statute provides authority to States to make choices among a number of options which impact the amount of collections families receive. State choices may well vary.

*Section 302.33—Services to Individuals Not Receiving Title IV–A Assistance General*

1. *Comment:* One commenter encouraged OCSE to ensure that the final rule and the preamble to the final rule implementing the fee be as simple and flexible as possible. The commenter is concerned that if the rules for imposing and collecting the fee become too detailed or complex, it will become more difficult for State governments to collect the fees. OCSE should provide general guidance and leave States the flexibility to determine how the rule applies in specific case scenarios.

*Response:* OCSE has a longstanding partnership with States and the approach to developing rules and working with the States supports flexibility for State choices. We have responded to questions concerning some specific case scenarios in this section of the preamble.

2. *Comment:* One commenter is concerned with the fact that States must implement the $25 annual fee prior to issuance of the final rules. The cost could be significantly increased depending on the content of the final rules and could result in additional systems programming changes.

*Response:* As stated in DCL–06–16, section 7310 of the DRA amends section 454(6) of the Act to provide that a State child support plan must provide for the imposition of an annual fee of $25 in each case in which an individual has never received assistance under a State program funded under title IV–A of the Act and for whom the State has collected at least $500 of support, effective October 1, 2006.

In order to certify compliance with this new requirement, States are required to submit a State plan amendment certifying to the Secretary that the State has implemented the $25 annual fee requirement by the effective date in the particular State. States will not be penalized for fee procedures they implement to meet the statutory effective date that are reasonable and consistent with the statutory fee language. Additional changes for compliance with the final rule may be necessary and States must make any necessary changes required under the final rules. The effective date of the rule is 60 days from the date of publication.

*Annual $25 Fee—Section 302.33(e)(1)*

1. *Comment:* Four commenters asked for the definition of ''never-assistance'' for purposes of assessing the fee. Another commenter said that proposed § 302.33(e)(1) states that receipt of any type of TANF assistance exempts an individual from the $25 mandatory fee. The commenter goes on to say that OCSE–AT–99–10 includes types of IV–A benefits not included in the explanation of never-assistance in the proposed rule, and therefore not exempt from the fee. If a case receives assistance as defined in AT–99–10, but is not referred to the IV–D agency, the IV–D agency may not know whether the fee is required. One commenter opposed allowing an exemption from the fee for those cases which do not meet the definition of ''assistance'' at 45 CFR 260.31.

*Response:* We have determined that a definition of the term ''never-assistance'' is not appropriate because that term has different connotations within the IV–D program depending on the context in which it is used. OCSE–AT–99–10 transmitted the definition of ''assistance'' found in the TANF program rules. The term ''assistance'' is appropriately defined in the rules governing the TANF program and specifies what services are included in the definition of ''assistance'' as well as what benefits are not considered TANF assistance. Assistance is defined in the TANF rules at 45 CFR 260.31 as:

''(a)(1) The term ''assistance'' includes cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses).

(2) It includes such benefits even when they are:

(i) Provided in the form of payments by a TANF agency, or other agency on its behalf, to individual recipients; and

(ii) Conditioned on participation in work experience or community service (or any other work activity under Sec. 261.30 of this chapter).

(3) Except where excluded under paragraph (b) of this section, it also includes supportive services such as transportation and child care provided to families who are not employed.

(b) It excludes:

(1) Nonrecurrent, short-term benefits that:

(i) Are designed to deal with a specific crisis situation or episode of need;

(ii) Are not intended to meet recurrent or ongoing needs; and

(iii) Will not extend beyond four months.

(2) Work subsidies (i.e., payments to employers or third parties to help cover the costs of employee wages, benefits, supervision, and training);

(3) Supportive services such as child care and transportation provided to families who are employed;

(4) Refundable earned income tax credits;

(5) Contributions to, and distributions from, Individual Development Accounts;

(6) Services such as counseling, case management, peer support, child care information and referral, transitional services, job retention, job advancement, and other employment-related services that do not provide basic income support; and

(7) Transportation benefits provided under a Job Access or Reverse Commute project, pursuant to section 404(k) of the Act, to an individual who is not otherwise receiving assistance.

(c) The definition of the term assistance specified in paragraphs (a) and (b) of this section:

(1) Does not apply to the use of the term assistance at part 263, subpart A, or at part 264, subpart B, of this chapter; and

(2) Does not preclude a State from providing other types of benefits and services in support of the TANF goal at Sec. 260.20(a).''

In response to comments, the proposed rules at § 302.33(e)(1) have been amended to add reference to the receipt of assistance under the former AFDC programs as well as to include a cross-reference to the TANF rules definitions of assistance at 45 CFR 260.31. For consistency with the inclusion of the cross-reference to the definition of TANF assistance, we also included a cross-reference to the definition of Tribal TANF assistance 45 CFR 286.10.

2. *Comment:* One commenter asked if the Federal rules could be interpreted to indicate that the fee is not assessed any time there is an assignment of support rights to the State as a condition of receiving assistance under Title IV–A of the Act. The commenter also asked if the final rules will allow individual States to determine the definition of ''never IV–A assistance cases.''

*Response:* The answer to both questions is no. The Federal statute at section 454(6) of the Act does not limit those who are exempt from the fee to those who have assigned their support rights to the State under a State TANF program. We believe that a cross-reference to a definition of assistance in these rules is critical to ensure consistency across State IV–D programs. Any individual who is required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at 7 CFR 273.11(o) and (p) will not be charged the fee (although, if all other conditions are met—an individual in the case receiving IV–D services has never received State AFDC, State or Tribal TANF assistance, and the State has collected and disbursed at least $500 of support to the family— the other parent or the State may ultimately be responsible for paying the fee). This is discussed in more detail later in the preamble. In addition, the TANF rules exclude from the definition of ''assistance'' under the TANF program, anything in 45 CFR 260.31(b)(1)–(7). If the only TANF benefits received by an individual fall into the categories listed in 45 CFR 260.31(b)(1)–(7), those individuals would not be considered to be receiving or to have received assistance under title IV–A of the Act unless they received assistance under the former AFDC program. Therefore, those individuals are subject to the fee if all other conditions for collecting the fee are met.

3. *Comment:* One commenter appreciated that OCSE has proposed a broad definition of IV–A assistance in order to allow States to exempt as many families as possible from the fee. However, this definition is broader than the definition of ''IV–A assistance paid to the family'' set forth in OCSE AT 99–10. Some States will only be able to identify families receiving assistance under this narrower definition, which essentially covers those who have been paid cash assistance and had their cases referred to the IV–D agency. We recommend that OCSE permit State flexibility in this area, so that States must exempt from the fee those cases in which IV–A assistance has been paid to the family, but may exempt cases receiving the broader type of IV–A benefits, as defined at 45 CFR 260.31(b), when a State can easily identify these cases.

*Response:* As discussed earlier, the definition of assistance under the State and Tribal TANF program rules is appropriate and a cross-reference has been added to ensure consistency among State definitions and similar treatment of families regardless of the State in which they live. Individuals in TANF cases that only receive benefits excluded from the TANF definition of assistance in 45 CFR 260.31 do not assign rights to support and should not be referred to the IV–D agency. An application for IV–D services would be required in such cases to be considered a IV–D case. See PIQ–05–06, dated December 22, 2005 [*http://www.acf.hhs.gov/programs/cse/pol/PIQ/2005/piq-05-06.htm*], for treatment of inappropriately referred cases.

4. *Comment:* One commenter wanted to know whether to assess the fee on a case that had received IV–A assistance, as defined by AT 99–10, but was not referred by the IV–A agency to the IV–D agency.

*Response:* Referral by the IV–A agency is irrelevant to the imposition of the $25 fee. If there is a IV–D case that otherwise meets the conditions for the imposition of the fee, the case is subject to the fee.

5. *Comment:* Two commenters stated that tracking whether someone (for example, in an interstate case) is receiving Tribal IV–A assistance will be problematic since many State IV–D agencies do not electronically communicate with Tribes. The commenter asked for suggestions for overcoming this barrier. One commenter proposed that OCSE require States to establish procedures so all former or current Tribal TANF clients can inform the State of their TANF status, so a State does not inadvertently impose the fee.

*Response:* Although States may not electronically communicate with Tribes operating Tribal TANF programs, ascertaining whether an individual has received Tribal IV–A assistance is not an insurmountable barrier. As the IV–D caseworker is soliciting information from the custodial parent in an application case, questions specific to receipt of IV–A assistance should be asked. States may want to develop specific questions related to IV–A assistance and benefits to determine what type of IV–A assistance, if any, a custodial parent or a child in the family receives/received. IV–D agencies will have necessary case records to identify current TANF cases referred to the IV–D agency and former TANF cases that continue to receive IV–D services. If a custodial parent tells the IV–D office that he or she or the child received Tribal IV–A assistance, the State would need to contact the Tribal IV–A office to confirm receipt of Tribal TANF. By the close of FY 2006, 52 Tribal TANF plans were approved to operate on behalf of 236 Tribal and Alaskan Native Villages. If a State finds it necessary to confirm receipt of Tribal TANF, the Tribal TANF contact list may be accessed on the ACF Internet via: *http://www.acf.dhhs.gov/programs/dts/ttanfcont_1002.htm* and, as appropriate, the exemption from the fee noted in the IV–D case record.

This situation may not occur in many cases. The State would only be required to verify whether an individual received this assistance in instances in which an individual had asserted that he or she had received or is receiving Tribal TANF. States should document in the case record whether an exemption is appropriate.

6. *Comment:* Three commenters asked for clarification on how to ascertain if an applicant for IV–D services formerly received or currently receives TANF. Another commenter said that the NPRM does not clarify the level of documentation a State IV–D program needs to exempt a case from a fee if a custodial parent says he or she received AFDC or TANF in another State or Tribal program. Such verification could include documentation from another State agency or language in a court order. The commenter suggested that if the IV–D agency receives a sworn statement from the custodial parent stating the parent received IV–A assistance in another State, that would be sufficient documentation for the family and for the State and Federal government. This would be comparable to requirements for signatures for the Federally approved interstate form ''Affidavit in Support of Establishing Paternity'' and a signature of a parent on a paternity acknowledgement under 42 U.S.C. 652(a)(7).

*Response:* In order for a State to determine that an individual never received assistance under a State or Tribal IV–A plan, the State should ask the individual applying for services. Current State TANF recipients do not apply for IV–D services. The State may also confirm with the State or Tribal IV–A program to ensure that assistance has not been provided. However, States are not required to have a confirmation from every State that the client has never received assistance; contacting the State or Tribal program named by the applicant would be sufficient.

Some States may determine it is in the best interest of the individual and for documentation purposes to develop a procedure for instances in which an individual claims receipt of TANF in another State. A State may consider a sworn statement from the custodial parent stating the parent received qualifying assistance under a former State AFDC program or the current TANF program (with the exception of emergency assistance as defined in 45 CFR 260.31(b)(1)–(7)) in another State to be adequate documentation for exemption from the fee.

7. *Comment:* One commenter recommended providing instructions to address situations such as when the individual custodial parent who has never received assistance as defined under § 302.33(e)(1) has a IV–D case and moves from one State where the fee is paid by the State, and applies for services in another State that collects the fee from the noncustodial parent or retains the fee from the collection made for the custodial parent, during the same fiscal year. The commenter asked for clarification as to whether both States will be required to impose the fee during the same fiscal year, regardless of which collection method or methods are used.

*Response:* In such a situation, the second State may document in the case record that the previous State collected the fee. The $25 annual fee may be imposed and paid or collected only once per year in a case in which the fee is assessed, regardless of where the individual lives. A sworn statement from a custodial parent would not be adequate in this instance because the State may have absorbed the fee or the noncustodial parent may have paid the fee without the custodial parent's knowledge. A IV–D agency should ask each applicant for services if the fee has already been collected or paid for the year. If an individual moves to a different State, the second State should confirm with the first State that the fee was collected or paid by the State and document that the fee was accounted for or paid to another State.

8. *Comment:* One commenter believes that the Food Stamp Act prohibits the collection of the annual $25 fee on Food Stamp-only cases when the State has elected to require IV–D services for families who receive food-stamps.

*Response:* The Food Stamp rule at 7 CFR 273.11(o)(1), *Option to disqualify custodial parent for failure to cooperate* provides the State Food Stamp agency the option to disqualify, or make ineligible for the Food stamp program an individual who refuses to cooperate with a State IV–D agency. This section further clarifies that if the State Food Stamp agency chooses to implement the provision to disqualify an individual for non-cooperation with the State child support agency, it must refer all appropriate individuals to the IV–D agency to establish paternity of the child and establish, modify, or enforce a support order with respect to the child and the individual in accordance with the cooperation provision in section 454(29) of the Act. If the individual is receiving TANF or Medicaid, or assistance from the State IV–D agency, and has already been determined to be cooperating, or has been determined to have good cause for not cooperating, then the State agency shall consider the individual to be cooperating for Food stamp purposes. Section 273.11(o)(4) of Title 7 says that a State agency electing to implement the provision to disqualify a custodial parent for failure to cooperate shall not require the payment of a fee or other costs for services provided under Part D of title IV–D of the Social Security Act. The Food Stamp agency issued guidance on August 22, 2007, to States to explain the impact of the fee provision in the DRA on the Food Stamp program. OCSE transmitted this through IM–07–09, dated September 24, 2007. This may be viewed at *http://www.acf.dhhs.gov/programs/cse/pol/2007-im.html*.

We are aware of five States that have opted to require cooperation by the custodial parent with the IV–D program in order to be eligible to receive Food Stamp services. Those States are Idaho, Wisconsin, Michigan, Mississippi, and Florida. Of those five States, Mississippi and Wisconsin also require cooperation by the noncustodial parent with the IV–D program in order to receive Food Stamp services.

The commenter asks whether it is a correct interpretation of the Food Stamp Act that in a ''Food Stamp-only'' case the IV–D agency will not require the payment of a fee or other costs for services provided under title IV–D of the Act. In a IV–D case in which the custodial parent is required to cooperate with the IV–D agency in order to be eligible for Food Stamps, even when the IV–D case otherwise meets the criteria for the imposition of the fee, the fee may not be assessed against the custodial parent. However, the statute provides four options for payment of the fee. In this instance, the fee would be required to be paid either by the State, by the noncustodial parent or charged to the noncustodial parent and deducted from a collection after current support and any payment on arrearages for the month under a court or administrative order have been disbursed to the family.

In instances in which the noncustodial parent in a IV–D case is receiving Food Stamps and is required to cooperate with the IV–D agency, if the custodial parent in the same case is not receiving Food Stamps, and the case otherwise meets the criteria for the fee assessment (i.e., an individual in the case receiving IV–D services has never received State AFDC, State or Tribal TANF assistance, and the State has collected and disbursed at least $500 of support to the family), the fee could be taken from the collection, charged to the custodial parent or paid by the State.

In a IV–D case in a State in which the Food Stamp agency requires cooperation with the IV–D agency and both the custodial and noncustodial parent are recipients of Food Stamps, and the case in which the noncustodial parent is involved otherwise meets the conditions for the imposition of the fee (i.e., the individual in the case has never received State AFDC, State or Tribal TANF assistance, and the State has collected and disbursed at least $500 of support to the family), the State would be required to pay the fee.

9. *Comment:* Seven commenters stated that the proposed rules are unclear on whether current or former IV–E assistance cases are exempt from the annual $25 fee assessment. These commenters believe that in some places, the proposed rules for the annual $25 fee appear not to exclude from the fee individuals who have received assistance under title IV–E while elsewhere in the rules reference to IV–E cases appears to exclude those cases from the fee. The commenters are seeking clarification on whether or not the proposed rules require the State to assess the annual fee in IV–E cases.

*Response:* In any current or former IV–E assistance case in which the criteria for imposition of the fee are met, a fee is required. As stated earlier, a fee is assessed for any case in which the individual has never received assistance under a former State AFDC program, or State or Tribal TANF and the State has

collected and disbursed at least $500 of support to the family. The impact of the use of the ''disbursed to the family'' regulatory language is that current IV–E cases will rarely, if ever, be subject to the fee because the family may never receive $500 in support collections in a Federal fiscal year. However, in instances in which an individual formerly received title IV–E assistance, and all conditions for imposition of the fee are met, including disbursement of $500 to the former IV–E family, then an annual fee is required.

10. *Comment:* One commenter stated that the proposed rule at § 302.33(e)(1) defines the cases charged the fee as those in which an individual has never received assistance under a State or Tribal title IV–A program, and for whom the State has disbursed to the family at least $500 of support in the fiscal year. Since one requirement for imposing the fee is that the payment is disbursed to the family and foster care payments are disbursed to a State agency, are IV–E foster care cases exempt from the fee?

*Response:* See preceding response. As explained in the preamble to the NPRM, the $500 in support collection must have been disbursed to the family in a title IV–D case before imposing the $25 fee because to allow otherwise would result in imposition of a fee in cases in which support is collected but not disbursed to the family. To allow the fee to be collected prior to the collection being disbursed to the family would be inconsistent with the statute's concept that a case subject to the $25 fee would have benefited from receipt of the $500 in support during the year before an annual $25 fee is imposed.

The impact of the use of the ''disbursed to the family'' regulatory language is that current IV–E cases and possibly other categories of cases, for example some former IV–E cases, will not be subject to the fee if $500 has not been disbursed to the family. We believe that this is reasonable since the family will not have received $500 in support if the support is assigned to the State and retained in whole or in part to reimburse the State and Federal government for the costs for assistance programs under the title IV–E.

11. *Comment:* One commenter asked for clarification as to whether or not cases in which an individual never received assistance under title IV–A of the Act but has received services from other means-tested programs like Food Stamps, IV–E foster care, and Medicaid are exempt from the fee. The commenter also requested confirmation that collections that are assigned and not disbursed to the family do not count towards the $500 of support in a year.

*Response:* As mentioned earlier in the preamble, an individual who has received assistance under a State AFDC program, assistance as defined in § 260.31 under a State TANF program, or assistance as defined in § 286.10 under a Tribal TANF program, is exempt from the $25 annual fee. As discussed above, in situations in which an individual in a IV–D case formerly received IV–E foster care services and $500 of support has been disbursed to the family that case would be subject to a fee. Similarly, Medicaid-only cases, in which child support collected is paid to the family and assigned cash medical support may be retained by the State may be subject to the fee if other conditions are met; i.e., the individual in the case has never received AFDC, State, or Tribal title IV–A assistance, is not required to cooperate with the IV–D agency in Food Stamp cases, and the State has collected and disbursed at least $500 of support to the family within the Federal fiscal year.

While the statute at section 454(6) of the Act does not specifically mention recipients of Food Stamps, individuals who are cooperating with and receiving services from the IV–D program as a condition of Food Stamp eligibility under 7 CFR 273.11(o) and (p) may not be charged the $25 annual fee. As discussed earlier, in such cases the collection of the $25 annual fee from the individual required to cooperate is prohibited. However, the fee must be assessed and accounted for if all conditions for assessing the fee are met. These final rules reflect this change to the proposed rule at § 302.33(e)(3)(i)(B), (ii) and (iii) to prohibit collecting the fee from individuals required to cooperate with the IV–D program as a condition of eligibility for Food Stamps.

12. *Comment:* One commenter stated that in the preamble, the terms ''family'' and ''caretaker relative'' are used rather than the term ''individual'' as stated in the proposed rule. The commenter asked if the determination of ''never received assistance'' is applied to any individual in the case.

*Response:* Yes, the determination that an individual never received assistance is applied to any individual in the case. If any individual in a IV–D case received assistance as defined in § 302.33(e), that case is exempt from the $25 annual fee.

13. *Comment:* One commenter is seeking clarification of the fee provision for title XIX Medicaid-only cases which are only receiving medical services under 45 CFR 302.33(a)(5). The proposed medical support rules will result in more orders for cash medical support in IV–D cases. Some of those IV–D cases will be Medicaid-only cases receiving IV–D services under § 302.33(a)(1)(ii). Some will already have support orders which will include a requirement for the noncustodial parent to pay both child support and cash medical support. Many will be cases in which the custodial parent has never received IV–A assistance. In some of the Medicaid-only cases, the custodial parents will inform the IV–D agency they only want medical support services, and not child support services. Because these are IV–D cases, though, all support payments under the support orders may be made through the State Disbursement Unit (SDU). However, the IV–D agency is not providing child support enforcement services, but merely receiving and disbursing child support payments through the SDU, so the custodial parent is not an individual ''for whom the State has collected at least $500 of support.''

*Response:* Because in these Medicaid-only cases IV–D child support services have been refused, the IV–D agency is not providing child support enforcement services to the family, but merely receiving and disbursing the child support payments through the SDU. In these cases, even when the custodial parent receives $500 of child support in the Federal fiscal year, that support is not considered to have been collected and disbursed to the family through IV–D program services and thus no fee is charged.

14. *Comment:* One commenter asked whether to assess the fee for a custodial parent who was on Medicaid one year, and the next year Medicaid ended, and the custodial parent (who declined child support enforcement services while receiving Medicaid) requests, in response to the notice, all IV–D services be provided including child support and medical support services. When the IV–D agency disburses at least $500 in the new year to the custodial parent, is a $25 annual fee due for that case that year?

*Response:* In accordance with 45 CFR 302.33(a)(4), whenever a family is no longer eligible for assistance under the State title IV–A, IV–E foster care, and Medicaid programs, the IV–D agency must notify the family, within 5 working days of the notification of ineligibility, that IV–D services will be continued unless the IV–D agency is notified by the family to the contrary. The notice must inform the family of the consequences of continuing to receive IV–D services, including the available services and the State's fees, cost recovery, and distribution policies.

If the scenario described by the commenter occurs, the fee would be

imposed in the case if all of the other conditions for imposing the fee are met; i.e., the individual in the case has never received AFDC, State, or Tribal title IV–A assistance, and the State has collected and disbursed at least $500 of support to the family within the Federal fiscal year. If the custodial parent or non-custodial parent is required to cooperate with the IV–D program as a condition of eligibility for Food Stamps, the fee could not be collected from such individual but could be collection from the other parent or be paid by the State.

15. *Comment:* One commenter requested that OCSE redefine public assistance in the rules to include recipients of means-tested programs outside of TANF such as Medicaid, SCHIP, and Food Stamps as exempt from the fee. Another commenter said that the proposed rules do not exempt Medicaid-only/former Medicaid-only cases from the fee and believes it is contrary to sound public policy because Medicaid-only recipients who are referred to IV–D for services do not have a choice whether or not to participate. They have limited income; Medicaid-only recipients are allowed to opt out of child support services.

*Response:* The Federal statute at section 454(6) of the Act does not provide for any additional categories of exempt individuals such as those who may be receiving, or who may have received in the past, other types of Federal, State or Tribal assistance. However, as discussed earlier, the impact of the use of the ''disbursed to the family'' regulatory language is that current IV–E cases and possibly other categories of cases, for example some former IV–E cases, will not be subject to the fee if $500 has not been disbursed to the family. We believe that this is reasonable since the family will not have received $500 in support if the support is assigned to the State and retained in whole or in part to reimburse the State and Federal government for the costs for assistance programs under the title IV–E. In addition, under specific circumstances, the fee would not be collected from individuals receiving Food Stamps based on language in the Food Stamp Act. *See Comment and Response 8* in this section of the preamble.

16. *Comment:* One commenter supports the exemption of individuals who have received Tribal IV–A assistance from the fee, but expressed concern that referring to Tribal IV–A programs in the State rules could lead to changes in the Tribal IV–D program. The commenter supports the protection of all Tribal individuals and programs from the demands the new rules would imply.

*Response:* The statute at section 454(6) of the Act and these rules do not apply to the Tribal IV–D program cases.

17. *Comment:* One commenter agrees with OCSE's decision to exempt current and former Tribal title IV–A assistance cases along with current and former State title IV–A cases from the fee.

*Response:* We appreciate the support of the commenter. As stated in the preamble to the NPRM, we believe that it is authorized and consistent with the purpose and the scope of the statutory exemption to exempt individuals who are receiving or have received Tribal title IV–A assistance as a subset of the category of those who are exempt from the fee.

18. *Comment:* One commenter asked if a case in which the only collection made is a Federal tax refund offset that is applied to satisfy an assigned arrearage, or a non-Federal tax refund offset that is applied to a case in which the only dollar amount owed is assigned to the Medicaid agency, is exempt from the $25 collection fee since a disbursement was not sent to the family.

*Response:* Yes, in the instance described, no annual fee would be due because the State had not disbursed at least $500 of support collected to the family.

19. *Comment:* One commenter asked for clarification of whether a case is eligible for the $25 annual fee if an individual in a current IV–D case had received IV–A assistance in a prior IV–D case. For example, if the noncustodial parent is currently in a case that does not qualify for the fee but formerly received AFDC as part of an entirely different family, is the current case eligible for the new $25 fee?

*Response:* If a noncustodial parent in a case who does not currently receive IV–A assistance formerly received assistance as part of an entirely different family, the current case is subject to the $25 annual fee if all conditions are met. The rules at § 302.33(e)(1) mandates the fee ''if there is an individual in the case to whom IV–D services are provided and for whom the State has collected and disbursed at least $500 of support in that year; who has never received assistance under a former State AFDC program, assistance as defined in § 260.31 under a State TANF program, or assistance as defined in § 286.10 under a Tribal TANF program * * *'' The collections must be disbursed to the individual receiving IV–D services. In the case of a noncustodial parent, the collections are not being disbursed to the noncustodial parent; a fee must be imposed if all of the other conditions are met (i.e., the individual in the case has never received AFDC, State or Tribal TANF assistance, or in certain Food Stamp cases, and the State has collected and disbursed at least $500 of support to the family within the Federal fiscal year).

20. *Comment:* One commenter asked whether the fee should be imposed in a IV–D case in the following situations:

- The child is the only individual in the household that has received or currently receives IV–A assistance. The custodial parent has never received assistance.
- The custodial parent received IV–A assistance as a child.
- The noncustodial parent received IV–A assistance as a custodial parent or as a child.
- The IV–A agency provides assistance or benefits to a custodial parent but there is no assignment of support rights or referral to IV–D agency.

*Response:* The fee requirements for the above scenarios, in the order listed are as follows:

- If the child is the only individual in the household that has received or currently receives IV–A assistance, the fee may not be imposed.
- If the custodial parent received public assistance as a child but has never received State or Tribal title IV–A assistance as an adult, the case is subject to the fee if all other conditions for imposing the fee are met (i.e., the State has collected and disbursed at least $500 of support to the family in the Federal fiscal year).
- The noncustodial parent is not an individual for whom $500 of support has been collected in the year in question. Therefore, neither the case nor the noncustodial parent is exempt from the fee even if he or she previously received IV–A assistance as a custodial parent or as a child, and the fee must be imposed if all other conditions are met.
- If the IV–A agency provides assistance to a custodial parent, a fee would not be required. If the custodial parent applies for IV–D services, qualifies for the fee and the IV–D agency collects and disburses $500 to the family in the Federal fiscal year, a fee would be imposed in this case, as the custodial parent is receiving title IV–A benefits excluded from the definition of TANF assistance at 45 CFR 260.31(b).

21. *Comment:* Four commenters supported the use of the calendar year for imposing and collecting the annual fee. These commenters indicated that charging a fee according to a calendar year is easier for the general public to understand. One commenter said that if

the fee was charged in accordance with the Federal fiscal year, the average child support order in a State is $250 per month, and the fee is collected from the noncustodial parent, then a noncustodial parent who pays current support in the first two months of the fiscal year would be assessed the fee in early December. This could impact holiday celebrations and take money from families just before Christmas. By shifting the year to calendar year, it is less likely to impact families at the December holidays. Six commenters supported the use of the Federal fiscal year and one commenter said that using a Federal fiscal year will assist States in computer re-programming because it will be consistent with current reporting of collections, disbursements, and undistributed collections on the Form OCSE–34A, Quarterly Report of Collections; with program income and expenditures reporting on the Form OCSE–396A, Child Support Enforcement Program Financial Report; and with reporting caseload size, court order percentage, and other performance measures data on the Form OCSE–157, Child Support Enforcement Annual Data Report. One commenter indicated that the definition of ''annual'' should be universal and not vary from State to State. One commenter indicated that the Federal fiscal year will best serve the State in the future, however, for the initial year the State will incur extraordinary expenses because of advance payment of the fee and the cost of technological improvement.

*Response:* The NPRM proposed that the annual fee be imposed and reported for the Federal fiscal year. OCSE specifically solicited comments on and a rationale for, an alternative 12-month period in order to provide more State flexibility.

While we support State flexibility, we agree that the Federal fiscal year will be more consistent with current reporting of collections, disbursements, and undistributed collections on the Form OCSE–34A, Quarterly Report of Collections; with program income and expenditures reporting on the Form OCSE–396A, Child Support Enforcement Program Financial Report; and with reporting caseload size, court-order percentage, and other performance measures data on the Form OCSE–157, Child Support Enforcement Annual Data Report. We agree with the commenter that a universal definition of ''annual'' is needed; therefore, the final rule retains the Federal fiscal year as the 12-month period in which the $25 annual fee must be imposed and reported.

22. *Comment:* Two commenters asked for States that require legislation to implement the fee, if in the first year of implementation the fee applies to all cases in which the individuals involved in the case never received title IV–A assistance and for which $500 has been disbursed to the family or if it only applies to cases in which $500 was disbursed to the family after the effective date of the State law. The commenters believe that a requirement to look at any period prior to the State's implementation date would be unreasonable and inconsistent with Congressional recognition that some States need time to obtain statutory authority for the new fee. Another commenter asked if a State is responsible for fees and program income for the entire year if the implementation date is later than the beginning of the fiscal year.

*Response:* The statutory effective date for the annual fee mandated in section 7310 of the DRA is October 1, 2006. If a State requires legislation in order to implement this provision, the effective date of the mandatory annual fee provision is three months after the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that began after February 8, 2006. In the case of a State that has a two-year legislative session, each year of the session shall be considered to be a separate regular session of the State legislature. The mandate for the collection of the fee does not apply to any period prior to the effective date of the State law in each State. For example, if in State A a law is needed and the legislative session for State A begins January 1, 2007 (after the February 8, 2006 enactment date of the DRA), and the close of the regular session is April 30, 2007, the fee provision must be implemented by October 1, 2007. If in State *B* a law is needed and the legislative session for State *B* begins January 1, 2007 (after the February 8, 2006 enactment date of the DRA), and the close of the regular session is December 30, 2007, the effective date for fee provision would be April 1, 2008. The State is not responsible for program income for fees for the entire fiscal year if the State's need for legislation requires that the implementation month for the $25 fee is other than the beginning of the Federal fiscal year.

23. *Comment:* One commenter said that its State legislators asked if the State could charge the annual fee to a former recipient of TANF when it has been a year since the former recipient of TANF received assistance. The commenter went on to ask if a State is limited to charging the $25 annual fee only for cases in which the individual involved never received assistance as defined under § 302.33(e) or if the State could choose to expand those cases subject to the fee.

*Response:* A State may not charge a former recipient of TANF the annual fee after the individual has been off TANF assistance for a year. The statute is clear that the fee is assessed in the case of an individual who has never received title IV–A assistance. An individual who has been off TANF assistance for a year is not an individual who has never received assistance under title IV–A of the Act. The State may not expand those cases which are subject to the $25 annual fee.

24. *Comment:* Seven commenters asked for clarification of whether or not to impose the fee in a case in which the individual never received State or Tribal title IV–A assistance prior to the disbursement of the $500 of support to the family for whom the support is owed, but begins to receive State or Tribal title IV–A assistance during the year after the disbursement of the $500 to the family for whom the support is owed. The commenters went on to ask for clarification in instances in which the individual becomes IV–A-eligible during a year after the fee has been collected and whether the State would be required to return the fee.

*Response:* If a fee has already been assessed and collected, there is no authority to reimburse the fee, because at the time the fee was assessed, the conditions for imposing the fee were met.

*When the $500 of Support Threshold Is Reached—Section 302.33(e)(1)(i)*

1. *Comment:* Several commenters wanted to know how the $500 support threshold will be calculated: When the money is collected or when it is disbursed to the family. The commenters are in support of calculating the threshold when the $500 is disbursed to the family. Allowing otherwise may result in imposition of the $25 fee in cases in which support is collected but not disbursed to the family, e.g. Federal tax intercepts held pending appeal which may overturn their collection. If this happens, and the State had already calculated that the $500 threshold is met from those intercepts, and collected the $25 fee amounts over the $500, the reversal of those two processes would be administratively challenging at best. In addition, the commenters believe this would be inconsistent with the concept that a family has benefited from

receiving $500 in support prior to the State receiving the annual $25 fee.

*Response:* We agree that the family must benefit from the receipt of the $500 collection of support made by the State before the fee is collected. It is clear in § 302.33(e)(1) that at least $500 of support must be collected and disbursed to the family prior to the imposition of the fee.

2. *Comment:* One commenter noted that the proposed rules say: ''In the case of an individual who has never received assistance under a State or Tribal title IV–A program, and for whom the State has disbursed to the family at least $500 of support * * *'' The statute says: ''* * * in the case of an individual who has never received assistance under a State program funded under Part A and for whom the State has collected at least $500 * * *''

The commenter said that the proposed rule is more prescriptive than Federal law. The final rule should use the word ''collected'' to mirror the Federal law or be changed to provide a State option to impose the annual fee either at the point of distribution or the point of disbursement.

*Response:* We disagree that these rules should be changed. We believe it is imperative that the family receive the $500 of support collected prior to the imposition and collection of the $25 annual fee. Collecting the annual fee prior to disbursing the child support collection means the family has not yet benefited from the collection.

3. *Comment:* Two commenters asked that OCSE define ''disbursed.'' The commenters asked if a payment received in one Federal fiscal year and held in escrow due to a pending legal matter and disbursed in the subsequent Federal fiscal year counts toward the $500 threshold in the Federal fiscal year in which the collection was made or the Federal fiscal year in which the disbursement was made. If a disbursement is held pending location of the custodial parent in one Federal fiscal year and the collection is not sent to the family until a subsequent Federal fiscal year, once the custodial parent is located, does the disbursement count toward the $500 threshold in the Federal fiscal year in which the support was collected or in the Federal fiscal year in which the custodial parent was located and the collection was disbursed? If a disbursement is returned as undeliverable in one Federal fiscal year or is lost in the mail, and the payment is received by the family due the payment in the subsequent Federal fiscal year, can a State deduct the $25 fee paid in the original Federal fiscal year from the total fee paid in the subsequent year? The commenter indicated that he thinks that the fees taken from the collections should be treated like disbursements and count toward the calculation of the $500 threshold.

*Response:* As stated earlier in the preamble, we did not define ''disbursement'' in § 301.1 of these rules. As noted, disbursement refers to the act of paying, by check or electronic transfer, support collections to a family. The rule language makes clear that the collection of the fee in a case in which the individual has never received assistance must occur after the $500 collection is disbursed to the family.

If a payment received in one Federal fiscal year is held in escrow due to a pending legal matter and released in a subsequent Federal fiscal year so that the disbursement of this payment also happens in the subsequent Federal fiscal year, the disbursement counts toward the $500 threshold in the Federal fiscal year in which the payment was disbursed.

If more than $500 is collected and disbursed and the $25 fee withheld in one Federal fiscal year but the disbursement to the family is returned as undeliverable in the Federal fiscal year subsequent to the year in which it was disbursed, a State may consider the $25 annual fee paid in the original Federal fiscal year as the fee paid in the subsequent year because the collection was disbursed to the family in the subsequent year and the conditions in which the $25 fee were imposed were met during the subsequent year.

We do not agree that fees taken from the collections should be treated as disbursement and count towards the calculation of the $500 because the $500 has to have been disbursed to the family. Fees taken from the $500 in collections reduce the amount disbursed to the family.

4. *Comment:* Several commenters requested clarification of the following statement: ''If $500 in support is collected in one year but not disbursed until the next year, the fee would be imposed in the year in which the collection was actually disbursed to the family.'' It is clear from this statement that if a single (and the only) $500 collection is received in one year but not disbursed until the following year; the fee would apply in the following year, because $500 is disbursed in that year. However, the statement could be read to require imposition of a fee in the following year when $500 total support is collected in one year, but only $450 is disbursed in that year, and $50 disbursed in the following year. It is clear to us that a fee should not be imposed in these circumstances, but the language of the referenced statement could imply to someone that a fee should be imposed in such a case.

*Response:* We agree that if only $500 is collected in one year, but the entire $500 is not disbursed to the family in the same year, there will be no fee imposed in that case for the year the $500 was collected. As stated earlier, the family must benefit from the entire $500 collection prior to the imposition and collection of the fee.

5. *Comment:* One commenter stated that the difference in the amount of fee collections would be negligible whether assessing the fee at the point of distribution or the point of disbursement and that for some States, levying the fee at the point of disbursement will be considerably more costly than imposing at the point of distribution.

*Response:* We believe that it is paramount that families benefit from the $500 collection prior to the imposition of the fee. Therefore, the fee must not be assessed and collected until after the disbursement of the $500 in collections to the family.

*Collection of the Annual Fee: State Options To Retain, Charge, Recover or Pay the Annual Fee—Section 302.33(e)(3)*

1. *Comment:* One commenter stated that if a State opts to impose the fee on the noncustodial parent, the conforming amendment made by section 7310(b) of the DRA to 42 U.S.C. 657(a)(3) allows a State to collect that fee by withholding it from collections and subsequently collecting an additional $25 in support from the noncustodial parent. The commenter stated that OCSE has a long-standing policy since 1989 precluding such withholding. The commenter believes that it is appropriate to withhold the fee from collections based on the following rationale: The DRA did amend the Federal statute on how money collected as support is distributed. The DRA amendment to section 457(a)(3) of the Act (which becomes section 457(a)(4) effective October 1, 2009, or up to a year earlier at State option) [1] allows States to take the fee from support collected before paying the rest to the family that never received assistance as defined under § 302.33(e). This applies regardless of whether the State chooses to have the custodial parent or noncustodial parent pay the fee. The 1989 policy is superseded by the new language which allows States to deduct the $25 fee

[1] Throughout the preamble, this provision will be referenced as 457(a)(4) for ease of understanding.

charged to the noncustodial parent before paying the remaining amount collected to the family. Therefore, Congress has specifically provided authority for taking the new fee from support collections and Congress did not limit that authority to instances in which only the custodial parent pays the fee.

*Response:* We believe that section 457(a)(3) of the Act (to become paragraph (a)(4) as explained above) can be read to allow the fee to be charged to the noncustodial parent and retained from a collection under certain circumstances. If a State opts to charge the fee to a noncustodial parent, the fee may be taken from a child support collection provided that $500 has been disbursed to the family in the Federal fiscal year, current support for the month in which the collection is received has been satisfied, and any specified arrearage payment for that month pursuant to an administrative or court order has been satisfied. In this way the family receives its current monthly support payment and an obligor who has been ordered to pay an additional amount each month to satisfy an outstanding arrearage will not fail to meet a court or administratively ordered payment. States are reminded that if they elect to collect the fee in this manner, the due process rights of the noncustodial parent must be protected.

Section 302.33(e)(3)(i) has been revised to read: ''Retained by the State from support collected in cases subject to the fee in accordance with the distribution requirements in § 302.51(a)(5) of this part, except that no cost will be assessed for such services against: (A) A foreign obligee in an international case receiving IV–D services pursuant to section 454(32)(C) of the Act; and (B) an individual who is required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7.

Section 302.51(a)(5) has been revised to allow the fee to be collected prior to the support collection being distributed to a family that has never received assistance as defined under § 302.33(e) and now reads: ''(i) Except as provided in paragraph (a)(5)(ii), a State must pay to the family that has never received assistance under a program funded or approved under title IV–A and to an individual who is not required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7 the portion of the amount collected that remains after withholding any annual $25 fee that the State imposes under § 302.33(e) of this part. (ii) If a State charges the noncustodial parent the annual $25 fee under § 302.33(e) of this part, the State may retain the $25 fee from the support collected after current support and any payment on arrearages for the month under a court or administrative order have been disbursed to the family provided the non-custodial parent is not required to cooperate with the IV–D agency as a condition of eligibility for Food Stamps.''

2. *Comment:* One commenter noted that the preamble to the NPRM states that the fee will reduce IV–D administrative costs. The commenter does not agree and says this is only true for the Federal government. The requirement that the State must pay the fee to the Federal government even if the State has not collected the fee is essentially a ''bill for services'' to the States from the Federal government.

*Response:* The State is not required to absorb the fee by paying it out of State funds. The statute provides for four options for collecting or accounting for the fee. The fee may be retained by the State from support collected on behalf of the custodial parent, paid by the custodial parent applying for services, recovered from the noncustodial parent or collected by the State out of its own funds. Regardless of which method the State chooses, the fee is reported as program income and is used to offset both the State and Federal shares of the IV–D program expenses.

3. *Comment:* One commenter stated that the rules allow four options to collect the fee and wants to know why a State must identify the exact method of collecting the fee when there are four options. The commenter suggests limiting the State plan preprint to indicate the State will impose and collect the fee and not identify the method to be used.

*Response:* State plan preprint pages indicate options chosen when States have authority to choose among various options. We often get requests for information on State choices with respect to the various State plan options including fee and cost recovery policy. Having this information available to us will allow us to track the information without asking the States directly. A State is free to indicate it will use more than one method to account for fees assessed.

4. *Comment:* One commenter noted the preamble to the NPRM indicates that: ''If a State * * * collects less than $25 in excess of the first $500 * * *, the State must collect the fee using one of the other methods, and, if all else fails, pay the fee itself * * *'' The commenter questions whether a State must make other attempts to collect before paying the fee itself. The commenter also asked if a State would have to develop and administer a secondary billing system to collect small (under $25) unpaid amounts from custodial parents and noncustodial parents. The commenter recommended that States have the option to use other methods to collect unpaid amounts, or to pay the fee itself.

*Response:* A State does not have to make other attempts to collect the fee before paying the fee itself. The statute allows for four options for collecting the fee. Nor is a State required to develop and administer a secondary billing system, but should a State determine that it is a viable option for collecting and tracking the fee, it may do so.

5. *Comment:* A number of commenters proposed that the rule eliminate the four payment options and require that the fee only be deducted from collections and noted that the preamble states that ''* * * retaining the annual fee from support collected * * * may be the least administratively burdensome method * * *'' Payment of the fee can only be guaranteed if it is deducted from collections or if it is paid by the State.

*Response:* The statute allows four options for collecting the annual fee. While retaining the annual fee from the support collected may be the least administratively burdensome method for collection of the fee, we have no discretion to eliminate any of the options authorized by the statute.

6. *Comment:* One commenter stated that by allowing four payment methods, there will not be uniformity among the States which will result in less fees being collected. For example, if one State law requires the fee to be collected from the noncustodial parent and it is an interstate case, then the fee could not be collected by that State. Further, if the noncustodial parent resides in a State that is only permitted to deduct the fee from collections, then the noncustodial parent is not paying the fee at all.

*Response:* The statute allows State discretion and we agree it will result in different policies in different States. As discussed later in the preamble, in an interstate case, the application fee is charged by the State in which the individual applies for services. Only the initiating State has all the information necessary to know whether the $25 annual fee should be imposed in a particular case. Therefore, it is appropriate for the initiating State to impose the annual $25 fee in eligible cases after the $500 threshold is met, and to report the amount of the fees imposed as required.

As discussed earlier in the preamble, if a State opts to charge the fee to a noncustodial parent, the fee may be taken from a child support collection provided that $500 has been disbursed to the family in the Federal fiscal year, current support for the month in which the collection is received has been satisfied and any specified arrearage payment for the month pursuant to an administrative or court order has been satisfied. Allowing collection of the fee in this manner will help ensure the appropriate amount of fees are collected and reported.

7. *Comment:* One commenter asked that OCSE provide guidance concerning potential conflicts of law between the initiating and responding State. If the responding State's law requires the custodial parent to pay the fee, but the initiating State's laws require the noncustodial parent to pay, whose law governs? If the initiating State's law governs, the responding State, by its law, cannot collect the fee, because the noncustodial parent is not liable in that State.

*Response:* As stated in the preamble to the NPRM, we believe it is appropriate for the initiating State to impose the annual $25 fee in eligible cases after the $500 threshold is met, and to report the amount of the fees imposed as required. The initiating State will collect and impose the fee; therefore it is the initiating State law which governs.

8. *Comment:* One commenter said that the preamble to the NPRM states that the noncustodial parent must designate a portion of a subsequent payment as the $25 annual fee before the State retains a portion of the support collection as payment for the fee. The commenter asked for clarification of whether a State may retain the fee from the noncustodial parent's support payment.

*Response:* We believe that section 457(a)(4) of the Act can be read to allow the fee to be charged to the noncustodial parent under certain circumstances, as discussed earlier in the preamble. Therefore, with respect to the $25 annual fee, the noncustodial parent does not have to designate a portion of the payment as the $25 annual fee.

9. *Comment:* One commenter stated that should a State select one of the first three options outlined in the statute, the language in the U.S. Code does not appear to authorize the mandatory payment interpretation of the State paying the fee in the rules. Several commenters stated that section 7310 of the DRA does not require States to pay the fee for services. It specifically allows States to collect the fee from either the custodial or noncustodial parent. The recovery of the fee is never certain and they believe Congress contemplated that some fees would not be collected or paid. The preamble and rules make States the guarantors for payment of the fee. There is no authority for OCSE to use its regulatory powers to contravene the statutory provisions. Congress allowed States to pay the fee or collect it from the parents. The commenters asked that OCSE reconsider this issue and amend the rules accordingly. Many commenters stated that billing the custodial parent or the noncustodial parent for the fee will be administratively impractical. If they do not pay, the State will have to resort to retaining the fee from collected support or paying it from its own funds.

*Response:* Section 454(6)(B)(ii) of the Act conveys a clear expectation that the $25 fee will actually be imposed and retained, collected, or paid in all eligible cases in which at least $500 of support was collected in a year. Therefore, each State is responsible for imposing, retaining, collecting or paying the fee, and reporting the total amount of annual $25 fees imposed in all cases in which the fee is required to be imposed during the Federal fiscal year.

10. *Comment:* Several commenters requested clarification if a IV–D agency chooses to collect the annual fee from a custodial parent. If the IV–D agency does not collect enough (only collects $510 in a fiscal year) to cover the fee, the rules require the State to make up the difference. In such cases, can the State seek to recoup that fee? May the fee be deducted from subsequent payments that occur in the next year, without specific authorization from the custodial parent? Another commenter asked, if the custodial parent is assessed the fee and the collections made on the case amounts to only $510 in the year the fee is assessed, does the State have to wait until it collects in excess of $525 in the next year before collecting the remaining $15 of the fee? The commenters are seeking clarity on the status of the debt to the State.

*Response:* If the State pays the fee for a qualifying case in the preceding year, it may recoup the fee from the custodial parent responsible for the fee under State procedures in the subsequent year without the custodial parent's specific authorization. However, in accordance with § 303.2(a)(2), the State IV–D agency must notify the applicant that the cost recovery will be made. The State does not have to wait until it collects in excess of $525 in the next year to recoup the $15 fee it paid in the previous year.

11. *Comment:* Many commenters asked for clarification of the following situation: The $500 threshold is met and the collection is disbursed at the end of Year A and the $25 fee to be deducted from the next collection has not been collected. The State pays the $25 fee in Year A. How is the $25 fee retained by the State in the subsequent year (Year B) to reimburse the State for paying the fee the year before (Year A) counted for the purposes of the threshold in Year B? Does the State need to collect $525 in Year B before the next $25 is collected?

*Response:* Yes. If the State pays the fee for a qualifying case in the preceding year, it may recoup the fee from the custodial parent responsible for the fee under State procedures in the subsequent year. The fee that is recouped by the State in the next year would not be counted towards the $500 threshold because that fee is kept by the State and not disbursed to the family. Collections must be disbursed to the family in order for them to count towards the $500 threshold.

12. *Comment:* One commenter stated that the proposed rule authorizes that the fee may be ''retained'' by the State and believes the use of the term ''retained'' is incorrect. The correct terminology should be ''distributed'' as defined in the preamble, specifically in § 302.32 where the term ''distribution'' is defined as how a support collection is allocated between families and the State and the Federal government in accordance with requirements. Once collections are received on behalf of the individual receiving services, the money must be ''distributed,'' ''disbursed,'' or accounted for as ''undistributed.'' Saying in § 302.51(a)(5) that ''the State must pay to a family that has never received assistance * * * after withholding any $25 fee that the State imposes * * *'' understates the ''distribution'' impact of this option.

*Response:* The regulatory language in § 302.51(a)(5) is consistent with the statutory language at section 457(a)(4) of the Act, which says: ''In the case of any other family, the State shall distribute to the family the portion of the amount so collected that remains after withholding any fee pursuant to section 454(6)(B)(ii).'' Distribution in cases in which the family has never received assistance as defined under § 302.33(e) is not complex because, other than the authority to withhold the $25 annual fee, all collections go to the family.

13. *Comment:* One commenter requested clarification on how IV–D agencies can ''recover'' the $25 annual fee from a noncustodial parent, if the noncustodial parent is to be responsible for the fee. The commenter specifically asked if the State can employ typical IV–D collection tools such as income

withholding, Financial Institution Data Match and Federal tax offset to recover the fee from the noncustodial parent. If so, will the annual fee be at the bottom of the distribution hierarchy after current support and arrearages? In States that charge interest, this could create a situation where interest could potentially accrue on the fee in addition to the child support arrearages.

*Response:* Since section 457(a)(4) of the Act can be read to allow the State to charge the noncustodial parent the fee and take the fee from the child support collection, we have revised § 302.33(e)(3)(i) to recognize that the fee may be retained by the State from a collection in accordance with the distribution requirements in § 302.51(a)(5) which require that current support and any payment on arrearages for the month under a court or administrative order have been disbursed to the family before the fee is retained. Whether assessing the fee against the noncustodial parent or the custodial parent, the fee may be retained from the collection provided that the requirements for assessing the fee are met, i.e., the individual has never received assistance as defined in § 302.33(e) and the State has collected and disbursed $500 in the Federal fiscal year to the family. However, States may also use IV–D enforcement techniques, including income withholding, to collect the fee.

14. *Comment:* One commenter asked if, in instances in which a State must use IV–D enforcement efforts to collect the $25 annual fee from the noncustodial parent, the resources used to collect the fee are eligible for IV–D Federal financial participation.

*Response:* Yes, the resources used to collect the annual fee are allowable costs attributable to the program and eligible for IV–D Federal financial participation.

15. *Comment:* One commenter asked if when using the standard Federal income withholding form to collect the annual fee an employer must follow the $25 annual fee rules of the State issuing the income withholding order, or whether the employer must follow the $25 annual fee rules of the State of the principal place of employment of the noncustodial parent.

*Response:* Employers must continue to comply with the terms of income withholding orders. If the order indicates that the employer must retain a $25 fee from the employee's wages, in addition to the amount of the collection, the employer must follow those instructions.

16. *Comment:* Several commenters stated that the preamble to the NPRM indicates that a State's option to account for a fee, if not collected through one of the other allowable methods, at the end of the Federal fiscal year in which the threshold was met is limited to paying the fee out of State funds. States would not be able to exercise options to collect the fee by retaining the fee from collections in situations in which they are unable to collect the fee by the end of the Federal fiscal year. The State should not be held accountable for a fee that it cannot collect using an allowable option under the DRA.

*Response:* The preamble indicates that if the $500 threshold is reached toward the end of a Federal fiscal year, the methods available to the State to collect the fee may be limited to retaining the fee from a subsequent collection, if there is one made and disbursed before the end of the year or paying the fee out of State funds. As indicated earlier, if there is not a $25 collection in excess of the $500 and the State pays the fee, the State can recoup that payment from the individual responsible for making the payment in the following year.

17. *Comment:* One commenter asked if, in an instance in which the State elects to recover the fee from one of the parties, the fee is not collected from that party in the year in which it was due, and the State has to pay the fee, cost recovery, as described under § 302.33(d), could be used.

*Response:* Section 302.33(d) allows States to recover costs in excess of any fees collected to cover administrative costs. If a State elects to recover the annual $25 fee from one of the parties, and the threshold for imposing the fee is met during the year, but the fee is not paid by the party in that same year, the State is required to pay the fee. The State may then recover the fee from a subsequent collection to reimburse itself. As discussed earlier in this preamble, we agree that the language in the DRA provides the State the ability to retain the fee in accordance with § 302.33(e)(3), from the collection to the family that has never received assistance as defined under § 302.33(e) and section 457(a)(4) of the Act. If the State opts to charge the fee to the noncustodial parent and retains the first $25 of the collection in excess of $500 and in accordance with § 302.51(a)(5), the amount of support paid to the family will be reduced.

18. *Comment:* One commenter asked if the Federal tax refund intercept is the only collection a State gets in excess of $500 in the Federal fiscal year, will both the $25 intercept fee and the $25 annual fee be assessed on that case. In other words, would the State be required to charge the custodial parent the $25 annual fee and then the custodial parent would receive the IRS intercept amount minus $50?

*Response:* These rules at § 303.72(i)(1) provide that the Secretary of the Treasury may impose a fee with respect to non-IV–A tax offset submittals which shall not exceed $25 per submittal. The rules at § 303.72(i)(2) allow the State IV–D agency to charge an individual who is receiving services a fee not to exceed $25 for submitting past-due support for Federal tax refund offset. These fees are distinct from the $25 annual fee required in § 302.33(e). It is conceivable that a custodial parent who receives a Federal tax refund offset could be charged three different fees of $25 each, totaling $75 for one case: A $25 fee each from the Secretary of Treasury and the State IV–D agency, both for the tax refund offset, and the $25 annual fee because the case meets the criteria for charging the fee.

*One $25 Fee for Each Qualifying Case—Section 302.33(e)(1)*

1. *Comment:* One commenter said that at § 302.33(e)(1) the proposed rules state ''* * * in the case of an individual who has never received assistance * * *'' and asked how the concept of tying the applicability of the fee to an individual reconciled with the concept of tying the applicability of the fee to a case.

*Response:* The statute says ''* * * in the case of an individual who has never received assistance under a State program funded under part A and for whom the State has collected at least $500 of support, the State shall impose an annual fee of $25 *for each case in which services are furnished,* which shall be retained by the State from support collected on *behalf of the individual* (but not from the first $500 so collected), paid by the individual applying for the services, recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and the fees shall be considered income to the program).'' It is our interpretation that the determination of whether a fee should be assessed in a IV–D case is dependent on whether any individual in that IV–D case receives or has received AFDC, State, or Tribal TANF assistance under title IV–A of the Act. The statutory language refers to both an individual receiving IV–D services and a case in which IV–D services are furnished.

2. *Comment:* One commenter opposes charging a $25 annual fee because if the $25 annual fee is charged to the

custodial parent, the annual fee, and other fees required by a State could deter a custodial parent from requesting needed services. The $25 annual fee, coupled with administrative fees charged to the noncustodial parent in some States, will cause further financial burdens to parents already struggling to meet child support obligations. Whether the fee is charged to the custodial parent or noncustodial parent, it is a burden.

*Response:* As discussed earlier, the imposition of the $25 annual fee is limited to circumstances in which an individual has never received assistance under a State AFDC program; State or Tribal TANF program; and the State has successfully collected and disbursed $500 to the family in a Federal fiscal year. Section 454(6) of the Act requires some fees and authorizes States to charge other fees and recover costs. This requirement implements the $25 annual fee required by the statute. We believe that the language in the statute and rules appropriately exempts categories of individuals who are low-income or who have not benefited adequately from receipt of child support and offers alternative methods of collection to allow States to determine who should pay the fee.

3. *Comment:* One commenter stated that a $25 fee may be assessed on cases submitted for Federal tax refund offset and that it would be beneficial to allow States to refrain from assessing the fee on those cases. At State option, the State may charge an individual who is receiving IV–D services a fee not to exceed $25 for submitting past-due support for Federal tax refund offset. The Department of Treasury Federal tax refund offset program is already allowed to deduct a $25 fee from collections made on behalf of non-public assistance custodial parents. The commenter does not feel it benefits families to add the additional $25 annual fee. However, the commenter supports allowing Federal tax refund offset dollars to be used in calculating the $500 threshold.

*Response:* We believe that the fees charged are reasonable and commensurate with the receipt of successful child support services.

4. *Comment:* One commenter noted that the proposed rules at 45 CFR § 302.33(e) require that States impose the fee in international cases, but that States are not able to retain the fee from collections. The commenter does not believe a State should be responsible for imposing a fee which it is not able to collect by using one of the allowable fee collection options allowed under the section 7310 of the DRA which amends section 454(6)(B) of the Act and that international cases should be exempt from the fee.

*Response:* Under section 454(32) of the Act, any request for services by a foreign reciprocating country or a foreign country with which a State has an arrangement is treated like a request from a State and foreign obligees may not be charged fees. However, as discussed earlier in the preamble, we believe that the language in section 7310 of the DRA which amends section 457(a)(4) of the Act can be read to allow the fee to be charged to the noncustodial parent and retained from a collection under certain circumstances. Therefore, the fee assessed in qualifying international cases may be retained from a collection before the distribution of the collection to the family, provided that $500 has been disbursed to the family in the Federal fiscal year, current support for the month in which the collection is received has been satisfied, and any specified arrearage payment pursuant to an administrative or court order for that month has been satisfied. A State also has the option to charge the noncustodial parent or pay the fee itself in incoming international cases. Because the statute and rules provide these alternative methods to collect and account for the fee, imposition of the fee in appropriate cases is fitting.

*Who Imposes the Fee in Interstate, International and Intergovernmental Tribal Title IV–D Cases?—Section 302.33(e)(2)*

1. *Comment:* Three commenters agreed with the selection of the initiating State as the one to impose and report the annual fee in interstate IV–D cases, as proposed in § 303.7(e). A commenter went on to say that there must be a consistent Federal standard, and the initiating State is in the best position to determine when it is appropriate to impose the fee.

*Response:* We appreciate the comments. As stated in the preamble to the proposed rule, only the initiating State has all the information necessary to know whether the annual $25 fee should be imposed in a particular case.

2. *Comment:* One commenter noted that the NPRM preamble language says: ''A State may not impose a fee in a Tribal IV–D case that is referred to the State IV–D program for assistance in securing support from a Tribal IV–D program.'' The commenter questions why a Tribal IV–D program would refer a case to the State to secure child support from another Tribal IV–D program and asked if this was a typographical error.

*Response:* There is a typographical error in the sentence. The phrase ''from a Tribal IV–D program'' at the end of the phrase should not have been included. The sentence should have read: ''A State may not impose a fee in a Tribal IV–D case that is referred to the State IV–D program for assistance in securing support.''

3. *Comment:* One commenter said that the preamble to the proposed rule states that if the $25 annual fee is not addressed in a cooperative agreement between a Tribal IV–D program and a State IV–D program, the State IV–D program would be responsible for collecting the fee in any case where the State is the jurisdiction receiving the application or receiving a referral from a State TANF, Foster care, or Medicaid program. However, there is an exemption from the fee for current or former State TANF cases.

*Response:* The preamble language was misleading. We agree that there is an exemption from the fee for individuals who are receiving or have ever received AFDC or State or Tribal TANF, as defined in § 302.33(3)(1). If a State were to receive a referral from a TANF agency, the individual in the TANF case would clearly be receiving title IV–A services and would not be assessed a fee.

4. *Comment:* One commenter said that if a State imposes the annual fee and a Tribe is required to collect the fee, the fee becomes an administrative burden for the Tribe, and may actually result in an increase in program expenditures. Tribes do not have automated systems, and imposing and tracking the fee will be labor intensive.

*Response:* Section 454(6)(B)(ii) of the Act is a State plan requirement and as such is not applicable to Tribal IV–D programs. A Tribe would only be required to impose and collect the annual fee if the Tribe is not operating a Tribal IV–D program but has entered into a cooperative agreement with a State IV–D agency under section 454(33) of the Act and § 302.34 to assist the State in delivering title IV–D services. The fee is not applicable to the Tribal IV–D program.

5. *Comment:* One commenter opposes the requirement that forces a Tribe to charge the fee when working cooperatively with a State to provide IV–D services. The commenter noted that this may cause Tribal IV–D programs not to work cooperatively with States.

*Response:* A Tribe that is under a cooperative agreement with the State under section 454(33) of the Act is providing IV–D services under a State program that is subject to State IV–D requirements and receives reimbursement from the State IV–D

agency for providing services specified in the cooperative agreement. The statute requires the annual fee where appropriate in State IV–D cases. We have no discretion to allow an exception to the fee requirement for State IV–D programs working with Tribes to provide IV–D services under a cooperative agreement in accordance with section 454(33) of the Act because services provided by the Tribe are provided in a State IV–D program and the $25 annual fee requirement is a State plan requirement at section 454(6)(B)(ii) of the Act. The fee is not applicable to Tribal IV–D programs operating under section 455(f) of the Act.

6. *Comment:* One commenter noted that the preamble indicates that a State may not impose the fee on an individual residing in a foreign country in an international case and asked why the noncustodial parent in a foreign country is exempt from the fee.

*Response:* The noncustodial parent in a foreign country is not exempt from the fee. Section 454(32)(C) of the Act only prohibits States from charging application fees or assessing costs against the foreign reciprocating country or foreign obligee.

7. *Comment:* Two commenters noted that the proposed method of handling the $25 annual fee for international cases causes an additional burden to implement, track, report, and pay the fee, due to further system programming to define and separate international cases because fees in international cases would have to be paid differently, that is, the State would either pay out of general funds or would have to charge the noncustodial parent. This would be an additional burden both for reporting and paying.

*Response:* There are three methods of accounting for fees in appropriate international cases: Retaining the fee from the support collection, paying the fee out of State funds, or charging the fee to the noncustodial parent.

8. *Comment:* One commenter stated that the rules are unclear with respect to ''responding'' international cases. The preamble says the proposed rules at § 302.33(e) would require the State that receives the request from the Foreign Reciprocating Country to impose the fee. Earlier, the preamble states that the State cannot impose the fee due to section 454(32)(C) of the Act. Does this mean that the State must pay the fee or require the noncustodial parent to pay the fee?

*Response:* Yes. However, as stated earlier in the preamble, we believe that section 457(a)(4) of the Act can be read to allow the fee to be charged to the noncustodial parent and retained from a collection under certain circumstances. If the State opts to retain the fee in accordance with § 302.33(e)(3) and § 302.51(a)(5) before sending remaining amounts collected to the family, the noncustodial parent does not have to designate a portion of the support payment as the fee. Therefore, the issue of collecting a fee on an incoming international case should be resolved by allowing the fee charged to the noncustodial parent to be retained from the collections provided that $500 has been disbursed to the family in the Federal fiscal year, current support for the month in which the collection is received has been satisfied, and any specified arrearage payment for that month pursuant to an administrative or court order has been satisfied.

9. *Comment:* Several commenters said that international cases should be excluded from the fee or the party in the other country should pay the fee. The annual fee is a user fee to be paid after services are received and custodial parents residing in foreign countries and receiving child support services should also be subject to the fee. There is disparity if a custodial parent cannot be charged the fee when living in a foreign country.

*Response:* As stated in the preamble to the NPRM, section 454(32)(C) of the Act provides that ''no applications will be required from, and no costs will be assessed for such services against, the foreign reciprocating country or foreign obligee (but costs may at State option be assessed against the obligor).'' We have no discretion to allow States to charge the custodial parent living in a foreign reciprocating country the annual fee. However, as noted in the previous response, allowing States to take the $25 fee from the collection may alleviate problems in collecting the fee from the noncustodial parent. In addition, the restriction under section 454(32)(C) of the Act does not apply to applicants for services who live in foreign countries but apply directly to a State for IV–D services, rather than through the country in which they live. Custodial parents in these direct application cases would be subject to the fee if all other conditions for imposing the fee are met.

10. *Comment:* One commenter stated that if the State imposes a fee in international cases, but cannot collect the fee from the custodial parent because the custodial parent is living in a foreign country, the States automated system would not ''know'' which custodial parents are residing abroad and which are residing in the States.

*Response:* As stated earlier in the preamble, we have no discretion to allow States to impose the fee on obligees exempt from the fee pursuant to section 454(32)(C) of the Act. And, because of the expanding IV–D program role in international cases, States are required to distinguish international cases on the Form OCSE–157, Child Support Enforcement Annual Data Report beginning October 1, 2009. Therefore, States should be able to identify incoming and outgoing international cases by 2009.

11. *Comment:* One commenter asked if the State could assess and collect the fee from an individual living in Canada who applies for services directly with a State.

*Response:* Yes. As stated earlier, in any instance in which the applicant for services living in another country applies for IV–D services directly with a State IV–D agency, if all conditions for imposing the fee are met, the case is subject to the annual fee and the State may assess and collect the fee from the applicant.

*Reporting the $25 Annual Fee—Section 302.33(e)(4)*

1. *Comment:* Several commenters stated that under Executive Order 13132, the annual fee appears to impose substantial direct compliance costs on State and local governments and has federalism impacts as defined in the Executive Order. The requirement that the State pay the $25 mandatory fee in the absence of collecting it can be looked at as nothing other than direct compliance costs on the State government. OCSE should revise the preamble to acknowledge the burden these rules are putting on the States and take other steps to comply with Executive Order 13132.

*Response:* We disagree. Section 454(6)(B)(ii) of the Act provides the State with four options to collect this mandatory fee. The fee may be withheld from the amount collected, paid by the custodial parent, paid by the noncustodial parent or paid by the State. We anticipate that most States will select the first option. Nevertheless, even where a State chooses to pay the fee itself, a portion of the fee will be retained by the State as its share (currently 34 percent) of program income. In addition, the State retains the option of reimbursing itself by withholding the amount from a future collection.

Over the next 5 years, the Federal Government will provide $20 billion in Federal funds for child support program costs, including more than $2 billion in Federal incentive payments to States. The Federal Government continues to pay 66 percent of State costs to operate

child support enforcement programs. This is a generous matching rate, exceeding the administrative matching rate of other programs such as Medicaid and Food Stamps. Therefore, we do not believe that the annual fee amounts to direct compliance costs on States and local governments, nor does it have a federalism impact.

2. *Comment:* Two commenters stated that the proposed rules require that the total amount of the annual fees imposed be reported, whereas other fees are reported at the Federal Financial Participation rate of 66 percent. The commenters asked why these fees are being reported differently.

*Response:* All fees are reported as program income in an identical manner. OCSE has always required that any mandatory or optional fees collected by States or other program income in the operation of this program be used to offset program expenses on a dollar-for-dollar basis. Program expenditures are reduced by program income before calculating the Federal and State share of expenditures. This new annual fee is treated no differently and is reported on the quarterly expenditure report both as the total amount collected ($25 in the case of the new annual fee) and as the Federal share of the amount collected (or $16.50 for every $25 fee reported, at the current 66-percent Federal financial participation rate). The statutory language at section 454(6)(B)(ii) of the Act is also clear that the payment of the annual fee by a State shall not be considered as an administrative cost of the State for the operation of the plan, and that the fee shall be considered solely as program income.

3. *Comment:* Several commenters asked where the fee should be recorded on the Form OCSE–34A, Quarterly Report of Collections, if the custodial parent is assessed the fee; if the noncustodial parent is assessed the fee; if the applicant is assessed the fee; or if the State pays the fee. Others indicated that OCSE should provide directions or instructions in the final rules about the appropriate way to fill out the Form OCSE–34A, Quarterly Report of Collections, to record support collections from the noncustodial parent that are not actually support payments to the custodial parent. Another commenter stated that the amount collected/receipted by the State Disbursement Unit must be recorded in the top portion of the form (Form OCSE–34A, Quarterly Report of Collections) and the noncustodial parent must get credit for paying the support when the State is charging the custodial parent the fee. All collections on the top portion (collection) of the 34A must be accounted for in the lower portions (distributions) of the 34A, but there is no place to record ''fees'' distribution.

*Response:* On November 27, 2007, OCSE issued Action Transmittal 07–08, *Implementation of Revised Financial Reporting Forms: Form OCSE–396A and Form OCSE–34A*. This AT may be viewed electronically at: *http://www.acf.hhs.gov/programs/cse/pol/AT/2007/at-07-08.htm*. To accommodate these comments concerning the reporting of fees, we revised Form OCSE–34A, the Quarterly Report of Collections, to enable States to report those fees withheld from child support collections in the ''distributions'' section of the report. This new data entry line, Line 7e, assures that each State accurately reports the amount of the collection distributed in accordance with the requirements of section 457 of the Act and separately reports the portion withheld to comply with the new fee requirements. However, this new data collection line will only be for a fee retained from a child support collection; fees collected separately from either parent or paid by the State will not be reported on Form OCSE–34A, Quarterly Report of Collections. All fees, including these, regardless of the method of collection, are treated as program income and are reported on Line 2a of the quarterly expenditure report, Form OCSE–396A, Child Support Enforcement Program Financial Report.

4. *Comment:* One commenter noted that it would be most beneficial to all parties if States reported the $525 as collected and disbursed on the Form OCSE–34A, Quarterly Report of Collections, as if the State were sending $525 to the custodial parent and the custodial parent was remitting the $25 fee to State. This way the noncustodial parent will receive credit for total payment of $525 and the State will get credit for $525 towards the collection base. In addition the $25 fee would be reported as required on the Form OCSE–396A, Child Support Enforcement Program Financial Report.

*Response:* See the response to Comment #3. Although we received comments suggesting different ways to report these fees, we decided to include a separate reporting line for any fee withheld from a collection. In this way, the State will be able to accurately report the portion of the collection distributed and disbursed to the custodial parent and the portion retained from the collection as the fee paid by the custodial parent. Both the amount distributed to the custodial parent and the $25 fee retained by the State will be considered as ''distributed collections'' when computing the State's collection base for purposes of calculating its annual incentive payment; the noncustodial parent receives full credit for the amount paid. In the example cited by the commenter, the State would report $500 as distributed to the family and $25 as retained by the State as the custodial parent's fee; the State also would report the $25 fee as program income. The State would be credited with $525 in distributed collections and the noncustodial parent would be credited with a $525 child support payment.

Alternately, if the State opts to charge the fee to the noncustodial parent and collect it by retaining the $25 annual fee from a collection before sending the remaining amount to the custodial parent, the noncustodial parent would not get credit for the total amount paid. For example, a State makes a collection of over $500, in this instance it is $550, and $25 is retained from the collection as the fee charged to the noncustodial parent. The State then sends the remaining $525 to the custodial parent and the noncustodial parent is credited as making a support payment of $525.

5. *Comment:* One commenter stated that the preamble discusses the reporting of the fees as the total amount of $25 fees imposed during the Federal fiscal year on line 2a of the Form OCSE–396A, Child Support Enforcement Program Financial Report. That reporting requirement will commingle the $25 fee amount with other amounts reported for other fees, costs recovered, and interest and asks how that will be audited. If States collect the fee from either party, how will the reporting of the fee be reconciled with State reporting of collections on the Form OCSE–34A, Quarterly Report of Collections? The commenter stated that Federal guidance is necessary on how the fee should be accounted for and reconciled with all relevant Federal reporting forms.

*Response:* The quarterly financial reports States are required to submit are cumulative reports of the State's financial activities related to this program during the fiscal quarter. Each State always is expected to maintain full and complete accounting records and documentation in accordance with Generally Accepted Accounting Principles (GAAP) available for review. Such documentation would include a record of each annual fee reported on the quarterly collection report, the quarterly expenditure report, or both. Specifically, if a State elects to collect the fee from either parent or pay the fee itself, it is reported as program income

on the Form OCSE–396A, Child Support Enforcement Program Financial Report. If a State elects to withhold the fee from a collection, it is reported as a retained fee on the reporting line being added for that purpose on Form OCSE–34A, Quarterly Report of Collections, and also reported as program income on the Form OCSE–396A, Child Support Enforcement Program Financial Report.

6. *Comment:* One commenter asked, if the State elects to recover the fee from the custodial parent through retaining support collections, will the fee be reported as distributed collections on Form OCSE–34A, Quarterly Report of Collections, and the Form OCSE–157, Child Support Enforcement Annual Data Report, and reported as program income on the Form OCSE–396A, Child Support Enforcement Program Financial Report?

*Response:* Yes, if the State elects to recover the fee from the custodial parent through retaining support collections, the fee will be reported on Form OCSE–34A, Quarterly Report of Collections, and Form OCSE–157, Child Support Enforcement Annual Data Report, and reported as program income on the Form OCSE–396A, Child Support Enforcement Program Financial Report.

7. *Comment:* One commenter said that to the extent that OCSE determines that changes are needed to either Form OCSE–396A, Child Support Enforcement Program Financial Report or Form OCSE–34A, Quarterly Report of Collections, to accommodate the reporting of fee collections, OCSE should refer such issues to an appropriate workgroup with OCSE and State representatives, rather than addressing such form issues in the final rules. The commenter also recommended against requiring States to report on Form OCSE–34A, Quarterly Report of Collections, when the State is paying the fee itself. Because both the DRA and the rules provide States with flexibility about how to collect the fee, OCSE should provide States with the flexibility to use the reporting method that best supports the collection method that the State selects. One commenter said if States must report program income when assessed for this fee only, then a new field should be developed on the Form OCSE–396A, Child Support Enforcement Program Financial Report.

*Response:* OCSE revised both the Form OCSE–396A: Child Support Enforcement Program Financial Report and OCSE–34A: Quarterly Report of Collections. On December 4, 2006, the Proposed Information Collection Activity with Comment Request was published in the **Federal Register** (71 FR 70407). The notice indicated that the DRA contains a number of provisions that will impact the States' completion and submission of the quarterly financial reports and opened a formal 60-day comment period for the public. OCSE assembled a workgroup of Federal and State staff to recommend any changes to improve and update these forms, including revisions necessary to accommodate the DRA.

In response to the commenter's second suggestion, fees paid by the State itself are not reported on Form OCSE–34A, Quarterly Report of Collections, but will be reported as program income on Form OCSE–396A, Child Support Enforcement Program Financial Report.

8. *Comment:* Two commenters asked for clarification of reporting for interstate cases. In an interstate case, the responding State collects all support from the noncustodial parent and sends it to the initiating State. If the initiating State chooses to assess the fee against the noncustodial parent, the initiating State cannot count that collection as a support payment on the Form OCSE–34A, Quarterly Report of Collections. The commenter asked how the responding State would know that the collection went to the fee, and not to the support. If the responding State does not change the collection from a support payment to a fee collection, the responding State gets credit for the support payment in the incentives collection base amount, whereas the initiating State is penalized for having a fee in the collections base amount.

*Response:* From the responding State's perspective, the entire amount is a child support collection and the responding State properly receives credit for the full amount collected and forwarded to the initiating State. The responding State reports the full amount collected and sent to the initiating State on the appropriate lines of Form OCSE–34A, Quarterly Report of Collections (Lines 2 and 5, respectively) in the quarter in which each transaction occurs. The initiating State subsequently reports the full amount of the collection received on Line 2f of Form OCSE–34A, Quarterly Report of Collections. The amount disbursed to the custodial parent is reported by the initiating State on Line 7d of its Form OCSE–34A, Quarterly Report of Collections. The fee is reported as program income by the initiating State on Line 2a of Form OCSE–396A, Child Support Enforcement Program Financial Report, and, if the fee is withheld from the collection, also reported on (proposed) Line 7e of Form OCSE–34A, Quarterly Report of Collections.

9. *Comment:* One commenter asked if States can rely on the definition of ''never-assistance'' for Federal reporting purposes to determine whether a case is exempt from the fee.

*Response:* No. A State must identify cases subject to the fee in accordance with § 302.33(e). All conditions for charging the fee under § 302.33(e) must be met before imposing the $25 annual fee.

10. *Comment:* Two commenters said that it seems that with the new annual fee, States will be required to commingle two different accounting styles: Accrual-based and cash-based accounting. Another commenter said that it is inappropriate to hold a State responsible for the fee by requiring the State to report the fee as program income before it is actually collected unless the State has elected to pay the fee from State funds. The fee is not program income as defined in 45 CFR 92.25 unless and until the fee is collected.

*Response:* OCSE uses a cash-basis for accounting for financial transactions. Transactions are reported in the quarter in which they occur, i.e., when cash changes hands (when the check is dated or the electronic transfer occurs). Fees are no different and are reported in the quarter collected, not assessed. In most cases, fees will likely be assessed and collected in the same quarter. Fees are reported as collected when either paid by the custodial parent, paid by the noncustodial parent, paid by the State (transferred from one State account to another) or retained by the State from the collection.

11. *Comment:* One commenter asked if the Tribal IV–D agency or the State IV–D agency was responsible for reporting and paying the annual fee if there are both Tribal and State IV–D agencies in a State.

*Response:* Section 454(6)(B)(ii) of the Act is a State plan requirement and as such is not applicable to Tribal IV–D programs. The State IV–D agency is responsible for collecting the fee on State cases that meet the criteria for collection of the fee.

12. *Comment:* One commenter asked if the intent is that States will be reporting, as program income, the total amount of the fees imposed for each Federal fiscal year on the 4th quarter expenditure report, rather than reporting quarterly.

*Response:* Fees are reported on Line 2a of Form OCSE–34A, Quarterly Report of Collections, in the quarter in which they are received, not assessed. As stated earlier, the child support enforcement program is a cash-based system: Expenditures are reported as paid when the check is written or funds transferred to pay the invoice, not when

the service is provided. Some States that are electing to pay the fee from State funds have requested that they be permitted to claim as program income all mandatory fees for all cases on a ''lump sum'' basis once a year. That is an acceptable reporting methodology in those circumstances; States that elect to collect the fee from either parent or withhold the fee from a collection must report the fees as collected on a quarter-by-quarter basis.

13. *Comment:* One commenter said that the preamble specifies that all fees imposed under the DRA need to be reported as program income and treated in accordance with 45 CFR 302.15. The commenter asked if that means that if the State decides to collect the fee from a noncustodial parent and is not successful, it still needs to report the full amount as program income, give the Federal government its share and use the State share to offset administrative expenses. The commenter went on to say that if that is the case, it means that if the State is not able to collect the fee, it not only has to use its own funds to provide program income to the Federal government, it also has to use State funds to offset administrative expenses before seeking reimbursement.

*Response:* This is a mandatory fee. If the State elects to collect the fee directly from either parent and is unsuccessful, it is required to pay the fee itself and report the full amount as program income.

*Section 302.51—Distribution of Support Collections*

The comments received concerning distribution of past-due support collected via the Federal tax refund offset program are addressed in the *Response to Comments* at § 303.72, Federal tax refund offset.

1. *Comment:* One commenter requested confirmation that if the State elects to increase its pass-through and disregard from $50 to $100 that the Federal share of the entire $100 does not have to be paid.

*Response:* This is confirmation that if a State elects to increase its pass-through and disregard from $50 to $100 that the Federal share of the entire $100 does not have to be paid.

## PART 303—STANDARDS FOR PROGRAM OPERATIONS

*Section 303.7—Provision of Services in Interstate Title IV–D Cases*

1. *Comment:* One commenter stated that the proposed rule would require that it is the initiating State's responsibility to impose the fee in an interstate case. The commenter stated that the initiating State is not always aware of collections in a timely manner and should only be held responsible for imposition of fees when aware of qualifying collections in a timely manner.

*Response:* Under 45 CFR 303.7(c)(7)(iv), in an interstate case, the responding State is responsible for collecting and monitoring any support payments from the noncustodial parent and forwarding payments to the location specified by the IV–D agency in the initiating State. Under section 457 of the Act, effective October 1, 1998 (or October 1, 1999, in States in which courts were processing child support collections on August 21, 1996), the responding SDU must, within 2 days of receipt in the SDU, send the amount collected in an interstate IV–D case to the SDU in the initiating State.

*Section 303.8—Review and Adjustment of Child Support Orders*

1. *Comment:* Five commenters asked for clarification on how to identify the beginning of the three-year period for review and adjustment of child support orders as required by revised section 466(a)(10) of the Act. Two commenters indicated support for the three-year review period to begin with the date of the last review or modified order, and asked that OCSE clarify the beginning of time period for the review of an order.

*Response:* When this provision requiring review and adjustment of child support orders was first mandated by the Family Support Act of 1988, it required that the State implement a process whereby orders enforced under title IV–D were reviewed within 36 months after establishment of the order or the most recent review of the order and adjusted in accordance with the State's guidelines for support award amounts. The requirement for three-year reviews in TANF cases was removed with the passage of PRWORA.

The statutory change in the DRA to section 466(a)(10) of the Act on review and adjustment of child support orders does not explicitly tie the three-year timeframe to any starting point, as the 1988 legislation did. However, the intent of the change was to revert back to the previous policy. Therefore, the timeframe for the review and adjustment of an order, if appropriate, would begin within 36 months after establishment of the order or the most recent review of the order.

In response to comments, we have amended the rules at § 303.8(b)(1) to read: ''(1) The State must have procedures under which, within 36 months after establishment of the order or the most recent review of the order (or such shorter cycle as the State may determine), if there is an assignment under part A, or upon the request of either parent, the State shall, with respect to a support order being enforced under title IV–D of the Act, taking into account the best interests of the child involved:

(i) Review and, if appropriate, adjust the order in accordance with the State's guidelines established pursuant to section 467(a) of the Act if the amount of the child support award under the order differs from the amount that would be awarded in accordance with the guidelines.''

2. *Comments:* One commenter said that the NPRM suggests that the requirement to review orders in TANF cases every 3 years will cost the states $10 million in FY 2008, but save them $40 million over the next 4 years. The commenter is in a State with a two-year time limit on TANF benefits and is interested in learning more about the methodology OCSE used in arriving at the cost savings due to increased orders among TANF recipients.

*Response:* These costs reflect the upfront increased administrative costs in reviewing these cases and, as appropriate, updating the orders every 3 years and the savings that will result over time in the way of increased revenues (Federal and State shares of the larger collection amounts in TANF cases). This provision is also beneficial to families in terms of ensuring that support orders remain fair and equitable over time and reflect the noncustodial parent's current ability to pay.

*Section 303.72—Requests for Collection of Past-Due Support by Federal Tax Refund Offset*

1. *Comment:* Several commenters said that the proposed rules require the State to inform individuals in advance if the State chooses to continue to apply offset collections to State-assigned arrearages and asked if the intent of the requirement is to now proactively notify the individuals of this option. A number of other commenters indicated that, under current rules, States are required to advise persons receiving services of the order of distribution of funds collected through the Federal tax refund offset program. The proposed change to require a notice that the State has opted to continue this distribution priority is unnecessary.

*Response:* The current rules at § 303.72(h)(3) require that the IV–D agency must inform individuals receiving services under § 302.33 in advance that amounts offset will be applied to satisfy any past-due support which has been assigned to the State

and submitted for Federal tax refund offset. States that elect to continue to apply section 457(a)(2)(B) of the Act as in effect until October 1, 2009, for distribution of collections in former-assistance cases in the future must continue to inform individuals that the State chooses to apply amounts offset to satisfy any past-due support which has been assigned to the State. The intent of the rule is not to proactively notify individuals, but to continue to notify them, as currently required, if the State does not choose to use Federal tax refund offset first to satisfy current support due and past-due support owed to a family in former-assistance cases effective October 1, 2009, or up to a year earlier at State option.

We changed the regulatory language at § 303.72(h)(3) for clarity. It now reads:

''(3)(i) Except as provided in paragraph (ii), the IV–D agency must inform individuals receiving services under § 302.33 of this chapter in advance that amounts offset will be applied to satisfy any past-due support which has been assigned to the State and submitted for Federal tax refund offset.

(ii) Effective October 1, 2009, or up to a year earlier at State option, the IV–D agency need no longer meet the requirement for notice under paragraph (i) if the State has opted, under section 454(34) of the Act, to apply amounts submitted for Federal tax refund offset first to satisfy any current support due and past-due support owed to the family.''

2. *Comment:* Two commenters asked for verification regarding the application of IRS tax intercepts towards current support if the State chooses to change the distribution hierarchy in former-assistances cases. The commenter asked if the intent of the distribution requirements in § 302.51 is to pay current support on collections that have been intercepted because of their delinquency.

*Response:* The manner in which child support payments collected through Federal tax refund intercepts are distributed depends on the distribution options that a State chooses with respect to former-assistance cases. Section 454(34) of the Act as amended by the DRA allows States to determine whether to follow PRWORA distribution rules or DRA distribution rules in former-assistance cases.

If a State elects to follow PRWORA distribution rules, then IRS tax intercepts must be distributed in accordance with former section 457(a)(2)(B)(iv) of the Act. Under former section 457(a)(2)(B)(iv) of the Act, Federal tax refund offset collections must be distributed to arrearages only, and must be applied first to any arrearages owed to the State to reimburse assistance paid to the former-assistance family.

Effective October 1, 2009, or up to a year earlier at State option, if States choose the new distribution rules for former-assistance cases under section 457(a)(2)(B) of the Act as amended by the DRA, States must treat Federal tax refund offset collections the same as any other collections for purposes of distribution in all IV–D cases. States choosing to follow the DRA distribution rules will distribute Federal tax refund offset collections first to current support, then to arrearages owed to the family.

Please see Action Transmittal–07–05, *Instructions for the Assignment and Distribution of Child Support Under Sections 408(a)(3) and 457 of the Social Security Act (the Act)* dated July 11, 2007: *http://www.acf.dhhs.gov/programs/cse/pol/AT/2007/at-07-05.htm*.

## PART 304—FEDERAL FINANCIAL PARTICIPATION

*Section 304.20—Availability and Rate of Federal Financial Participation*

1. *Comment:* One commenter opposes reducing the Federal financial participation in IV–D program expenditures for paternity establishment for States from 90 percent to 66 percent. The commenter states that this further burdens the State budgets which could eventually trickle down to the families and thereby reduce the Paternity Establishment Performance for States. The commenter encouraged the repeal of the proposed rules pursuant to section 654 of the Treasury and General Government Appropriations Act of 1999 that requires Federal agencies to determine whether a proposed policy or rule may negatively affect the well-being of families.

*Response:* This is a statutory mandate. Section 7303 of the DRA amended section 455 of the Act to reduce the previously enhanced Federal matching rate for laboratory costs to determine paternity. The enhanced matching rate was originally implemented in 1988 because of the high costs of genetic testing for the determination of paternity. However, the cost of genetic testing has significantly declined since 1988 and enhanced funding is no longer necessary.

## III. Impact Analysis

*Paperwork Reduction Act of 1995*

This rule references information collection requirements that have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA). Under this Act, no persons are required to respond to a collection of information unless it displays a valid OMB control Number.

There is a reporting requirement for a State's IV–D plan in section 454(34) of the Act, with respect to distribution options, to allow a State to choose either to apply amounts collected, including amounts offset from Federal tax refunds, to satisfy any support owed to the family first or to continue to distribute Federal tax offsets amounts, to satisfy any past-due support assigned to the State first. A new State plan preprint page was developed for States to indicate their distribution choice under section 454(34) of the Act. This information collection was set to expire on November 11, 2007. The notice to amend the form was published on August 21, 2007. OMB approved this collection tool on July 3, 2008 under OMB # 0970–0017.

States must submit a State IV–D preprint plan page to indicate that a State will impose a $25 annual fee in accordance with 454(6)(B)(ii) and how the fee will be collected. Because of the October 1, 2006 effective date for the mandate that States implement and collect a $25 annual fee in specified cases, the second notice for the State plan preprint page was published prior to the final rule. The notice was published in the **Federal Register** on November 6, 2007. OMB approved this collection tool on February 1, 2008 under OMB # 0970–0017.

States also are required to keep track of the total amount of $25 fees that must be included as program income reported on Form OCSE–396A, Child Support Enforcement Program Financial Report. In addition, States are required to report the collection of the total amount of $25 fees that are retained for a child support collection on Form 34A, Quarterly Report of Collections. The requirement to track fees is not a new requirement; the $25 annual fee is tracked and reported the same way other fees associated with the Child Support Enforcement Program are tracked and reported. These two forms were approved as a package by OMB under # 0970–0181 on November 16, 2007.

If a State elects to recover a fee from the custodial parent through retaining child support collections, it must be reported on the OCSE–157. This form was approved by OMB under # 0970–0177 on September 8, 2008.

The burden associated with these collection tools has not changed as a result of this regulation. The DRA made

changes to various sections of the Social Security Act and mandated implementation of those various sections *prior* to promulgation of final regulations. As a result, the respondents were required to comply with the paperwork burden before the publication of this regulation. The appropriate notice and comment period was provided and OMB approved these collection tools. The burden described in the final rule for these collections is the same as the currently approved ICR.

The respondents are State IV–D agencies.

The total estimated burden for the entire State Plan and Financial Report Forms are:

| Requirement | Number of respondents | Yearly submittals | Average burden hour per response | Total burden hours |
|---|---|---|---|---|
| State Plan (OCSE–100) | 54 | 1 | .25 | 13.5 |
| State Plan Transmittal (OCSE–21–U4) | 54 | 1 | .25 | 13.5 |
| Financial Form 396A (tracking the $25 fee) | 54 | 4 | 1 | *216 |
| OCSE form 34A | 54 | 4 | 1 | *216 |
| OCSE Form 157 | 54 | 1 | 7 | *378 |
| Total | 54 | 11 | 9.50 | 837 |

*These hours represent the total burden associated with the reporting form. Incremental increases applicable to the provisions of this regulation were not calculated but are estimated to be less than 1% of the total burden shown.

*Regulatory Flexibility Analysis*

The Secretary certifies that, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), this rule will not result in a significant impact on a substantial number of small entities. The primary impact is on State governments. State governments are not considered small entities under the Act.

*Regulatory Impact Analysis*

Executive Order 12866 requires that rules be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that these rules are consistent with these priorities and principles and is an economically significant rule as defined by the Executive Order because it will have an estimated $500 million impact on the economy over a 5-year period and, potentially, a $100 million impact on the economy in any given year. The impacts discussed for provisions below have been carried in the program's base since enactment of the DRA and are most currently reflected in the FY 2009 President's Mid-Session Review Budget baseline estimates.

Specifically, when the DRA was enacted we estimated that the requirement for review and adjustment of child support orders in TANF cases every 3 years will cost the Federal government approximately $15 million in FY 2008 but result in approximately $40 million in savings over 4 years. Similarly, this provision was estimated to cost State governments approximately $10 million in FY 2008 but save States almost $40 million over 4 years with a net government impact of approximately $25 million in costs in FY 2008 and approximately $80 million in savings by FY 2011. These costs reflect the upfront increased administrative costs involved in reviewing these cases and, as appropriate, updating the orders every 3 years, and the savings that will result over time in the way of increased revenues (Federal and State shares of the larger collections amounts). This provision is also beneficial to families in terms of ensuring that support orders remain fair and equitable over time and reflect the noncustodial parent's current ability to pay support.

The provision on imposition of a $25 annual collection fee for never-IV–A cases with at least $500 in collections was estimated to save the Federal government, when DRA was enacted, a little less than $50 million in FY 2007 and result in approximately $270 million in Federal savings over 5 years. The provision was estimated to save State governments approximately $25 million in FY 2007 and approximately $140 million over 5 years. These fees will partially offset the government's costs of providing services and are representative of Federal and State cost sharing in the program (66 and 34 percent, respectively). The clarification included in this regulation which exempts additional Tribal Title IV–A populations from this provision has negligible impacts on these estimates.

Finally, the provision eliminating enhanced Federal funding for the cost of paternity testing was estimated to save the Federal government almost $8 million in FY 2007 and approximately $40 million over 5 years, and will result in a dollar-for-dollar increase in State costs. In other words, each dollar saved by the Federal government because of the decrease in Federal financial participation will result in a dollar in State costs. Enhanced Federal funding for paternity testing is no longer necessary because the cost of these tests has decreased significantly over time.

All together these provisions were estimated to save the Federal and State governments approximately $66 million in FY 2007 and approximately $495 million over 5 years. As each of these provisions was mandated under the Deficit Reduction Act of 2005, alternatives to this rulemaking are limited. We could have chosen not to update program rules to reflect these statutory changes, but that would be confusing to the public and would ultimately have no budgetary impact since these provisions are effective without regard to the issuance of rules.

In the end, the rule remains consistent with the statute and the underlying budget implications.

*Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $120 million or more in any one year.

If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The Department has determined that this rule, in implementing the new statutory requirements of the Deficit Reduction Act, would not impose a

mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year. Rather, we estimate that combined the provisions will result in savings to States. Over 5 years, the Federal government is estimated to save approximately $315 million as a result of the review and adjustment and collection fee provisions of the rules and States to save almost $180 million. States are estimated to receive approximately $40 million less in Federal reimbursement for laboratory costs associated with paternity establishment over 5 years. Thus, the estimated net impact of the rules on States is a savings of almost $140 million over 5 years.

*Congressional Review*

The final rule being issued here is a major rule subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to the Congress and the Comptroller General for review.

*Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may negatively affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. The required review of the rules and policies to determine their effect on family well-being has been completed, and these rules will have a positive impact on family well-being as defined in the legislation because expanded access to the Federal tax refund offset, mandatory three-year reviews of support orders in TANF cases, and State options to pay more collections to families will ensure more child support is paid to families.

*Executive Order 13132*

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments or is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These rules do not have federalism implications for State or local governments as defined in the Executive Order.

**List of Subjects**

*45 CFR Part 301*

Child support, Grants programs/social programs.

*45 CFR Part 302*

Child support, Grants programs/social programs.

*45 CFR Part 303*

Child support, Grant programs/social programs.

*45 CFR Part 304*

Child support, Grants programs/social programs.

(Catalog of Federal Domestic Assistance Programs No. 93.563, Child Support Enforcement Program)

Dated: April 1, 2008.

**Daniel C. Schneider,**

*Acting Assistant Secretary for Children and Families.*

Approved: August 13, 2008.

**Michael O. Leavitt,**

*Secretary of Health and Human Services.*

■ For the reasons discussed above, title 45 chapter III of the Code of Federal Regulations is amended as follows:

## PART 301—STATE PLAN APPROVAL AND GRANT PROCEDURES

■ 1. The authority citation for part 301 continues to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 660, 664, 666, 667, 1301, and 1302.

■ 2. In § 301.1, revise the definitions of ''Past-due support'' and ''Qualified child'' to read as follows:

### § 301.l General Definitions.

* * * * *

*Past-due support* means the amount of support determined under a court order or an order of an administrative process established under State law for support and maintenance of a child, or of a child and the parent with whom the child is living, which has not been paid. Through September 30, 2007, for purposes of referral for Federal tax refund offset of support due an individual who is receiving services under § 302.33 of this chapter, past-due support means support owed to or on behalf of a qualified child, or a qualified child and the parent with whom the child is living if the same support order includes support for the child and the parent.

* * * * *

*Qualified child,* through September 30, 2007, means a child who is a minor or who, while a minor, was determined to be disabled under title II or XVI of the Act, and for whom a support order is in effect.

* * * * *

## PART 302—STATE PLAN APPROVAL REQUIREMENTS

■ 1. The authority citation for part 302 continues to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 660, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396k.

■ 2. In § 302.32, revise paragraphs (b) introductory text, (b)(2)(iv), and (b)(3)(ii) to read as follows:

### § 302.32 Collection and disbursement of support payments by the title IV–D Agency.

* * * * *

(b) Timeframes for disbursement of support payments by the State disbursement unit (SDU) under section 454B of the Act.

* * * * *

(2) * * *

(iv) Collections as a result of Federal tax refund offset paid to the family or distributed in title IV–E foster care cases under § 302.52(b)(4) of this part, must be sent to the title IV–A family or title IV–E agency, as appropriate, within 30 calendar days of the date of initial receipt by the title IV–D agency, unless State law requires a post-offset appeal process and an appeal is filed timely, in which case the SDU must send any payment to the title IV–A family or title IV–E agency within 15 calendar days of the date the appeal is resolved.

(3) * * *

(ii) Collections due the family as a result of Federal tax refund offset must be sent to the family within 30 calendar days of the date of initial receipt in the title IV–D agency, except:

(A) If State law requires a post-offset appeal process and an appeal is timely filed, in which case the SDU must send any payment to the family within 15 calendar days of the date the appeal is resolved; or

(B) As provided in § 303.72(h)(5) of this chapter.

■ 3. In § 302.33, revise the section heading and add new paragraph (e) to read as follows:

### § 302.33 Services to individuals not receiving title IV–A assistance.

* * * * *

(e) *Annual $25 fee.*

(1) A State must impose in, and report for, a Federal fiscal year an annual fee of $25 for each case if there is an individual in the case to whom IV–D services are provided and:

(i) for whom the State has collected and disbursed to the family at least $500 of support in that year; and

(ii) no individual in the case has received assistance under a former State AFDC program, assistance as defined in § 260.31 under a State TANF program, or assistance as defined in § 286.10 under a Tribal TANF program.

(2) The State must impose the annual $25 fee in international cases under section 454(32) of the Act in which the criteria for imposition of the annual $25 fee under paragraph (1) of this section are met.

(3) For each Federal fiscal year, after the first $500 of support is collected and disbursed to the family, the fee must be collected by one or more of the following methods:

(i) Retained by the State from support collected in cases subject to the fee in accordance with distribution requirements in § 302.51(a)(5) of this part, except that no cost will be assessed for such services against:

(A) a foreign obligee in an international case receiving IV–D services pursuant to section 454(32)(C) of the Act; and

(B) an individual who is required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7;

(ii) Paid by the individual applying for services under section 454(4)(A)(ii) of the Act and implementing regulations in this section, provided that the individual is not required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7;

(iii) Recovered from the noncustodial parent, provided that the noncustodial parent is not an individual required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7; or

(iv) Paid by the State out of its own funds.

(4) The State must report, in accordance with § 302.15 of this part and instructions issued by the Secretary, the total amount of annual $25 fees imposed under this section for each Federal fiscal year as program income, regardless of which method or methods are used under paragraph (3) of this section.

(5) State funds used to pay the annual $25 fee shall not be considered administrative costs of the State for the operation of the title IV–D plan, and all annual $25 fees imposed during a Federal fiscal year must be considered income to the program, in accordance with § 304.50 of this chapter.

■ 4. In § 302.51, revise paragraphs (a)(1) and (a)(3) and add paragraph (a)(5) to read as follows:

**§ 302.51 Distribution of support collections.**

* * * * *

(a)(1) For purposes of distribution in a IV–D case, amounts collected, except as provided under paragraphs (a)(3) and (5) of this section, shall be treated first as payment on the required support obligation for the month in which the support was collected and if any amounts are collected which are in excess of such amount, these excess amounts shall be treated as amounts which represent payment on the required support obligation for previous months.

* * * * *

(3)(i) Except as provided in paragraph (a)(3)(ii), amounts collected through Federal tax refund offset must be distributed as arrearages in accordance with § 303.72 of this chapter, and section 457 of the Act;

(ii) Effective October 1, 2009, or up to a year earlier at State option, amounts collected through Federal tax refund offset shall be distributed in accordance with § 303.72 of this chapter and the option selected under section 454(34) of the Act.

* * * * *

(5)(i) Except as provided in paragraph (a)(5)(ii), a State must pay to a family that has never received assistance under a program funded or approved under title IV–A or foster care under title IV–E of the Act and to an individual who is not required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7 the portion of the amount collected that remains after withholding any annual $25 fee that the State imposes under § 302.33(e) of this part.

(ii) If a State charges the noncustodial parent the annual $25 fee under § 302.33(e) of this part, the State may retain the $25 fee from the support collected after current support and any payment on arrearages for the month under a court or administrative order have been disbursed to the family provided the noncustodial parent is not required to cooperate with the IV–D program as a condition of Food Stamp eligibility as defined at § 273.11(o) and (p) of title 7.

* * * * *

■ 5. In § 302.70, revise paragraph (a)(10) in its entirety to read as follows:

**§ 302.70 Required State laws.**

(a) * * *

(10) Procedures for the review and adjustment of child support orders in accordance with § 303.8(b) of this chapter.

* * * * *

## PART 303—STANDARDS FOR PROGRAM OPERATIONS

■ 1. The authority citation for part 303 is revised to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 659, 659A, 660, 663, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396k.

■ 2. In § 303.7, add new paragraph (e) to read as follows:

**§ 303.7 Provision of services in interstate cases.**

* * * * *

(e) *Imposition and reporting of annual $25 fee in interstate cases.* The title IV–D agency in the initiating State must impose and report the annual $25 fee in accordance with § 302.33(e) of this chapter.

* * * * *

■ 3. In § 303.8, revise paragraphs (b) introductory text, (b)(1) introductory text, and (b)(1)(i) to read as follows:

**§ 303.8 Review and adjustment of child support orders.**

* * * * *

(b) *Required procedures.* Pursuant to section 466(a)(10) of the Act, when providing services under this chapter:

(1) The State must have procedures under which, within 36 months after establishment of the order or the most recent review of the order (or such shorter cycle as the State may determine), if there is an assignment under part A, or upon the request of either parent, the State shall, with respect to a support order being enforced under title IV–D of the Act, taking into account the best interests of the child involved:

(i) Review and, if appropriate, adjust the order in accordance with the State's guidelines established pursuant to section 467(a) of the Act if the amount of the child support award under the order differs from the amount that would be awarded in accordance with the guidelines;

* * * * *

■ 4. In § 303.72 revise paragraphs (a)(3) introductory text, (a)(3)(i), and (h)(1) and (h)(3) to read as follows:

**§ 303.72 Requests for collection of past-due support by Federal tax refund offset.**

(a) * * *

(3) For support owed in cases where the title IV–D agency is providing title IV–D services under § 302.33 of this chapter:

(i) The support is owed to or on behalf of a child, or a child and the parent with whom the child is living if the same support order includes support for the child and the parent.

* * * * *

(h) * * *

(1) Collections received by the IV–D agency as a result of Federal tax refund offset to satisfy title IV–A or non-IV–A past-due support shall be distributed as required in accordance with section 457 and, effective October 1, 2009, or up to a year earlier at State option, in accordance with the option selected under section 454(34) of the Act.

* * * * *

(3)(i) Except as provided in paragraph (h)(3)(ii), the IV–D agency must inform individuals receiving services under § 302.33 of this chapter in advance that amounts offset will be applied to satisfy any past-due support which has been assigned to the State and submitted for Federal tax refund offset.

(ii) Effective October 1, 2009, or up to a year earlier at State option, the IV–D agency need no longer meet the requirement for notice under paragraph (h)(3)(i) if the State has opted, under section 454(34) of the Act, to apply amounts submitted to Federal tax refund offset first to satisfy any current support due and past-due support owed to the family.

* * * * *

## PART 304—FEDERAL FINANCIAL PARTICIPATION

■ 1. The authority citation for part 304 continues to read as follows:

**Authority:** 42 U.S.C. 651 through 655, 657, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396k.

### § 304.20 [Amended]

■ 2. In § 304.20, revise paragraph (d) to read as follows:

### § 304.20 Availability and rate of Federal financial participation.

* * * * *

(d) Federal financial participation at the 90 percent rate is available for laboratory costs incurred in determining paternity on or after October 1, 1988, and until September 30, 2006, including the costs of obtaining and transporting blood and other samples of genetic material, repeated testing when necessary, analysis of test results, and the costs for expert witnesses in a paternity determination proceeding, but only if the expert witness costs are included as part of the genetic testing contract.

[FR Doc. E8–28660 Filed 12–8–08; 8:45 am]

BILLING CODE 4184–01–P

Federal Register

Tuesday,
December 9, 2008

# Part V

# The President

## Proclamation 8326—National Pearl Harbor Remembrance Day, 2008

Federal Register
Vol. 73, No. 237
Tuesday, December 9, 2008

# Presidential Documents

**Title 3—**

**The President**

**Proclamation 8326 of December 5, 2008**

## National Pearl Harbor Remembrance Day, 2008

**By the President of the United States of America**

**A Proclamation**

On National Pearl Harbor Remembrance Day, we mourn the more than 2,400 Americans whose lives were lost in the surprise attack on our homeland that changed the course of history. Their service and sacrifice and the service and sacrifice of all our World War II veterans will be forever honored on this day by the citizens of a free and grateful Nation.

On December 7, 1941, the enemy nearly destroyed our Pacific Fleet, and the United States was forced into a long and terrible war. A generation of Americans stepped forward to fight for our country. Their message to America's enemies was clear: If you attack this country and harm our people, there is no corner of the Earth remote enough to protect you from the reach of our Nation's Armed Forces.

Following the war the United States worked to make our most bitter enemies into our closest friends through the transformative power of freedom. The joys of liberty are often secured by the sacrifices of those who serve a cause greater than self. To honor and recognize the sacrifice of our Armed Forces, I have designated nine sites as the World War II Valor in the Pacific National Monument. This monument will preserve our history and help share this heritage with future generations. On this anniversary, we honor the heroes who risked and lost their lives for our security and freedom. Their selfless dedication exemplifies the great character of America and continues to inspire our Nation.

The Congress, by Public Law 103–308, as amended, has designated December 7 of each year as ''National Pearl Harbor Remembrance Day.''

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim December 7, 2008, as National Pearl Harbor Remembrance Day. I encourage all Americans to observe this solemn occasion with appropriate ceremonies and activities. I urge all Federal agencies and interested organizations, groups, and individuals to fly the flag of the United States at half-staff this December 7 in honor of those who died as a result of their service at Pearl Harbor.

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

[FR Doc. E8–29315
Filed 12–8–08; 11:15 am]
Billing code 3195–W9–P

# Reader Aids

**Federal Register**

Vol. 73, No. 237

Tuesday, December 9, 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/federal1register**

### 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, DECEMBER

72687–73148 ..... 1
73149–73544 ..... 2
73545–73760 ..... 3
73761–73994 ..... 4
73995–74342 ..... 5
74343–74604 ..... 8
74605–74926 ..... 9

## CFR PARTS AFFECTED DURING DECEMBER

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:**
8324 ..... 73149
8325 ..... 73151
8326 ..... 74925

**Executive Orders:**
12171 (amended by 13480) ..... 73991
13480 ..... 73991

**5 CFR**

**Proposed Rules:**
315 ..... 74071
316 ..... 74071
532 ..... 74374
591 ..... 74858
9901 ..... 73606

**6 CFR**

**Proposed Rules:**
5 ..... 74632, 74633, 74635, 74637

**7 CFR**

250 ..... 74605
761 ..... 74343
762 ..... 74343
764 ..... 74343
767 ..... 74343
946 ..... 74346
984 ..... 73761, 73995
1430 ..... 73764

**Proposed Rules:**
319 ..... 74073
930 ..... 74073
1205 ..... 72747
1220 ..... 74078
1487 ..... 73617

**8 CFR**

299 ..... 74605

**10 CFR**

**Proposed Rules:**
430 ..... 74639
1004 ..... 74658
1010 ..... 72748

**11 CFR**

111 ..... 72687

**12 CFR**

308 ..... 73153
327 ..... 73158
701 ..... 73392
702 ..... 72688
704 ..... 72688

**14 CFR**

1 ..... 73768
25 ..... 73997
39 ..... 73165, 73168, 73169, 73545, 73782, 73785
91 ..... 73171
101 ..... 73768
121 ..... 73171
125 ..... 73171
400 ..... 73768
401 ..... 73768
420 ..... 73768

**Proposed Rules:**
23 ..... 73195
39 ..... 73618, 74080, 74661
71 ..... 74376, 74377, 74378
234 ..... 74586
259 ..... 74586
399 ..... 74586

**15 CFR**

744 ..... 73999
760 ..... 74348
770 ..... 73547
774 ..... 73547
902 ..... 74003

**18 CFR**

284 ..... 72692, 73494

**20 CFR**

**Proposed Rules:**
416 ..... 74663

**21 CFR**

101 ..... 74349
556 ..... 72714
558 ..... 72714
1300 ..... 73549
1315 ..... 73549
1316 ..... 73549

**25 CFR**

293 ..... 74004

**26 CFR**

301 ..... 73180

**Proposed Rules:**
1 ..... 73197, 74380
31 ..... 74082

**28 CFR**

73 ..... 73181

**29 CFR**

4022 ..... 72715
4044 ..... 72716

**Proposed Rules:**
1926 ..... 73197

**30 CFR**

938 ..... 72717

**31 CFR**

103 ..... 74010

560 ..... 73788

**32 CFR**

706 ..... 72725, 73556, 73557
**Proposed Rules:**
185 ..... 73896

**33 CFR**

117 ..... 74018
**Proposed Rules:**
117 ..... 72752

**34 CFR**

99 ..... 74806
300 ..... 73006

**36 CFR**

7 ..... 74606
212 ..... 74612

**37 CFR**

381 ..... 72726

**38 CFR**

53 ..... 73558

**39 CFR**

**Proposed Rules:**
3001 ..... 72754

**40 CFR**

52 ..... 73562, 74019, 74027, 74029
63 ..... 72727
80 ..... 74403
112 ..... 74236
180 ..... 73580, 73586
261 ..... 72912
262 ..... 72912
1045 ..... 73789
1054 ..... 73789
1065 ..... 73789
**Proposed Rules:**
Ch. I ..... 73620
52 ..... 74096, 74097, 74098
60 ..... 72962, 73629
61 ..... 73629
63 ..... 72756, 73629, 73631
80 ..... 74350
180 ..... 73632
260 ..... 73520
261 ..... 73520
264 ..... 73520
265 ..... 73520
268 ..... 73520
270 ..... 73520
273 ..... 73520

**42 CFR**

440 ..... 73694

**43 CFR**

419 ..... 74031
429 ..... 74326
2300 ..... 74039
3800 ..... 73789

**44 CFR**

67 ..... 73182
**Proposed Rules:**
67 ..... 74666, 74673

**45 CFR**

301 ..... 74898
302 ..... 74898
303 ..... 74898
304 ..... 74898
**Proposed Rules:**
301 ..... 74408
302 ..... 74408
303 ..... 74408
305 ..... 74408
308 ..... 74408

**46 CFR**

**Proposed Rules:**
71 ..... 74426
114 ..... 74426
115 ..... 74426
122 ..... 74426
170 ..... 74426
171 ..... 74426
172 ..... 74426
174 ..... 74426
175 ..... 74426
176 ..... 74426
178 ..... 74426
179 ..... 74426
185 ..... 74426

**47 CFR**

51 ..... 72732
54 ..... 72732
61 ..... 72732
69 ..... 72732
73 ..... 73192, 74047
**Proposed Rules:**
73 ..... 73199

**48 CFR**

533 ..... 74613
552 ..... 74613
**Proposed Rules:**
536 ..... 73199
1804 ..... 73201
1845 ..... 73202
1852 ..... 73201, 73202

**49 CFR**

192 ..... 72737
229 ..... 74070
232 ..... 74070
383 ..... 73096
384 ..... 73096
390 ..... 73096
391 ..... 73096
**Proposed Rules:**
89 ..... 74098
213 ..... 73078
390 ..... 73129
391 ..... 73129
571 ..... 72758
573 ..... 74101
575 ..... 72758
579 ..... 72758, 74101

**50 CFR**

14 ..... 74615
17 ..... 73794, 74357
229 ..... 73032
300 ..... 72737
404 ..... 73592
622 ..... 73192
648 ..... 74373, 74631
660 ..... 72739, 72740
**Proposed Rules:**
17 ..... 73211, 74123, 74427, 74434, 74674, 74675
21 ..... 74445, 74447
226 ..... 74681
622 ..... 73219
679 ..... 73222
680 ..... 74129

## 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 DECEMBER 9, 2008

**AGRICULTURE DEPARTMENT**

**Agricultural Marketing Service**

Irish Potatoes Grown in Washington; Modification of Late Payment and Interest Charge Regulation; published 12-8-08

**COMMERCE DEPARTMENT**

**National Oceanic and Atmospheric Administration**

Endangered Fish and Wildlife:

Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales; published 12-5-08

Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales; published 10-10-08

Fisheries of the Northeastern United States:

Atlantic Herring Fishery; 2007-2009 Specifications; published 12-9-08

**HOMELAND SECURITY DEPARTMENT**

**U.S. Citizenship and Immigration Services**

Special Immigrant and Nonimmigrant Religious Workers; Correcting Amendment; published 12-9-08

**INTERIOR DEPARTMENT**

**National Park Service**

Special Regulations; Areas of the National Park System; published 12-9-08

**TRANSPORTATION DEPARTMENT**

**Federal Aviation Administration**

Airworthiness Directives:

Cessna Aircraft Company 150 Series Airplanes; published 11-4-08

Rolls-Royce plc RB211-535E4-37, RB211-535E4-B-37, and RB211-535E4-B-75 Series Turbofan Engines; published 11-4-08

Congestion Management Rule for John F. Kennedy International and Newark Liberty International Airports; published 10-10-08

Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport:

Correction; published 11-10-08

Congestion Management Rule for LaGuardia Airport; published 10-10-08

Congestion Management Rule for LaGuardia Airport; Correction; published 11-10-08

## COMMENTS DUE NEXT WEEK

**AGRICULTURE DEPARTMENT**

**Rural Business-Cooperative Service**

Rural Development Grants; comments due by 12-15-08; published 10-15-08 [FR E8-23286]

**AGRICULTURE DEPARTMENT**

**Rural Housing Service**

Rural Development Grants; comments due by 12-15-08; published 10-15-08 [FR E8-23286]

**AGRICULTURE DEPARTMENT**

**Rural Utilities Service**

Amending the Household Water Well System Grant Program Regulations; comments due by 12-18-08; published 11-18-08 [FR E8-26769]

Rural Development Grants; comments due by 12-15-08; published 10-15-08 [FR E8-23286]

**COMMERCE DEPARTMENT**

**National Oceanic and Atmospheric Administration**

Atlantic Highly Migratory Species:

Atlantic Swordfish Quotas; comments due by 12-18-08; published 11-18-08 [FR E8-27337]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:

Amendments to the Spiny Lobster Fishery Management Plans for the Caribbean and Gulf of Mexico and South Atlantic; comments due by 12-15-08; published 10-29-08 [FR E8-25823]

Spiny Lobster (Panulirus argus) Resources of the Caribbean, Gulf of Mexico, and South Atlantic; Minimum Conservation Standards for Imported Spiny Lobster; comments due by 12-15-08; published 10-15-08 [FR E8-24484]

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries:

Specifications and Management Measures; comments due by 12-17-08; published 11-17-08 [FR E8-27225]

Fisheries off West Coast States; Pacific Coast Groundfish Fishery:

Pacific Whiting Allocation; comments due by 12-16-08; published 12-1-08 [FR E8-28468]

Magnuson-Stevens Act Provisions; Scientific and Statistical Committees; Peer Review; National Standard Guidelines; comments due by 12-17-08; published 9-18-08 [FR E8-21837]

**DEFENSE DEPARTMENT**

**Defense Acquisition Regulations System**

Defense Federal Acquisition Regulation Supplement:

Clarification of Central Contractor Registration and Procurement Instrument Identification Data Requirements; comments due by 12-19-08; published 10-20-08 [FR E8-24486]

**EDUCATION DEPARTMENT**

Rehabilitation Training; comments due by 12-15-08; published 11-14-08 [FR E8-27136]

**ENERGY DEPARTMENT**

Energy Conservation Program:

Energy Conservation Standards for Certain Consumer Products and for Certain Commercial and Industrial Equipment; comments due by 12-16-08; published 10-17-08 [FR E8-23405]

**ENVIRONMENTAL PROTECTION AGENCY**

Approval and Promulgation of Air Quality Implementation Plans:

Virginia; Amendments to Ambient Air Quality Standards for Particulate Matter; comments due by 12-17-08; published 11-17-08 [FR E8-27192]

California State Implementation Plan, Ventura County Air Pollution Control District; Revisions; comments due by 12-19-08; published 11-19-08 [FR E8-27484]

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 Antidegradation Policy Applicable to Waters of the United States within the Commonwealth of Pennsylvania; removal; comments due by 12-15-08; published 11-14-08 [FR E8-27209]

Removing the Federal Antidegradation Policy Applicable to Waters of the United States:

Commonwealth of Pennsylvania; comments due by 12-15-08; published 12-30-99 [FR E8-26951]

State Implementation Plans:

CA Revisions; Great Basin Unified Air Pollution Control District et al.; comments due by 12-18-08; published 11-18-08 [FR E8-27301]

**FEDERAL COMMUNICATIONS COMMISSION**

Radio Broadcasting Services:

Marquez, TX; comments due by 12-15-08; published 11-10-08 [FR E8-26741]

Silverpeak, NV; comments due by 12-15-08; published 11-7-08 [FR E8-26511]

Williston, SC; comments due by 12-15-08; published 11-10-08 [FR E8-26747]

**FEDERAL DEPOSIT INSURANCE CORPORATION**

Deposit Insurance Regulations:

Temporary Increase in Standard Coverage Amount; Mortgage Servicing Accounts; comments due by 12-16-08; published 10-17-08 [FR E8-24626]

**FEDERAL HOUSING FINANCE BOARD**

Affordable Housing Program Amendments

Federal Home Loan Bank Mortgage Refinancing

Authority; comments due by 12-16-08; published 10-17-08 [FR E8-24320]

**FEDERAL HOUSING FINANCING AGENCY**

Affordable Housing Program Amendments

Federal Home Loan Bank Mortgage Refinancing Authority; comments due by 12-16-08; published 10-17-08 [FR E8-24320]

**HEALTH AND HUMAN SERVICES DEPARTMENT**

**Food and Drug Administration**

Applications for Food and Drug Administration Approval to Market a New Drug; Postmarketing Reports:

Reporting Information About Authorized Generic Drugs; Companion Document to Direct Final Rule; comments due by 12-15-08; published 9-29-08 [FR E8-22829]

Reporting Information About Authorized Generic Drugs; comments due by 12-15-08; published 9-29-08 [FR E8-22833]

**HOMELAND SECURITY DEPARTMENT**

**Coast Guard**

Safety Zones:

Fireworks Displays within the Fifth Coast Guard District; comments due by 12-15-08; published 11-14-08 [FR E8-27007]

Security Zone:

West Basin, Port Canaveral Harbor, Cape Canaveral, FL; comments due by 12-19-08; published 10-20-08 [FR E8-24808]

Security Zones; Escorted Vessels, Mobile, AL, Captain of the Port Zone; comments due by 12-15-08; published 11-13-08 [FR E8-26900]

**HOMELAND SECURITY DEPARTMENT**

**Federal Emergency Management Agency**

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 12-15-08; published 10-15-08 [FR E8-24475]

Proposed Flood Elevation Determinations; comments due by 12-16-08; published 9-17-08 [FR E8-21687]

**HOMELAND SECURITY DEPARTMENT**

Privacy Act of 1974; Implementation of Exemptions; comments due by 12-15-08; published 11-14-08 [FR E8-27093]

**HOUSING AND URBAN DEVELOPMENT DEPARTMENT**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Inspector Candidate Assessment Questionnaire; comments due by 12-15-08; published 10-15-08 [FR E8-24370]

Civil Money Penalties; Certain Prohibited Conduct; comments due by 12-16-08; published 10-17-08 [FR E8-24574]

Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts; comments due by 12-15-08; published 10-16-08 [FR E8-24573]

State Community Development Block Grant Program; Administrative Rule Changes; comments due by 12-16-08; published 10-17-08 [FR E8-24572]

**INTERIOR DEPARTMENT**

**Fish and Wildlife Service**

Endangered and Threatened Wildlife and Plants:

90-Day Finding on a Petition to List the Least Chub as Threatened or Endangered with Critical Habitat; comments due by 12-15-08; published 10-15-08 [FR E8-24467]

**LABOR DEPARTMENT**

**Occupational Safety and Health Administration**

Tree Care Operations; comments due by 12-17-08; published 9-18-08 [FR E8-21851]

**SECURITIES AND EXCHANGE COMMISSION**

Amendments to Regulation SHO; comments due by 12-16-08; published 10-17-08 [FR E8-24785]

**SMALL BUSINESS ADMINISTRATION**

Business Loan Program Regulations:

Incorporation of London Interbank Offered Rate Base Rate and Secondary Market Pool Interest Rate Changes; comments due by 12-15-08; published 11-13-08 [FR E8-26999]

**TRANSPORTATION DEPARTMENT**

**Federal Aviation Administration**

Airworthiness Directives:

Airbus Model A310 Series Airplanes; comments due by 12-15-08; published 11-13-08 [FR E8-26914]

Airbus Model A318, A319, A320, and A321 Series Airplanes; comments due by 12-17-08; published 11-17-08 [FR E8-27167]

BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes; comments due by 12-17-08; published 11-17-08 [FR E8-27161]

Boeing Model 727 Airplanes; comments due by 12-15-08; published 10-29-08 [FR E8-25758]

Boeing Model 737-600, -700, -700C, -800, and -900 Series Airplanes; comments due by 12-15-08; published 10-30-08 [FR E8-25903]

Boeing Model 737-600, 700, 700C, 800, and 900 Series Airplanes; comments due by 12-15-08; published 10-31-08 [FR E8-25990]

Boeing Model 767 Airplanes; comments due by 12-16-08; published 11-21-08 [FR E8-27519]

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; comments due by 12-17-08; published 11-17-08 [FR E8-27162]

Bombardier Model CL 600 2B19 (Regional Jet Series 100 & 440) Airplanes; comments due by 12-15-08; published 11-14-08 [FR E8-26911]

Hawker Beechcraft Corporation Model MU 300 10 Airplanes and Model 400 and 400A Series Airplanes; and Raytheon (Mitsubishi) Model MU-300 Airplanes; comments due by 12-15-08; published 10-31-08 [FR E8-26000]

McDonnell Douglas Model 717-200 Airplanes; comments due by 12-15-08; published 10-31-08 [FR E8-25991]

Rolls-Royce plc RB211 Trent 553-61, 553A2-61, 556-61, 556A2-61, 556B-61, 556B2-61, 560-61, and 560A2-61 Turbofan Engines; comments due by 12-15-08; published 11-14-08 [FR E8-26200]

Proposed Establishment of Colored Federal Airway; Alaska; comments due by 12-15-08; published 10-30-08 [FR E8-25940]

Proposed Establishment of Special Air Traffic Rule, in the Vicinity of Luke AFB, AZ; Correction; comments due by 12-15-08; published 10-15-08 [FR E8-24373]

**TREASURY DEPARTMENT**

**Foreign Assets Control Office**

Licensing Procedures for Exportation of Agricultural Commodities, Medicine, and Medical Devices to Sudan and Iran; comments due by 12-17-08; published 11-17-08 [FR E8-27242]

**TREASURY DEPARTMENT**

**Alcohol and Tobacco Tax and Trade Bureau**

Proposed Expansions of the Russian River Valley and Northern Sonoma Viticultural Areas; Reopening of Comment Period; comments due by 12-19-08; published 10-29-08 [FR E8-25748]

**VETERANS AFFAIRS DEPARTMENT**

Special Ratings; comments due by 12-16-08; published 10-17-08 [FR E8-23825]

## 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. 2040/P.L. 110–451**

Civil Rights Act of 1964 Commemorative Coin Act (Dec. 2, 2008; 122 Stat. 5021)

**S. 602/P.L. 110–452**

Child Safe Viewing Act of 2007 (Dec. 2, 2008; 122 Stat. 5025)

**S. 1193/P.L. 110–453**

To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

**Last List December 2, 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.