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Rules and Regulations

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 300

RIN 3206–AL18

Time-in-Grade Eliminated, Delay of Effective Date and Addition of Comment Period

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule; delay of effective date and addition of comment period.

SUMMARY: This document delays the effective date by 60 days and provides a 30-day public comment period to run concurrently for the final rule eliminating the time-in-grade requirement for competitive promotions, as published in the **Federal Register** on November 7, 2008.

DATES: The effective date for the final rule published on November 7, 2008 (73 FR 66157), is delayed until May 18, 2009. Written comments must be received on or before April 8, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Janice Warren by telephone (202) 606–0960; by FAX (202) 606–2329; by TTY (202) 418–2134; or by e-mail *janice.warren@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Personnel Management published a Final Rule in the **Federal Register** on November 7, 2008 (73 FR 66157). Pursuant to a January 20, 2009, White House Memorandum on regulatory review, agencies are requested to consider extending for 60 days the effective date of regulations that have been published in the **Federal Register** but not yet taken effect, for the purpose of reviewing questions of law and policy raised by those regulations. Where such an extension is made, agencies are requested to immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those regulations. As a result, OPM has delayed the effective date of the final rule from March 9, 2008 to May 18, 2009. OPM has also opened a 30-day public comment period.

U.S. Office of Personnel Management.

Kathie Ann Whipple,

Acting Director.

[FR Doc. E9–5008 Filed 3–5–09; 11:15 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL74

Prevailing Rate Systems; Abolishment of Santa Clara, CA, as a Nonappropriated Fund Federal Wage System Wage Area

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management is issuing a final rule to abolish the Santa Clara, California, nonappropriated fund (NAF) Federal Wage System (FWS) wage area and redefine Santa Clara County, CA, to the Monterey, CA, NAF wage area and Alameda, Contra Costa, and San Francisco Counties, CA, to the Solano, CA, NAF wage area. San Mateo County, CA, will no longer be defined to a wage area. These changes are necessary because the closure of the Moffett Federal Airfield Navy Exchange left the Santa Clara wage area without an activity having the capability to conduct a local wage survey.

DATES: *Effective date:* This regulation is effective on March 9, 2009. *Applicability date:* This regulation applies on the first day of the first applicable pay period beginning on or after November 15, 2008.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: On November 4, 2008, the U.S. Office of Personnel Management (OPM) issued an interim rule (73 FR 65495) to abolish the Santa Clara, California, nonappropriated fund (NAF) Federal Wage System wage area, redefine Santa Clara County, CA, to the Monterey, CA, NAF wage area and Alameda, Contra Costa, and San Francisco Counties, CA, to the Solano, CA, NAF wage area, and remove San Mateo County, CA, from the wage area definition. The interim rule had a 30-day public comment period, during which OPM received no comments.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Kathie Ann Whipple,

Acting Director.

■ Accordingly, under the authority of 5 U.S.C. 5343, the interim rule published on November 4, 2008, amending 5 CFR part 532 (73 FR 65495) is adopted as final with no changes.

[FR Doc. E9–4925 Filed 3–6–09; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Doc. No. AMS–FV–08–0114; FV09–989–1 IFR]

Raisins Produced From Grapes Grown in California; Final Free and Reserve Percentages for 2008–09 Crop Natural (Sun-Dried) Seedless Raisins

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule establishes final volume regulation percentages for 2008–09 crop Natural (sun-dried) Seedless (NS) raisins covered under the Federal marketing order for California raisins (order). The order regulates the handling of raisins produced from grapes grown in California and is locally administered by the Raisin Administrative Committee (Committee). The volume regulation percentages are 87 percent free and 13

percent reserve. The percentages are intended to help stabilize raisin supplies and prices, and strengthen market conditions.

DATES: Effective March 10, 2009. The volume regulation percentages apply to acquisitions of NS raisins from the 2008–09 crop until the reserve raisins from that crop are disposed of under the marketing order. Comments received by May 8, 2009, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Fax:* (202) 720–8938; or *Internet: http://www.regulations.gov*. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Rose M. Aguayo, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (559) 487–5901; *Fax:* (559) 487–5906; or *E-mail: Rose.Aguayo@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491; *Fax:* (202) 720–8938; or *E-mail: Jay.Guerber@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 989, both as amended (7 CFR part 989), regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the order provisions now in effect, final free and reserve percentages may be established for raisins acquired by handlers during the crop year. This rule establishes final free and reserve percentages for NS raisins for the 2008–09 crop year, which began August 1, 2008, and ends July 31, 2009. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule establishes final volume regulation percentages for the 2008–09 crop year for NS raisins covered under the order. The volume regulation percentages are 87 percent free and 13 percent reserve. Free tonnage raisins may be sold by handlers to any market. Reserve raisins must be held in a pool for the account of the Committee and are disposed of through various programs authorized under the order. For example, reserve raisins may be sold by the Committee to handlers for free use or to replace part of the free tonnage raisins they exported; used in diversion programs; carried over as a hedge against a short crop; or disposed of in other outlets not competitive with those for free tonnage raisins, such as government purchase, distilleries, or animal feed.

The volume regulation percentages are intended to help stabilize raisin supplies and prices, and strengthen market conditions. The Committee unanimously recommended final percentages for NS raisins on December 18, 2008.

Computation of Trade Demand

Section 989.54 of the order prescribes procedures and time frames to be followed in establishing volume regulation. This includes methodology used to calculate free and reserve percentages. Pursuant to § 989.54(a) of the order, the Committee met on August 15, 2008, to review shipment and inventory data, and other matters relating to the supplies of raisins of all varietal types. The Committee computed a trade demand for each varietal type for which a free tonnage percentage might be recommended. Trade demand is computed using a formula specified in the order and, for each varietal type, is equal to 90 percent of the prior year's shipments of free tonnage and reserve tonnage raisins sold for free use into all market outlets, adjusted by subtracting the carryin on August 1 of the current crop year, and adding the desirable carryout at the end of that crop year. As specified in § 989.154(a), the desirable carryout for NS raisins shall equal the total shipments of free tonnage during August and September for each of the past 5 crop years, converted to a natural condition basis, dropping the high and low figures, and dividing the remaining sum by three, or 60,000 natural condition tons, whichever is higher. For all other varietal types, the desirable carryout shall equal the total shipments of free tonnage during August, September and one-half of October for each of the past 5 crop years, converted to a natural condition basis, dropping the high and low figures, and dividing the remaining sum by three. In accordance with these provisions, the Committee computed and announced the 2008–09 trade demand for NS raisins at 273,863 tons as shown below.

COMPUTED TRADE DEMAND

[Natural condition tons]

	NS Raisins
Prior year's shipments	355,680
Multiplied by 90 percent	0.90
Equals adjusted base	320,112
Minus carryin inventory	106,249
Plus desirable carryout	60,000
Equals computed NS trade Demand	273,863

Computation of Volume Regulation Percentages

Section 989.54(b) of the order requires that the Committee announce, on or before October 5, preliminary crop estimates and determine whether volume regulation is warranted for the varietal types for which it computed a trade demand. That section allows the

Committee to extend the October 5 date up to 5 business days if warranted by a late crop. If the Committee determines that volume regulation is warranted, it must also compute and announce preliminary free and reserve percentages. Section 989.54(c) provides that the Committee may modify the preliminary free and reserve percentages prior to February 15 by announcing interim percentages which release less than the trade demand. Section 989.54(d) requires the Committee to recommend final percentages no later than February 15 which will tend to release the full trade demand. Final percentages are established by USDA through informal rulemaking.

The Committee met on October 9, 2008, and announced a 2008–09 crop estimate of 300,000 tons for NS raisins pursuant to § 989.54(b). NS raisins are the major varietal type of California raisin. The crop estimate of 300,000 tons was higher than the computed trade demand of 273,863 tons. Thus, it was determined that volume regulation for NS raisins was warranted. Preliminary volume regulation percentages computed to 78 percent free and 22 percent reserve to release 85 percent of the computed trade demand.

Pursuant to § 989.54(c), at its December 18, 2008, meeting, the Committee announced a revised crop estimate of 313,231 tons of NS raisins (up from the October estimate of 300,000 tons). The Committee announced interim volume regulation percentages for NS raisins to release slightly less than the full trade demand at 86.75 percent free and 13.25 percent reserve and recommended final volume regulation percentages of 87 percent free and 13 percent reserve pursuant to § 989.54(d). The Committee's calculations and determinations to arrive at final percentages for NS raisins are shown in the table below:

FINAL VOLUME REGULATION PERCENTAGES

[Natural condition tons]

	NS Raisins
Trade demand	273,863
Divided by crop estimate	313,231
Equals the free percentage	87.00
100 minus free percentage equals the reserve percentage	13.00

USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (Guidelines) specify that 110 percent of recent years' sales should be made available to primary markets each season for marketing orders utilizing reserve pool authority. This goal is expected to be met for NS raisins for the 2008–09 crop year. Application of the final percentages will make 273,863 tons of raisins available to handlers if the crop estimate is realized. In addition, handlers will be offered additional reserve raisins for sale under the ''10 plus 10 offers.'' As specified in § 989.54(g), the 10 plus 10 offers are two offers of reserve pool raisins which are made available to handlers during each season. For each such offer, a quantity of reserve raisins equal to 10 percent of the prior year's shipments is made available to handlers for free use. Handlers may sell their 10 plus 10 raisins to any market.

Based on 2007–08 NS shipments of 355,680 natural condition tons, 71,136 tons should be made available in the 10 plus 10 offers. However, based on the 313,231-ton crop estimate and the 273,863-ton trade demand, only 39,368 tons of 2008–09 reserve raisins would be available. There is no tonnage available from prior pools. Thus, all available reserve pool raisins should be offered to handlers for free use through the 10 plus 10 offers. Raisins that are not purchased by handlers through the 10 plus 10 offers may be used for other programs authorized under the order.

In addition to the 10 plus 10 offers, § 989.67(j) of the order provides authority for sales of reserve raisins to handlers under certain conditions such as a national emergency, crop failure, change in economic or marketing conditions, or if free tonnage shipments in the current crop year exceed shipments during a comparable period of the prior crop year. Pursuant to § 989.67(j), 643 tons of 2007–08 reserve raisins were sold to handlers in August 2008.

Adding the estimated figure of 39,368 tons of 10 plus 10 raisins to the 273,863-ton trade demand, plus 106,249 tons of carryin inventory, plus 643 tons of reserve raisins sold pursuant to § 989.67(j) results in a total supply of 420,123 tons of natural condition raisins, or 397,054 packed tons. This equates to 118 percent of the 2007–08 shipments of 355,680 natural condition tons or 336,150 packed tons.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 18 handlers of California raisins who are subject to regulation under the order and approximately 3,000 raisin producers in the regulated area. Small agricultural firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. No more than 7 handlers and a majority of producers of California raisins may be classified as small entities.

Since 1949, the California raisin industry has operated under a Federal marketing order. The order contains authority to, among other things, limit the portion of a given year's crop that can be marketed freely in any outlet by raisin handlers. This volume regulation mechanism is used to stabilize supplies and prices and strengthen market conditions. If the primary market (the normal domestic market) is oversupplied with raisins, grower prices decline substantially.

Pursuant to § 989.54(d) of the order, this rule establishes final volume regulation percentages for the 2008–09 crop year for NS raisins. The volume regulation percentages are 87 percent free and 13 percent reserve. Free tonnage raisins may be sold by handlers to any market. Reserve raisins must be held in a pool for the account of the Committee and are disposed of through certain programs authorized under the order. Volume regulation is warranted this season because the crop estimate of 313,231 tons is significantly higher than the 273,863 ton trade demand.

The volume regulation procedures have helped the industry address its marketing problems by keeping supplies in balance with domestic and export market needs, and strengthening market conditions. The volume regulation procedures fully supply the domestic and export markets, provide for market expansion, and help reduce the burden of oversupplies in the domestic market.

Raisin grapes are a perennial crop, so production in any year is dependent upon plantings made in earlier years. The sun-drying method of producing raisins involves considerable risk because of variable weather patterns.

Even though the product and the industry are viewed as mature, the industry has experienced considerable change over the last several decades. Before the 1975–76 crop year, more than 50 percent of the raisins were packed and sold directly to consumers. Now, about 62 percent of raisins are sold in bulk. This means that raisins are now sold to consumers mostly as an ingredient in another product such as cereal and baked goods. In addition, for a few years in the early 1970's, over 50 percent of the raisin grapes were sold to the wine market for crushing. Since then, the percent of raisin-variety grapes sold to the wine industry has decreased.

California's grapes are classified into three groups—table grapes, wine grapes, and raisin-variety grapes. Raisin-variety grapes are the most versatile of the three types. They can be marketed as fresh grapes, crushed for juice in the production of wine or juice concentrate, or dried into raisins. Annual fluctuations in the fresh grape, wine, and concentrate markets, as well as weather-related factors, cause fluctuations in raisin supply. This type of situation introduces a certain amount of variability into the raisin market. Although the size of the crop for raisin-variety grapes may be known, the amount dried for raisins depends on the demand for crushing. This makes the marketing of raisins a more difficult task. These supply fluctuations can result in producer price instability and disorderly market conditions.

Volume regulation is helpful to the raisin industry because it lessens the impact of such fluctuations and contributes to orderly marketing. For example, producer prices for NS raisins remained fairly steady between the 1993–94 through the 1997–98 crop years, although production varied. As shown in the table below, during those years, production varied from a low of 272,063 tons in 1996–97 to a high of 387,007 tons in 1993–94.

According to Committee data, the total producer return per ton during those years, which includes proceeds from both free tonnage plus reserve pool raisins, has varied from a low of $904.60 in 1993–94 to a high of $1,049.20 in 1996–97. Producer prices for the 1998–99 and 1999–2000 crop years increased significantly due to back-to-back short crops during those years. Record large crops followed and producer prices dropped dramatically for the 2000–01 through 2003–04 crop years, as inventories grew while demand stagnated. However, as noted below, producer prices were higher for the 2004–05 through the 2007–08 crop years:

NATURAL SEEDLESS (NATURAL CONDITION) DELIVERIES, FIELD PRICES AND PRODUCER PRICES

Crop year	Deliveries (tons)	Field prices (per ton) [1]	Producer prices (per ton)
2007–08	329,288	$1,210.00	[1] $1,028.50
2006–07	282,999	1,210.00	[2] 1,089.00
2005–06	319,126	1,210.00	[2] 998.25
2004–05	265,262	1,210.00	[3] 1,210.00
2003–04	296,864	810.00	567.00
2002–03	388,010	745.00	491.20
2001–02	377,328	880.00	650.94
2000–01	432,616	877.50	603.36
1999–2000	299,910	1,425.00	1,211.25
1998–99	240,469	1,290.00	[3] 1,290.00
1997–98	382,448	1,250.00	946.52
1996–97	272,063	1,220.00	1,049.20
1995–96	325,911	1,160.00	1,007.19
1994–95	378,427	1,160.00	928.27
1993–94	387,007	1,155.00	904.60

[1] Field prices for NS raisins are established by the Raisin Bargaining Association, and are also referred to in the industry as the free tonnage price for raisins.
[2] Return-to-date, reserve pool still open.
[3] No volume regulation.

There are essentially two broad markets for raisins—domestic and export. Domestic shipments generally increased over the years. Although domestic shipments decreased from a high of 204,805 packed tons during the 1990–91 crop year to a low of 156,325 packed tons in 1999–2000 crop year, they increased from 174,117 packed tons during the 2000–01 crop year to 193,609 packed tons during the 2007–08 crop year. Export shipments ranged from a high of 107,931 packed tons in 1991–92 crop year to a low of 91,599 packed tons in the 1999–2000 crop year. Since that time, export shipments increased to 106,755 tons of raisins during the 2004–05 crop year, fell to 101,684 tons in 2006–07 crop year, and again increased to 142,541 tons in 2007–08 crop year. This significant increase was due to a short crop in Turkey.

The per capita consumption of raisins has declined from 2.07 pounds in 1988 to 1.51 pounds in 2006. This decrease is consistent with the decrease in the per capita consumption of dried fruits in general, which is due to the increasing availability of most types of fresh fruit throughout the year.

While the overall demand for raisins has increased in four of the last five years (as reflected in increased commercial shipments), production has been decreasing. Deliveries of NS dried raisins from producers to handlers reached an all-time high of 432,616 tons in the 2000–01 crop year. This large crop was preceded by two short crop years; deliveries were 240,469 tons in 1998–99 crop year and 299,910 tons in 1999–2000 crop year. Deliveries for the 2000–01 crop year soared to a record level because of increased bearing acreage and yields. Deliveries for the 2001–02 crop year were at 377,328 tons, 388,010 tons for the 2002–03 crop year, 296,864 for the 2003–04 crop year, and 265,262 tons for the 2004–05 crop year. After three crop years of high production and a large 2001–02 carryin inventory, the industry diverted raisin production to other uses or removed bearing vines. Diversions/removals totaled 38,000 acres in 2001; 27,000 acres in 2002; and 8,000 acres of vines in 2003. These actions resulted in declining deliveries of 296,864 tons for the 2003–04 crop year and 265,262 tons for the 2004–05 crop year. Although deliveries increased in 2005–06 crop

year to 319,126 tons, this may have been because fewer growers opted to contract with wineries, as raisin variety grapes crushed in 2005–06 crop year decreased by 161,000 green tons, the equivalent of over 40,000 tons of raisins. In the 2006–07 crop year, raisin deliveries were again less than 300,000 tons at 282,999 tons and increased to 329,288 tons in 2007–08 crop year. The 2007–08 crop year was considered to be a good crop and the quality of the crop has a direct bearing on the overall production.

The order permits the industry to exercise volume regulation provisions, which allow for the establishment of free and reserve percentages, and establishment of a reserve pool. One of the primary purposes of establishing free and reserve percentages is to balance supply and demand. If raisin markets are over-supplied with product, producer prices will decline.

Raisins are generally marketed at relatively lower price levels in the more elastic export market than in the more inelastic domestic market. This results in a larger volume of raisins being marketed and enhances producer returns. In addition, this system allows the U.S. raisin industry to be more competitive in export markets.

The reserve percentage limits what handlers can market as free tonnage. Based on the 2008–09 crop year estimate of 313,231 tons, the 13 percent reserve would limit the total free tonnage to 273,863 natural condition tons (.87 × the 313,231 ton crop). Adding the 273,863 ton figure to the carryin of 106,249 tons, plus 39,368 tons of 2008–09 crop year reserve raisins anticipated for sale to handlers during the 2008–09 crop year under the 10 plus 10 offers, and 643 tons of 2007–08 crop year reserve raisins available to handlers in the 2008–09 crop year results in a total free supply of 420,123 natural condition tons.

With volume regulation, producer prices are expected to be higher than without volume regulation. This price increase is beneficial to all producers regardless of size and enhances producers' total revenues in comparison to no volume regulation. Establishing a reserve allows the industry to help stabilize supplies in both domestic and export markets, while improving returns to producers.

Free and reserve percentages are established by varietal type, and usually in years when the supply exceeds the trade demand by a large enough margin that the Committee believes volume regulation is necessary to maintain market stability. Accordingly, in assessing whether to apply volume regulation or, as an alternative, not to apply such regulation, it was determined that volume regulation is warranted this season for only one of the nine raisin varietal types defined under the order.

The free and reserve percentages established by this rule release the full trade demand and apply uniformly to all handlers in the industry, regardless of size. For NS raisins, with the exception of the 1998–99 and 2004–05 crop years, small and large raisin producers and handlers have been operating under volume regulation percentages every year since the 1983–84 crop year. There are no known additional costs incurred by small handlers that are not incurred by large handlers. While the level of benefits of this rulemaking are difficult to quantify, the stabilizing effects of the volume regulations impact small and large handlers positively by helping them maintain and expand markets even though raisin supplies fluctuate widely from season to season. Likewise, price stability positively impacts small and large producers by allowing them to better anticipate the revenues their raisins will generate.

There are some reporting, recordkeeping and other compliance requirements under the order. The reporting and recordkeeping requirements are necessary for compliance purposes and for developing statistical data for maintenance of the program. The requirements are the same as those applied in past seasons. Thus, this action imposes no additional reporting or recordkeeping requirements on either small or large raisin handlers. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. The information collection and recordkeeping requirements have been previously approved by the Office of Management and Budget (OMB) under OMB Control No. 0581–0178, Vegetable and Specialty Crops. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the Committee's meetings were widely publicized throughout the raisin industry and all interested persons were invited to attend the meetings and participate in the Committee's deliberations. Like all Committee meetings, the August 15, 2008, October 9, 2008, and December 18, 2008, meetings were public meetings and all entities, both large and small, were able to express their views on this issue.

Also, the Committee has a number of appointed subcommittees to review certain issues and make recommendations to the Committee. The Committee's Reserve Sales and Marketing Subcommittee met on August 15, 2008, October 9, 2008, and December 18 2008, and discussed these issues in detail. Those meetings were also public meetings and both large and small entities were able to participate and express their views. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on the establishment of final volume regulation percentages for the 2008–09 crop year for NS raisins covered under the order. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The relevant provisions of this part require that the percentages

designated herein for the 2008–09 crop year apply to all NS raisins acquired during the crop year; (2) handlers are aware of this action, which was unanimously recommended at a public meeting, and need no additional time to comply with these percentages; and (3) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 989 is amended to read as followed:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 989.257 is revised to read as follows:

§ 989.257 Final free and reserve percentages.

(a) The final percentages for the respective varietal type(s) of raisins acquired by handlers during the crop year beginning August 1, which shall be free tonnage and reserve tonnage, respectively, are designated as follows:

Crop year	Varietal type	Free percentage	Reserve percentage
2003–04	Natural (sun-dried) Seedless	70	30
2005–06	Natural (sun-dried) Seedless	82.50	17.50
2006–07	Natural (sun-dried) Seedless	90	10
2007–08	Natural (sun-dried) Seedless	85	15
2008–09	Natural (sun-dried) Seedless	87	13

(b) The volume regulation percentages apply to acquisitions of the varietal type of raisins for the applicable crop year until the reserve raisins for that crop are disposed of under the marketing order.

Dated: March 3, 2009.

Robert C. Keeney,

Acting Associate Administrator.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0063]

RIN 1625–AA00

Safety Zone; Coast Guard Air Station San Francisco Airborne Use of Force Judgmental Training Flights

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the navigable waters of the San Pablo Bay, CA for training purposes. This safety zone is established to ensure the safety of the public and participating crews from potential hazards associated with fast-moving Coast Guard smallboats taking part in the exercise. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission of the Captain of the Port San Francisco or his designated representative.

DATES: This safety zone is effective from 9 a.m. on February 10, 2009, until 10 p.m. on March 20, 2009.

ADDRESSES: Comments and materials received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket USCG–2009–0063 and are available online at *http://www.regulations.gov*, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0063 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and Coast Guard Sector San Francisco, 1 Yerba Buena Island, San Francisco, California 94130, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Junior Grade Megan Clifford, U.S. Coast Guard Sector San Francisco, at (415) 399–7436. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

Due to the dynamic availability of Coast Guard assets to conduct this training, the Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section (a)(1) of the Administrative Procedure Act (APA) (5 U.S.C. 553). This provision creates a military function exception to the advance publication requirements. Because of the potential hazards posed by this exercise, the safety zone is necessary to provide for the safety of the public, participating vessels and crews, and other vessels transiting the area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event.

Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay in the effective date of this rule would expose mariners to the potential hazards posed by the exercises. For the same reasons as above, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Background and Purpose

U.S. Coast Guard Air Station San Francisco will be conducting airborne use of force judgmental training flights with observers from the Coast Guard Aviation Training Center and Coast Guard Headquarters, on February 10, and March 5 through 20, 2009 (excluding Saturdays and Sundays), in the waters of San Pablo Bay. The exercises are designed to train and test Coast Guard aviation personnel in the judgmental decision-making process necessary to safely and effectively employ use of force from a helicopter

during homeland security incidents. The training will generally involve the use of Coast Guard helicopters to intercept fast-moving, evasive smallboats on the water. The helicopter crews will fire weapons at the smallboats using blank ammunition and catch bags to ensure that cartridges and other debris do not fall to the water. This safety zone is issued to establish a temporary restricted area in San Pablo Bay around the training site.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone in the navigable waters of San Pablo Bay. During the exercises the safety zone applies to the navigable waters, from the surface to the seafloor, defined by enclosing an area between the following points: 38°05′11″ N, 122°22′10″ W; 38°03′44″ N, 122°20′12″ W; 38°00′41″ N, 122°25′28″ W; and 38°01′45″ N, 122°26′38″ W (NAD 83).

The effect of the temporary safety zone will be to restrict navigation in the vicinity of the exercise.

Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the restricted area. These regulations are intended to keep the public a safe distance away from the participating smallboats and to ensure the safety of transiting vessels.

Regulatory Analyses

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

Regulatory Planning and Review

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

Although this rule restricts access to the waters encompassed by the safety zone, the effect of the rule will not be significant because the safety zone is in an area of San Pablo Bay not heavily used by commercial traffic and because local waterway users will be notified via Broadcast Notice to Mariners to ensure minimum impact. The entities most likely to be affected are pleasure craft engaged in recreational activities.

Small Entities

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

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

This rule may affect owners and operators of pleasure craft engaged in recreational activities and sightseeing. This rule will not have a significant economic impact on a substantial number of small entities for several reasons: (i) Vessel traffic can pass safely around the area, (ii) vessels engaged in recreational activities and sightseeing have ample space outside of the effected portion of the San Pablo Bay to engage in these activities, (iii) this rule will encompass only a small portion of the waterway for limited periods of time, and (iv) the maritime public will be advised in advance of and during the enforcement of this safety zone via Broadcast Notice to Mariners.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded under the Instruction that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because this temporary rule establishes a safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165–T11–149 to read as follows:

§ 165–T11–149 Safety Zone; Coast Guard Air Station San Francisco Airborne Use of Force Judgmental Training Flights.

(a) *Location.* This temporary safety zone is established for the navigable waters of the San Pablo Bay, from the surface to the seafloor, defined by enclosing an area between the following points: 38°05′11″ N, 122°22′10″ W; 38°03′44″ N, 122°20′12″ W; 38°00′41″ N, 122°25′28″ W; and 38°01′45″ N, 122°26′38″ W (NAD 83).

(b) *Definitions.* As used in this section, ''Designated representative'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel or a Federal, State, or local officer assisting the Captain of the Port (COTP) San Francisco in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general regulations in § 165.23 of this title, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or the COTP's designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the COTP's designated representative. Persons and vessels may request permission to enter the safety zone by contacting the Patrol Commander on VHF–16 or through the Coast Guard Command Center at telephone (415) 399–3547.

(d) *Enforcement period.* This temporary rule will be enforced from 9 a.m. to 5 p.m. on February 10, 2009, and from 10 a.m. to 10 p.m. on March 5–6, 9–13, and 16–20, 2009.

Dated: February 9, 2009.

P.M. Gugg,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco.

[FR Doc. E9–4894 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[R08–WY–2008–0001; FRL–8770–2]

New Source Performance Standards; Supplemental Delegation of Authority to the State of Wyoming

AGENCY: Environmental Protection Agency (EPA).

ACTION: Delegation of authority; technical amendment.

SUMMARY: The Wyoming Department of Environmental Quality submitted a request for an updated delegation of authority to implement and enforce the Federal New Source Performance Standards, including one new standard not previously delegated. EPA's review of Wyoming's updated regulations determined that they contain adequate and effective procedures for the implementation and enforcement of these Federal standards. This action informs the public of the updated delegation to Wyoming.

EPA is also making a technical amendment to update the list of subparts delegated to Wyoming.

DATES: This technical amendment is effective on March 9, 2009. The delegation of authority to Wyoming became effective on November 26, 2008.

ADDRESSES: Copies of documents relevant to this action are available for public inspection at the Environmental Protection Agency (EPA), Region 8, Air Program, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the materials. You may view the hard copy of the materials Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Amy Platt, EPA Region 8, at (303) 312–6449, or *Platt.Amy@epa.gov*.

SUPPLEMENTARY INFORMATION: For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The words *State* or *WY* mean the State of Wyoming, unless the context indicates otherwise.

(iv) The initials *WDEQ* mean the Wyoming Department of Environmental Quality.

(v) The initials *NSPS* mean the Federal New Source Performance Standards, as codified in 40 CFR part 60.

I. Delegation of Authority

Sections 110, 111(c)(1), and 301 of the Clean Air Act (CAA), as amended, authorize EPA to delegate authority to any state agency which submits adequate regulatory procedures for implementation and enforcement of the New Source Performance Standards (NSPS). The NSPS are codified in 40 CFR part 60. Delegation confers primary responsibility for implementation and enforcement of the listed NSPS to the respective state agency; however, EPA also retains the concurrent authority to enforce the standards.

With a June 13, 2008 letter, the Director of the Wyoming Department of Environmental Quality (WDEQ) requested delegation of authority for revisions to the New Source Performance Standards (NSPS), promulgated in Chapter 5, National Emission Standards, Section 2, *New source performance standards*, of the Wyoming Air Quality Standards and Regulations. For the most part, the revisions simply update the date for incorporation by reference of the Federal NSPS to those promulgated in 40 CFR part 60 as published on July 1, 2006. EPA's review of the pertinent regulations determined that they contain adequate and effective procedures for the implementation and enforcement of these Federal standards. Therefore, on November 26, 2008, delegation was given to Wyoming with the following letter:

Ref: 8P–AR

John V. Corra, Director, Wyoming Department of Environmental Quality, 122 West 25th Street, Cheyenne, WY 82002.

Re: Delegation of Clean Air Act New Source Performance Standards

Dear Mr. Corra: With your June 13, 2008 letter, the State of Wyoming submitted revisions to its Air Quality Standards and Regulations and requested, among other things, direct delegation to implement and enforce the Federal New Source Performance Standards (NSPS). Specifically, Wyoming Air Quality Standards and Regulations, Chapter 5, National Emission Standards, Section 2, *New source performance standards*, was revised, and a new Section 4, *Incorporation by reference*, was created to update the citation for the incorporated Federal NSPS in 40 CFR Part 60 as published on July 1, 2006, and to make minor administrative revisions.

Subsequent to States adopting NSPS regulations, EPA delegates the authority for the implementation and enforcement of those NSPS, so long as the States' regulations are equivalent to the Federal regulations. EPA reviewed the pertinent statutes and regulations of the State of Wyoming and determined that they provide an adequate and effective procedure for the implementation and enforcement of the NSPS by the State. Therefore, pursuant to Section 111(c) of the Clean Air Act (Act), as amended, and 40 CFR Part 60, EPA hereby delegates its authority for the implementation and enforcement of the NSPS to the State of Wyoming as follows:

(A) Responsibility for all sources located, or to be located, in the State of Wyoming subject to the standards of performance for new stationary sources promulgated in 40 CFR Part 60. The categories of new stationary sources covered by this delegation are all NSPS subparts in 40 CFR Part 60, as published on July 1, 2006. *Note this delegation does not include the emission guidelines in subparts Cb, Cc, Cd, Ce, BBBB, DDDD, FFFF, and HHHH. These subparts require state plans, which are approved under a separate process pursuant to Section 111(d) of the Act.*

(B) Not all authorities of NSPS can be delegated to States under Section 111(c) of the Act, as amended. The EPA Administrator retains authority to implement those sections of the NSPS that require: (1) Approving equivalency determinations and alternative test methods, (2) decision-making to ensure national consistency, and (3) EPA rulemaking in order to implement. Enclosed with this letter is a list of examples of sections in 40 CFR Part 60 related to the NSPS being delegated in this letter that cannot be delegated to the State of Wyoming. Please note that the enclosed list has been updated since our November 9, 2006 delegation of authority to implement and enforce the NSPS to the State of Wyoming.

(C) The Wyoming Department of Environmental Quality (WDEQ) and EPA will continue a system of communication sufficient to guarantee that each office is always kept informed and current regarding compliance status of the subject sources and interpretation of the regulations.

(D) Enforcement of the NSPS in the State will be the primary responsibility of the WDEQ. If the WDEQ determines that such enforcement is not feasible and so notifies EPA, or where the WDEQ acts in a manner inconsistent with the terms of this delegation, EPA may exercise its concurrent enforcement authority pursuant to section 113 of the Act, as amended, with respect to sources within the State of Wyoming subject to NSPS.

(E) The State of Wyoming will at no time grant a variance or waiver from compliance with NSPS regulations. Should WYDEQ grant such a variance or waiver, EPA will consider the source receiving such relief to be in violation of the applicable Federal regulation and initiate enforcement action against the source pursuant to section 113 of the Act. The granting of such relief by the WYDEQ shall also constitute grounds for revocation of the delegation by EPA.

(F) If at any time there is a conflict between a State regulation and a Federal regulation (40 CFR Part 60), the Federal regulation must be applied if it is more stringent than that of the State. If the State does not have the authority to enforce the more stringent Federal regulation, this portion of the delegation may be revoked.

(G) If the Regional Administrator determines that a State procedure for enforcing or implementing the NSPS is inadequate, or is not being effectively carried out, this delegation may be revoked in whole or part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the WDEQ.

(H) Acceptance of this delegation of presently promulgated NSPS does not commit the State of Wyoming to accept delegation of future standards and requirements. A new request for delegation will be required for any standards not included in the State's June 13, 2008 letter.

(I) Upon approval of the Regional Administrator of EPA Region 8, the Director of WDEQ may sub-delegate his authority to implement and enforce the NSPS to local air pollution control authorities in the State when such authorities have demonstrated that they have equivalent or more stringent programs in force.

(J) The State of Wyoming must require reporting of all excess emissions from any NSPS source in accordance with 40 CFR Part 60.7(c).

(K) Performance tests shall be scheduled and conducted in accordance with the procedures set forth in 40 CFR Part 60 unless alternate methods or procedures are approved by the EPA Administrator. Although the Administrator retains the exclusive right to approve equivalent and alternate test methods as specified in 40 CFR Part 60.8(b)(2) and (3), the State may approve minor changes in methodology provided these changes are reported to EPA Region 8. The Administrator also retains the right to change the opacity standard as specified in 40 CFR Part 60.11(e).

(L) Determinations of applicability, such as those specified in 40 CFR Part 60.5 and review of plans, as provided for in 40 CFR Part 60.6, shall be consistent with those determinations already made and reviews conducted by the EPA.

(M) Alternatives to continuous monitoring procedures or reporting requirements, as outlined in 40 CFR Part 60.13(i), may be approved by the State only if the specific NSPS grants that authority. Otherwise, EPA retains the authority to review and approve such alternatives.

(N) If a source proposes to modify its operation or facility which may cause the source to be subject to NSPS requirements, the State shall notify EPA Region 8 and obtain a determination on the applicability of the NSPS regulations.

(O) Information shall be made available to the public in accordance with 40 CFR Part 60.9. Any records, reports, or information provided to, or otherwise obtained by, the

State in accordance with the provisions of these regulations shall be made available to the designated representatives of EPA upon request.

(P) All reports required pursuant to the delegated NSPS should not be submitted to the EPA Region 8 office, but rather to the WDEQ.

(Q) As 40 CFR Part 60 is updated, Wyoming should revise its regulations accordingly and in a timely manner and submit to EPA requests for updates to its delegation of authority.

EPA is approving Wyoming's request for NSPS delegation for all areas within the State except for the following: Lands within the exterior boundaries of the Wind River Indian Reservation; any lands held in trust by the United States for an Indian tribe; and any other areas which are ''Indian Country'' as defined in 18 U.S.C. 1151.

Since this delegation is effective immediately, there is no need for the State to notify the EPA of its acceptance. Unless we receive written notice of objections from you within ten days of the date on which you receive this letter, the State of Wyoming will be deemed to accept all the terms of this delegation. To inform the public of this delegation, EPA will publish an information notice in the **Federal Register** in which this letter will appear in its entirety.

EPA would like to take this opportunity to advise the State of Wyoming regarding some inconsistencies between its NSPS program and the Federal regulations. Although these inconsistencies have not been problematic from a practical standpoint, it would be best to clarify the language for future purposes to avoid any misinterpretations. Specifically, the State of Wyoming should revise the applicability provision (Chapter 5, Section 2(d)) and the definition of ''existing facility'' (Chapter 5, Section 2(e)(i)) so that the language is consistent with the language in the Federal requirements. The Federal regulations state that an ''affected facility'' and ''existing facility'' are determined based on the time a standard is proposed rather than the standard's effective date (see 40 CFR 60.1(a), 60.2). The State should modify the current Wyoming applicability section, which refers to ''construction or modification of which is commenced after the *effective date*'' to be consistent with the Federal applicability wording, which refers to ''the construction or modification of which is commenced after * * * the *date of publication of any proposed standard* applicable to that facility.'' Further, the current Wyoming definition of ''existing facility,'' which refers to ''construction or modification of which commenced before the *effective date*,'' should be revised to mirror the Federal definition, which refers to ''construction or modification of which commenced before the *proposed date*.'' EPA requests that the State of Wyoming provide confirmation that it intends to make these modifications in an upcoming rulemaking.

If you have any questions on this matter, please contact me at (303) 312–6241 or Callie Videtich, Director of our Air Program, at (303) 312–6434, or toll-free at 1–800–227–8917.

Sincerely,

Stephen S. Tuber

Assistant Regional Administrator,

Office of Partnerships and Regulatory Assistance.

Enclosure

cc: Christine Anderson, WY Air Quality Division

Enclosure to Letter Delegating NSPS in 40 CFR Part 60, Effective Through July 1, 2006, to the State of Wyoming

EXAMPLES OF AUTHORITIES IN 40 CFR PART 60 WHICH CANNOT BE DELEGATED

40 CFR subparts	Section(s)
A	60.8(b)(2) and (b)(3), and those sections throughout the standards that reference 60.8(b)(2) and (b)(3); 60.11(b) and (e); and 60.13(i).
Da	60.47Da.
Db	60.44b(f), 60.44b(g) and 60.49b(a)(4).
Dc	60.48c(a)(4).
Ec	60.56c(i), 60.8.
J	60.105(a)(13)(iii) and 60.106(i)(12).
Ka	60.114a.
Kb	60.111b(f)(4), 60.114b, 60.116b(e)(3)(iii), 60.116b(e)(3)(iv), and 60.116b(f)(2)(iii).
O	60.153(e).
DD	60.302(d)(3).
GG	60.332(a)(4) and 60.335(b)(10)(ii).
VV	60.482–1(c)(2) and 60.484.
WW	60.493(b)(2)(i)(A) and 60.496(a)(1).
XX	60.502(e)(6).
AAA	60.531, 60.533, 60.534, 60.535, 60.536(i)(2), 60.537, 60.538(e), and 60.539.
BBB	60.543(c)(2)(ii)(B).
DDD	60.562–2(c).
GGG	60.592(c).
III	60.613(e).
JJJ	60.623.
KKK	60.634.
NNN	60.663(f).
QQQ	60.694.
RRR	60.703(e).
SSS	60.711(a)(16), 60.713(b)(1)(i) and (ii), 60.713(b)(5)(i), 60.713(d), 60.715(a) and 60.716.
TTT	60.723(b)(1), 60.723(b)(2)(i)(C), 60.723(b)(2)(iv), 60.724(e) and 60.725(b).
VVV	60.743(a)(3)(v)(A) and (B), 60.743(e), 60.745(a) and 60.746.
WWW	60.754(a)(5).
CCCC	60.2030(c)(1) through (7).
EEEE	60.2889(b)(1) through (6).

II. Region 8 States Delegation Status

In 40 CFR 60.4, we publish a table for Region 8 states that identifies the NSPS subparts for which EPA has delegated authority to implement and enforce to each state. In this document, we update that table to reflect the NSPS subparts delegated to Wyoming.

III. Summary of This Action

This action informs the public of an update to the delegation of authority to the State of Wyoming to implement and enforce the Federal New Source Performance Standards as published in 40 CFR part 60 on July 1, 2006. The letter granting delegation to the State of Wyoming is effective November 26, 2008. The letter specified that the

delegation was effective immediately as of the signature date of the letter and that if the State did not agree to the terms of the delegation, they could submit a written Notice of Objection within 10 days of the receipt of the letter, and EPA would withdraw delegation. Wyoming submitted no such Notice of Objection.

IV. Statutory and Executive Order Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In addition, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *May 8, 2009*. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Ammonium sulfate plants, Batteries, Beverages, Carbon monoxide, Cement industry, Chemicals, Coal, Copper, Dry cleaners, Electric power plants, Fertilizers, Fluoride, Gasoline, Glass and glass products, Grains, Graphic arts industry, Heaters, Household appliances, Insulation, Intergovernmental relations, Iron, Labeling, Lead, Lime, Metallic and nonmetallic mineral processing plants, Metals, Motor vehicles, Natural gas, Nitric acid plants, Nitrogen dioxide, Paper and paper products industry, Particulate matter, Paving and roofing materials, Petroleum, Phosphate, Plastics materials and synthetics, Polymers, Reporting and recordkeeping requirements, Sewage disposal, Steel, Sulfur oxides, Sulfuric acid plants, Tires, Urethane, Vinyl, Volatile organic compounds, Waste treatment and disposal, Zinc.

Dated: February 24, 2009.

Carol Rushin,

Acting Regional Administrator, Region 8.

■ 40 CFR part 60 is amended to read as follows:

PART 60—[AMENDED]

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

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

Subpart A—General Provisions

■ 2. In § 60.4, amend the table in paragraph (c) by revising the entry for subpart ''Dc,'' and by adding an entry for subpart ''EEEE'' in alphabetical order to read as follows:

§ 60.4 Address.

* * * * *

(c) * * *

DELEGATION STATUS OF NEW SOURCE PERFORMANCE STANDARDS

[(NSPS) for Region VIII]

Subpart	CO	MT	ND	SD	UT	WY
* * * * *			*		*	
Dc—Industrial-Commercial-Institutional Steam Generators	(*)	(*)	(*)	(*)	(*)	(*)

DELEGATION STATUS OF NEW SOURCE PERFORMANCE STANDARDS—Continued

[(NSPS) for Region VIII]

Subpart	CO	MT	ND	SD	UT	WY
* * * * *			*		*	
EEEE—Other Solid Waste Incineration Units for Which Construction is Commenced After December 9, 2004, or for Which Modification or Reconstruction is Commenced On or After June 16, 2006	.....	.....	.....	.....	.....	(*)
* * * * *			*		*	

(*) Indicates approval of State regulation.

* * * * *

[FR Doc. E9–4794 Filed 3–6–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 00–248; FCC 08–246]

Satellite Licensing Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection requirements associated with Sections 25.115, 25.134, 25.218 and 25.220 of the Commission's rules, and that these rules will take effect as of the date of this notice. On November 24, 2008, the Commission published the summary document of the Report and Order, *The Part 25 Earth Station Streamlining Eight Report and Order*, IB Docket No. 00–248, FCC 08–246, at 73 FR 70897. The Report and Order stated that the Commission will publish a notice in the **Federal Register** announcing when OMB approval for the rule sections which contain information collection requirements has been received and when the revised rules will take effect. This notice is consistent with the statement in the Report and Order.

DATES: Effective March 9, 2009.

FOR FURTHER INFORMATION CONTACT: For additional information, please contact Steven Spaeth, International Bureau, telephone number (202) 418–1539 or via the Internet at *steven.spaeth@fcc.gov*.

SUPPLEMENTARY INFORMATION: This document announces that, on February 27, 2009, OMB approved, for a period of three years, the information collection requirements contained in Sections 25.115, 25.134, 25.218 and 25.220 of the Commission's rules. The Commission publishes this notice to announce the effective date of these rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554. Please include OMB Control Number, 3060–0678, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the Commission is notifying the public that it received OMB approval on February 27, 2009, for the information collection requirements contained in the Commission's rules at 47 CFR Sections 25.115, 25.134, 25.218 and 25.220.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB Control Number.

The OMB Control Number is 3060–0678 and the total annual reporting burdens and costs for respondents are as follows:

OMB Control Numbers: 3060–0678.

OMB Approval Date: February 27, 2009.

Expiration Date: February 29, 2012.

Title: Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Stations and Space Stations.

Form Number: FCC Forms 312 and Schedule S.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities.

Number of Respondents/Responses: 4,112 respondents; 4,112 responses.

Estimated Hours per Response: 0.25–24 hours per response.

Frequency of Response: On occasion and annual reporting requirements; Third party disclosure requirement.

Total Annual Burden: 42,579 hours.

Total Annual Cost: $784,766,976.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 4(i), 7(a), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), and 303(r).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Act Assessment: No impact(s).

Needs and Uses: On October 17, 2008, the Federal Communications Commission (''Commission'') released an Eighth Report and Order and Order on Reconsideration titled, ''In the Matter of 2000 Biennial Regulatory Review—Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations; Streamlining the Commission's Rules and Regulations for Satellite Applications and Licensing Procedures'' (FCC 08–246), IB Docket No. 00–248. In the Eighth Report and Order, the Commission further streamlined the Commission's non-routine earth station processing rules by adopting a new earth station procedure that will enable the Commission to treat more applications routinely than is possible under the current earth station procedures. This rulemaking facilitates the provision of broadband Internet access services.

The PRA information collection requirements contained in the Eighth Report and Order are as follows:

1. The Commission plans to modify the ''Application for Satellite Space and Earth Station Authorizations'' (FCC Form 312), including Schedule B, in the International Bureau Filing System (''MyIBFS'') to reflect the off-axis equivalent isotropically radiated power (EIRP) envelope compliance requirement. In the interim, earth station applicants must submit a table as an attachment to the FCC Form 312 to show their compliance with the off-axis EIRP requirement.

2. Earth station licensees who plan to use a contention protocol must certify that their contention protocol usage will be reasonable. In the future, the Commission will revise the FCC Form 312 in MyIBFS to provide a streamlined method for earth station applicants planning to use a contention protocol to make this certification.

The information collection requirements accounted for in this collection are necessary to determine the technical and legal qualifications of applicants or licensees to operate a station, transfer or assign a license, and to determine whether the authorization is in the public interest, convenience and necessity. Without such information, the Commission could not determine whether to permit respondents to provide telecommunication services in the U.S. Therefore, the Commission would be unable to fulfill its statutory responsibilities in accordance with the Communications Act of 1934, as amended, and the obligations imposed on parties to the World Trade Organization (WTO) Basic Telecom Agreement.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–4905 Filed 3–6–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071004577–8124–02]

RIN 0648–XN46

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Reduction of the Landing Limit for Eastern Georges Bank Cod in the U.S./Canada Management Area

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

ACTION: Temporary rule; reduction of landing limit.

SUMMARY: This action decreases the landing limit of Eastern Georges Bank (GB) cod to 500 lb (226.8 kg) per day-at-sea (DAS), or any part of a DAS, up to 5,000 lb (2,267.9 kg) per trip for NE multispecies DAS vessels fishing in the U.S./Canada Management Area. This action is authorized by the regulations implementing Amendment 13 to the NE Multispecies Fishery Management Plan and is intended to increase the likelihood of harvesting the total allowable catch (TAC) for Eastern GB cod without exceeding it during the 2008 fishing year. This action is being taken to allow vessels to fully harvest the TACs for transboundary stocks of GB cod, haddock, and yellowtail flounder under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Effective March 9, 2009, through April 30, 2009.

FOR FURTHER INFORMATION CONTACT: Douglas Potts, Fishery Policy Analyst, (978) 281–9341, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the GB cod landing limit within the Eastern U.S./Canada Area are found at § 648.85(a)(3)(iv)(A) and (D). The regulations authorize vessels issued a valid limited access NE multispecies permit and fishing under a NE multispecies DAS to fish in the U.S./Canada Management Area, as defined at § 648.85(a)(1), under specific conditions. The TAC for Eastern GB cod for the 2008 fishing year (May 1, 2008 –April 30, 2009) was set at 667 mt (73 FR 16572, March 28, 2008), a 35–percent increase from the TAC for the 2007 fishing year.

The regulations at § 648.85(a)(3)(iv)(D) authorize the Administrator, Northeast (NE) Region, NMFS (Regional Administrator), to increase or decrease the trip limits in the U.S./Canada Management Area to prevent over-harvesting or under-harvesting the TAC allocation. The default landing limit of Eastern GB cod for NE multispecies DAS vessels fishing in the Eastern U.S./Canada Area is 500 lb (226.8 kg) per DAS, or any part of a DAS, up to 5,000 lb (2,268 kg) per trip. NMFS published a temporary rule on December 23, 2008 (73 FR 78659), increasing the landing limit for Eastern GB cod to 1,000 lb (453.6 kg) per DAS, or any part of a DAS, up to 10,000 lb (4,535.9 kg) per trip.

According to the most recent Vessel Monitoring System (VMS) reports and other available information, the cumulative Eastern GB cod catch, is approximately 53.8 percent of the TAC, as of February 12, 2009, and is expected to achieve the TAC by early April; prior to conclusion of the 2008 fishing year. If the TAC were reached it would require that the Eastern U.S./Canada Area be closed for the remainder of the 2008 fishing year, preventing the harvest of the remaining portion of the Eastern GB haddock TAC and preventing harvest of GB yellowtail flounder in the Eastern U.S./Canada Area. Based on this information, the Regional Administrator is decreasing the current Eastern GB cod landing limit of 1,000 lb (453.6 kg) per DAS, or any part of a DAS, up to 10,000 lb (4,535.9 kg) per trip in the Eastern U.S./Canada Area; to 500 lb (226.8 kg) per DAS, or any part of a DAS, up to 5,000 lb (2,268 kg) per trip, effective 0001 hours local time March 9, 2009, through April 30, 2009.

Eastern GB cod landings will continue to be closely monitored. Further inseason adjustments to increase or decrease the trip limit may be considered, based on updated catch data and projections. Should 100 percent of the TAC allocation for Eastern GB cod be projected to be harvested, the Eastern U.S./Canada Area would be closed to limited access NE multispecies DAS vessels for the remainder of the fishing year.

Classification

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

Pursuant to 5 U.S.C. 553(b)(3)(B) and (d)(3), the Assistant Administrator finds good cause to waive prior notice and opportunity for public comment, as well

as the delayed effectiveness for this action, because prior notice and comment and a delayed effectiveness would be impracticable and contrary to the public interest. The regulations under § 658.85(a)(3)(iv)(D) grant the Regional Administrator the authority to adjust the Eastern GB cod trip limit to prevent over-harvesting or under-harvesting the TAC allocation. This action would reduce the Eastern GB cod limit for all NE multispecies DAS vessels fishing in the U.S./Canada Management Area for the remainder of the 2008 fishing year. This action is intended to prevent the over-harvest of the Eastern GB cod TAC while allowing continued opportunities to achieve optimum yield in the NE multispecies fishery.

It is important to take this action immediately to slow the rate of Eastern GB cod harvest. Any further delay of this action is likely to result in a precipitous harvest of the Eastern GB cod TAC which may require that the Eastern U.S./Canada Area be closed for the remainder of the 2008 fishing year, preventing the harvest of the remaining portion of the Eastern GB haddock TAC, and preventing harvest of GB yellowtail flounder in the Eastern U.S./Canada Management Area, thereby reducing the ability of fishers to maximize their fishing opportunities. Exceeding the 2008 TAC for Eastern GB cod would increase mortality of this overfished stock beyond that evaluated during the development of Amendment 13, resulting in decreased revenue for the NE multispecies fishery, increased negative economic impacts to vessels operating in the Eastern U.S./Canada Management Area, a reduced chance of achieving optimum yield in the groundfish fishery, and unnecessary delays to the rebuilding of this overfished stock. Exceeding the 2008 Eastern GB cod TAC would also necessitate that any overages during the 2008 fishing year be deducted from the Eastern GB cod TAC for the 2009 fishing year. Reducing the 2009 TAC due to any 2008 TAC overage as a result of delaying this action would create an unnecessary burden on the fishing industry and further negative economic and social impacts that were not previously considered.

The Regional Administrator's authority to decrease the trip limit for Eastern GB cod in the U.S./Canada Management Area to ensure the shared U.S./Canada stocks of fish are harvested, but not exceeded, was publicly considered and open to public comment during the development of Amendment 13. Further, the potential of decreasing the Eastern GB cod trip limit was announced to the public when the current trip limit was implemented on December 23, 2008. The public is able to obtain information on the rate of harvest of the Eastern GB cod TAC via the NMFS Northeast Regional Office website (*http://www.nero.noaa.gov*), which provides at least some advanced notice of a potential action to prevent the TAC for Eastern GB cod from being exceeded during the 2008 fishing year. Therefore, any negative effect the waiving of public comment and delayed effectiveness may have on the public is mitigated by these factors.

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

Dated: March 4, 2009

Emily H. Menashes,

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

[FR Doc. E9–4893 Filed 3–4–09; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0809251266–81485–02]

RIN 0648–XN33

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

ACTION: Temporary rule; inseason quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2009 commercial summer flounder quota to the Commonwealth of Virginia. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

DATES: Effective March 4, 2009 through December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, (978) 281–9244, FAX (978) 281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

The final rule implementing Amendment 5 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.100(d). The Regional Administrator is required to consider the criteria set forth in § 648.100(d)(3) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 23,130 lb (10,492 kg) of its 2009 commercial quota to Virginia to cover the summer flounder landings of three North Carolina vessels granted safe harbor in Virginia due to mechanical issues between January 16 and January 28, 2009. The Regional Administrator has determined that the criteria set forth in § 648.100(d)(3) have been met. The revised quotas for calendar year 2009 are: North Carolina, 2,893,992 lb (1,312,693 kg) and Virginia, 2,341,054 lb (1,061,884 kg).

Classification

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

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

Dated: March 4, 2009.

Emily H. Menashes,

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

[FR Doc. E9–4896 Filed 3–4–09; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 09100091344–0956–02]

RIN 0648–XN71

Fisheries of the Exclusive Economic Zone Off Alaska; Deep–Water Species Fishery by Vessels Using Trawl Gear in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for species that comprise the deep–water species fishery by vessels using trawl gear in the Gulf of Alaska (GOA). This action is necessary because the first seasonal apportionment of the Pacific halibut bycatch allowance specified for the deep–water species fishery in the GOA has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), March 3, 2009, through 1200 hrs, A.l.t., April 1, 2009.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The first seasonal apportionment of the Pacific halibut bycatch allowance specified for the deep–water species fishery in the GOA is 100 metric tons as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009), for the period 1200 hrs, A.l.t., January 20, 2009, through 1200 hrs, A.l.t., April 1, 2009.

In accordance with § 679.21(d)(7)(i), the Administrator, Alaska Region, NMFS, has determined that the first seasonal apportionment of the Pacific halibut bycatch allowance specified for the trawl deep–water species fishery in the GOA has been reached. Consequently, NMFS is prohibiting directed fishing for the deep–water species fishery by vessels using trawl gear in the GOA. The species and species groups that comprise the deep–water species fishery include sablefish, rockfish, deep–water flatfish, rex sole, and arrowtooth flounder.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of the deep–water species fishery by vessels using trawl gear in the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 2, 2009.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: March 4, 2009.

Emily H. Menashes,

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

[FR Doc. E9–4889 Filed 3–4–09; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0810141351–9087–02]

RIN 0648–XN69

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (< 18.3 meters (m)) length overall (LOA) using hook–and–line or pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the A season apportionment of the 2009 total allowable catch (TAC) of Pacific cod to be harvested.

DATES: Effective March 4, 2009, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season apportionment of the 2009 Pacific cod TAC specified for vessels using jig gear in the BSAI is 1,324 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009), for the period 1200 hrs, A.l.t., January 1, 2009, through 1200 hrs, A.l.t., April 30, 2009.

The Administrator, Alaska Region, NMFS, has determined that jig vessels will not be able to harvest 1,200 mt of the A season apportionment of the 2009 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*1*). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions 1,200 mt of Pacific cod from the A season jig gear apportionment to catcher vessels < 60 feet (18.3 m) LOA using hook–and–line or pot gear.

The harvest specifications for Pacific cod included in the harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009) are revised as follows: 124 mt to the A season apportionment for vessels using jig gear and 4,337 mt to catcher vessels < 60 feet (18.3 m) LOA using hook–and–line or pot gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified from jig vessels to catcher vessels < 60 feet (18.3 m) LOA using hook–and–line or pot gear. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate

notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 26, 2009.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: March 4, 2009.

Emily H. Menashes,

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

[FR Doc. E9–4891 Filed 3–4–09; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 44
Monday, March 9, 2009

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL81

Prevailing Rate Systems; Redefinition of the Lake Charles-Alexandria and New Orleans, LA, Appropriated Fund Federal Wage System Wage Areas

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management is issuing a proposed rule that would redefine the geographic boundaries of the Lake Charles-Alexandria and New Orleans, LA, appropriated fund Federal Wage System (FWS) wage areas. The proposed rule would redefine Iberia and St. Martin Parishes, LA, from the New Orleans wage area to the Lake Charles-Alexandria wage area. These changes are based on recent consensus recommendations of the Federal Prevailing Rate Advisory Committee to best match the counties proposed for redefinition to a nearby FWS survey area. No other changes are proposed for the Lake Charles-Alexandria and New Orleans FWS wage areas.

DATES: We must receive comments on or before April 8, 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 7H31, 1900 E Street, NW., Washington, DC 20415–8200; email *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov;* or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to redefine the Lake Charles-Alexandria and New Orleans, LA, appropriated fund Federal Wage System (FWS) wage areas. This proposed rule would redefine Iberia and St. Martin Parishes, LA, from the New Orleans wage area to the Lake Charles-Alexandria wage area.

OPM considers the following regulatory criteria under 5 CFR 532.211 when defining FWS wage area boundaries:

(i) Distance, transportation facilities, and geographic features;

(ii) Commuting patterns; and

(iii) Similarities in overall population, employment, and the kinds and sizes of private industrial establishments.

Lafayette and St. Martin Parishes, LA, comprise the Lafayette, LA Metropolitan Statistical Area (MSA). The Lafayette MSA is split between the Lake Charles-Alexandria, LA, wage area and the New Orleans, LA, wage area. Lafayette Parish is part of the area of application of the Lake Charles-Alexandria wage area and St. Martin Parish is part of the area of application of the New Orleans wage area. St. Martin Parish is comprised of two noncontiguous parts.

Based on an analysis of the regulatory criteria for Lafayette Parish, the location of the main population center in the Lafayette MSA, we recommend that the entire Lafayette MSA be defined to the Lake Charles-Alexandria wage area. The distance criterion for Lafayette Parish favors the Lake Charles-Alexandria wage area more than the New Orleans wage area. All other criteria are inconclusive. We believe our regulatory analysis findings indicate that Lafayette Parish is appropriately defined to the Lake Charles-Alexandria wage area. OPM regulations at 5 CFR 532.211 permit splitting MSAs only in very unusual circumstances (*e.g.*, organizational relationships among closely located Federal activities). There appear to be no unusual circumstances that would permit splitting the Lafayette MSA. To comply with OPM regulations not to split MSAs, St. Martin Parish would be redefined to the Lake Charles-Alexandria wage area.

Because Iberia Parish splits St. Martin Parish into two noncontiguous parts, we recommend that Iberia Parish be redefined to the Lake Charles-Alexandria wage area. The distance criterion for Iberia Parish favors the Lake Charles-Alexandria wage area more than the New Orleans wage area. All other criteria are inconclusive. Although a standard review of regulatory criteria shows that most factors are inconclusive, distance does favor Lake Charles-Alexandria. Based on this analysis, we recommend that Iberia Parish be redefined to the Lake Charles-Alexandria wage area.

The Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, recommended these changes by consensus. These changes would be effective on the first day of the first applicable pay period beginning on or after 30 days following publication of the final regulations. FPRAC recommended no other changes in the geographic definitions of the Lake Charles-Alexandria and New Orleans wage areas.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Kathie Ann Whipple,

Acting Director.

Accordingly, the U.S. Office of Personnel Management is proposing to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

2. In appendix C to subpart B, the wage area listing for the State of Louisiana is amended by revising the listings for Lake Charles-Alexandria and New Orleans, to read as follows:

Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas

* * * * *

Louisiana

Lake Charles-Alexandria

Survey Area

Louisiana:
- Allen
- Beauregard
- Calcasieu
- Grant
- Rapides
- Sabine
- Vernon

Area of Application. Survey area plus:

Louisiana:
- Acadia
- Avoyelles
- Caldwell
- Cameron
- Catahoula
- Concordia
- Evangeline
- Franklin
- Iberia
- Jefferson Davis
- Lafayette
- La Salle
- Madison
- Natchitoches
- St. Landry
- St. Martin
- Tensas
- Vermilion
- Winn

New Orleans

Survey Area

Louisiana:
- Jefferson
- Orleans
- Plaquemines
- St. Bernard
- St. Charles
- St. John the Baptist
- St. Tammany

Area of Application. Survey area plus:

Louisiana:
- Ascension
- Assumption
- East Baton Rouge
- East Feliciana
- Iberville
- Lafourche
- Livingston
- Pointe Coupee
- St. Helena
- St. James
- St. Mary
- Tangipahoa
- Terrebonne
- Washington
- West Baton Rouge
- West Feliciana

* * * * *

[FR Doc. E9–4923 Filed 3–6–09; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AL82

Prevailing Rate Systems; Redefinition of the Boise, ID, and Utah Appropriated Fund Federal Wage System Wage Areas

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management is issuing a proposed rule that would redefine the geographic boundaries of the Boise, ID, and Utah appropriated fund Federal Wage System (FWS) wage areas. The proposed rule would redefine Franklin County, ID, from the Boise wage area to the Utah wage area. These changes are based on recent consensus recommendations of the Federal Prevailing Rate Advisory Committee to best match the counties proposed for redefinition to a nearby FWS survey area. No other changes are proposed for the Boise and Utah FWS wage areas.

DATES: We must receive comments on or before April 8, 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 7H31, 1900 E Street, NW., Washington, DC 20415–8200; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to redefine the Boise, ID, and Utah appropriated fund Federal Wage System (FWS) wage areas. This proposed rule would redefine Franklin County, ID, from the Boise wage area to the Utah wage area.

OPM considers the following regulatory criteria under 5 CFR 532.211 when defining FWS wage area boundaries:

i. Distance, transportation facilities, and geographic features;

ii. Commuting patterns; and

iii. Similarities in overall population, employment, and the kinds and sizes of private industrial establishments.

Franklin County, ID and Cache County, UT, comprise the Logan, UT–ID Metropolitan Statistical Area (MSA). The Logan MSA is split between the Boise, ID, wage area and the Utah wage area. Franklin County is part of the area of application of the Boise wage area and Cache County is part of the area of application of the Utah wage area.

Based on an analysis of the regulatory criteria for Cache County, the location of the main population center in the Logan MSA, we recommend that the entire Logan MSA be defined to the Utah wage area. The distance criterion for Cache County favors the Utah wage area more than the Boise wage area. The commuting patterns criterion favors the Utah wage area. All other criteria are inconclusive. We believe our regulatory analysis findings indicate that Cache County is appropriately defined to the Utah wage area. OPM regulations at 5 CFR 532.211 permit splitting MSAs only in very unusual circumstances (*e.g.*, organizational relationships among closely located Federal activities). There appear to be no unusual circumstances that would permit splitting the Logan MSA. To comply with OPM regulations not to split MSAs, Franklin County would be redefined to the Utah wage area.

The Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, recommended these changes by consensus. These changes would be effective on the first day of the first applicable pay period beginning on or after 30 days following publication of the final regulations. FPRAC recommended no other changes in the geographic definitions of the Boise and Utah wage areas.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Kathie Ann Whipple,

Acting Director.

Accordingly, the U.S. Office of Personnel Management is proposing to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

2. Appendix C to subpart B is amended by revising the wage area listings for the Boise, ID, and Utah wage areas to read as follows:

Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas

* * * * *

Idaho

Boise

Survey Area

Idaho:
Ada
Boise
Canyon
Elmore
Gem

Area of Application. Survey area plus:

Idaho:
Adams
Bannock
Bear Lake
Bingham
Blaine
Bonneville
Butte
Camas
Caribou
Cassia
Clark
Custer
Fremont
Gooding
Jefferson
Jerome
Lemhi
Lincoln
Madison
Minidoka
Oneida
Owyhee
Payette
Power
Teton
Twin Falls
Valley
Washington

* * * * *

Utah

Survey Area

Utah:
Box Elder
Davis
Salt Lake
Tooele
Utah
Weber

Area of Application. Survey area plus:

Utah:
Beaver
Cache
Carbon
Daggett
Duchesne
Emery
Garfield
Grand
Iron
Juab
Millard
Morgan
Piute
Rich
San Juan (Only includes the Canyonlands National Park portion.)
Sanpete
Sevier
Summit
Uintah
Wasatch
Washington
Wayne

Colorado:
Mesa
Moffat

Idaho:
Franklin

* * * * *

[FR Doc. E9–4921 Filed 3–6–09; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

7 CFR Part 980

[Doc. No. AMS FV–08–0097; FV09–980–1 PR]

Vegetables, Import Regulations; Partial Exemption to the Minimum Grade Requirements for Fresh Tomatoes

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on a proposed partial exemption to the minimum grade requirements under the tomato import regulation. The Florida Tomato Committee (Committee) which locally administers the marketing order for tomatoes grown in Florida (order) recommended the change for Florida tomatoes. The change in the import regulation is required under section 8e of the Agricultural Marketing Agreement Act of 1937. A separate rule amending the rules and regulations under the order to exempt Vintage Ripes™ tomatoes (Vintage Ripes™) from the shape requirements associated with the U.S. No. 2 grade is being issued by the Department of Agriculture (USDA). This rule would provide the same partial exemption under the import regulation so it would conform to the regulations under the order.

DATES: Comments must be received by May 8, 2009.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or *Internet: http://www.regulations.gov*. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist, or Christian Nissen, Regional Manager, Southeast Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (863) 324–3375, *Fax:* (863) 325–8793; or *E-mail: Doris.Jamieson@usda.gov* or *Christian.Nissen@usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491, Fax: (202) 720–8938, or *E-mail: Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act,'' which provides that whenever certain specified commodities, including tomatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodity.

USDA is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal will not preempt any State or local laws, regulations, or policies, unless they

present an irreconcilable conflict with this rule.

There are no administrative procedures, which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This proposal invites comments on a proposed partial exemption to the minimum grade requirements for Vintage Ripes™ imported into the United States. Absent an exemption, the import requirements specify that tomatoes must meet at least a U.S. No. 2 grade before they can be shipped and sold into the fresh market. An interim final rule amending the rules and regulations under the order exempting Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade was issued separately by USDA (73 FR 76191, December 16, 2008). This rule would provide the same partial exemption under the import regulation so it would conform to the regulations under the order.

Section 966.52 of the order provides the authority to establish grade requirements for Florida tomatoes. Section 966.323 of the order specifies, in part, the minimum grade requirements for tomatoes grown in Florida. Section 980.212 specifies the corresponding import requirements. Form and shape represent part of the elements of grade. The current minimum grade requirement for Florida tomatoes and for imported tomatoes is a U.S. No. 2. The specifics of this grade requirement are listed under the U.S. Standards for Grades of Fresh Tomatoes (7 CFR 51.1855–51.1877).

The U.S. Standards for Grades of Fresh Tomatoes (Standards) specify the criteria tomatoes must meet to grade a U.S. No. 2, including that they must be reasonably well formed, and not more than slightly rough. These two elements relate specifically to the shape of the tomato. The definitions section of the Standards defines reasonably well formed as not decidedly kidney shaped, lopsided, elongated, angular, or otherwise decidedly deformed. The term slightly rough means that the tomato is not decidedly ridged or grooved. This rule would amend § 980.212 to exempt Vintage Ripes™ from these shape requirements as specified under the grade for a U.S. No. 2.

Vintage Ripes™ are a trademarked tomato variety bred to look and taste like an heirloom-type tomato. One of the characteristics of this variety is its appearance. Vintage Ripes™ are often shaped differently from other round tomatoes. Depending on the time of year and the weather, Vintage Ripes™ are concave on the stem end with deep, ridged shoulders. They can also be very misshapen, appearing kidney shaped and lopsided. Because of this variance in shape and appearance, Vintage Ripes™ have difficulty meeting the shape requirements of the U.S. No. 2 grade.

In addition, the cost of production and handling for these tomatoes tends to be higher when compared to standard commercial varieties. The shoulders on Vintage Ripes™ are easily damaged, requiring additional care during picking and handling. These tomatoes are also more susceptible to disease. Consequently, Vintage Ripes™ require greater care in production to keep injuries and blemishes to a minimum. Still, when compared to standard commercial varieties, even with taking special precaution, larger quantities of these tomatoes are left in the field or need to be eliminated in the packinghouse to ensure a quality product. Losses can approach 50 percent or higher for Vintage Ripes™. With the higher production costs and the reduced packout, these tomatoes tend to sell at a higher price point than standard round tomatoes.

Heirloom-type tomatoes have been gaining favor with consumers. Vintage Ripes™ were bred specifically to address this demand. However, with its difficulty in meeting established shape requirements, and its increased cost of production, producing these tomatoes for market may not be financially viable without an exemption. In order to make more of these specialty tomatoes available for consumers, the Committee agreed to a change which would provide an exemption for Vintage Ripes™ from the shape requirements of the U.S. No. 2 grade. This exemption is the same as previously provided for a similar type tomato (72 FR 1919, January 17, 2007).

This rule would only provide imported Vintage Ripes™ with a partial exemption from the grade requirements under the import regulation. Consequently, Vintage Ripes™ would only be exempt from the shape requirements of the grade and would still be required to meet all other aspects of the U.S. No. 2 grade. Vintage Ripes™ would also continue to be required to meet all other requirements under the import regulation, such as size and inspection.

Prior to the 1998–99 season, the Committee recommended that the minimum grade be increased from a U.S. No. 3 to a U.S. No. 2. A conforming change was also made to the import regulation. Committee members agree that increasing the grade requirement has been very beneficial to the industry and in the marketing of tomatoes. It is important to the Committee that these benefits be maintained. There was some industry concern that providing a partial exemption for shape for an heirloom-type tomato could result in the shipment of U.S. No. 3 grade tomatoes of standard commercial varieties, contrary to the objectives of the exemption and the order.

To ensure this exemption would not result in the shipment of U.S. No. 3 grade tomatoes of other varieties, this exemption only applies to Vintage Ripes™ covered under the Agricultural Marketing Service's Identity Preservation (IP) program. The IP program was developed by the Agricultural Marketing Service to assist companies in marketing products having unique traits. The program provides independent, third-party verification of the segregation of a company's unique product at every stage, from seed, production and processing, to distribution. This exemption would be contingent upon the Vintage Ripes™ maintaining positive program status under the IP program and continuing to meet program requirements. As such, this should help ensure that only Vintage Ripes™ would be shipped under this exemption.

Section 8e of the Act provides that when certain domestically produced commodities, including tomatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. An interim final rule amending the rules and regulations under the order exempting Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade was issued separately by USDA (73 FR 76191, December 16, 2008). This rule would amend § 980.212 of the import requirements to bring the tomato import regulation into conformity with the changes to the order.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are

unique in that they are brought about through group action of essentially small entities acting on their own behalf. Import regulations issued under the Act are based on those established under Federal marketing orders.

There are approximately 200 importers of tomatoes subject to the regulation. Small agricultural service firms, which include tomato importers, are defined by the Small Business Administration (SBA) as those having annual receipts of less than $7,000,000 (13 CFR 121.201). Based on information from the Foreign Agricultural Service, USDA, the dollar value of imported fresh tomatoes ranged from around $1.07 billion in 2005 to $1.22 billion in 2007. Using these numbers, the majority of tomatoes importers may be classified as small entities.

Mexico, Canada, and the Netherlands are the major tomato producing countries exporting tomatoes to the United States. In 2007, shipments of tomatoes imported into the United States totaled 1.7 million metric tons. Mexico accounted for 949,695 metric tons, 111,697 metric tons were imported from Canada, and 5,147 metric tons arrived from the Netherlands.

This proposed rule would provide a partial exemption to the minimum grade requirements for Vintage Ripes(tm) imported into the United States. Absent an exemption, the import requirements for tomatoes specify that tomatoes must meet at least a U.S. No. 2 grade before they can be shipped and sold into the fresh market. An interim final rule amending the rules and regulations under the order to exempt Vintage Ripes™ from the shape requirements associated with the U.S. No. 2 grade was issued separately by USDA (73 FR 76191, December 16, 2008). Under section 8e of the Act, imports of tomatoes have to meet the same grade, size, quality, and maturity requirements as under the order. This rule would provide the same partial exemption under the import regulation so it conforms to the changes under the order.

This action would represent a small increase in costs for producers and handlers of Vintage Ripes™ primarily from costs associated with developing and maintaining an IP program. However, this rule would make additional volumes of Vintage Ripes™ available for shipment. This would result in increased sales of Vintage Ripes™. Consequently, the benefits of this action would more than offset the associated costs.

This rule would not impose any additional reporting or recordkeeping requirements beyond the IP program on either small or large tomatoes importers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Additionally, except for applicable domestic regulations, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.o/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this proposed rule.

This proposed rule invites comments on a partial exemption to the minimum grade requirements for imported tomatoes. A 60-day comment period is provided to allow interested persons to respond to this rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 980

Food grades and standards, Imports, Marketing agreements, Onions, Potatoes, Tomatoes.

For the reasons set forth in the preamble, 7 CFR part 980 is proposed to beamended as follows:

PART 980—VEGETABLES; IMPORT REGULATIONS

1. The authority citation for 7 CFR part 980 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. In § 980.212, paragraph (b)(1) all references to ''UglyRipe™'' are revised to read ''UglyRipe™ and Vintage Ripes™''.

Dated: March 3, 2009.

Robert C. Keeney,

Acting Associate Administrator.

[FR Doc. E9–4849 Filed 3–6–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0168; Directorate Identifier 2007–SW–33–AD]

RIN 2120–AA64

Airworthiness Directives; Agusta S.p.A. Model AB139 and AW139 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Agusta S.p.A. (Agusta) Model AB139 and AW139 helicopters. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The aviation authority of Italy, with which we have a bilateral agreement, states in the MCAI that during the installation of a fire extinguisher bottle on a new helicopter, it was found that the electrical receptacle/connectors on the bottle which commands the firing of the extinguishing agent were swapped between engines No. 1 and No. 2. This condition could affect helicopters already in service and fire extinguisher bottles of the same part number in stock as spare parts. If not corrected, an improperly wired fire extinguishing bottle might cause the extinguishing agent to be discharged toward the unselected engine when the system is activated, rather than toward the engine with the fire. The proposed AD would require determining if each engine has the proper outlet end on the electrical receptacle/connector that attaches the firing cartridge to the fire extinguisher bottle, and if not, replacing the fire extinguisher bottle. The proposed AD is intended to prevent the fire extinguishing agent from not discharging toward the engine with the fire, which could result in loss of the helicopter due to an engine fire.

DATES: We must receive comments on this proposed AD by April 8, 2009.

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

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

You may get the service information identified in this proposed AD from Agusta, Via Giovanni Agusta, 520 21017 Cascina Costa di Samarate (VA), Italy, telephone 39 0331–229111, fax 39 0331–229605/222595, or at *http://customersupport.agusta.com/technical_advice.php*.

Examining the 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 economic evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: John Strasburger, Aviation Safety Engineer FAA, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5167; fax (817) 222–5961.

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–2009–0168; Directorate Identifier 2007–SW–33–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The Ente Nazionale Per L'Aviazione Civile, which is the aviation authority for Italy, has issued an MCAI in the form of Airworthiness Directive No. 2007–227, dated June 18, 2007, (referred to after this as ''the MCAI''), to correct an unsafe condition for these Italian-certificated products. The MCAI states that during the installation of a fire extinguisher bottle, part number (P/N) 3G2620V00131, on a helicopter during manufacture, it was found that the electrical receptacle/connectors on the bottle which commands the firing of the extinguishing were swapped between engines No. 1 and No. 2. This condition could affect helicopters already in service and fire extinguisher bottles of the same part number in stock as spare parts. If not corrected, an improperly wired fire extinguishing bottle might cause the extinguishing agent to be discharged toward the unselected engine when the system is activated, rather than toward the engine with the fire. The proposed AD would require determining if each engine has the proper outlet end on the electrical receptacle/connector that attaches the firing cartridge to the fire extinguisher bottle, and if not, replacing the fire extinguisher bottle. The proposed AD is intended to prevent the fire extinguishing agent from not discharging toward the engine with the fire, which could result in loss of the helicopter due to an engine fire.

You may obtain further information by examining the MCAI and service information in the AD docket.

Relevant Service Information

Agusta has issued Bollettino Tecnico No. 139–085, dated May 18, 2007. The actions described in the MCAI are intended to correct the same unsafe condition as that identified in the service information.

FAA's Determination and Proposed Requirements

This product has been approved by the aviation authority of Italy, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, we have been notified of the unsafe condition described in the MCAI and the service information. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI

We have reviewed the MCAI and related service information and, in general, agree with their substance. However, our AD differs from the MCAI to clarify the unsafe condition and compliance instructions. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information. These differences are highlighted in the ''Differences Between the FAA AD and the MCAI'' section in the proposed AD.

Costs of Compliance

We estimate that this proposed AD would affect about 20 helicopters of U.S. registry and that it would take about 1 work-hour per helicopter to verify the correct installation of electrical receptacles/connectors on the two fire extinguisher bottles. We also estimate that it would take about 3 work-hours per helicopter to replace a fire extinguisher bottle with the inverted electrical receptacles/connectors and that about 5% (2 bottles) of the fire extinguisher bottles in the fleet would have to be replaced. The cost of a replacement fire extinguisher bottle is $10,300. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $22,680.

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 an economic 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:

Agusta S.p.A.: Docket No. FAA–2009–0168; Directorate Identifier 2007–SW–33–AD.

Comments Due Date

(a) We must receive comments by April 8, 2009.

Other Affected ADs

(b) None.

Applicability

(c) This AD applies to Model AB139 helicopters, serial number (S/N) 31005 through 31054, except S/N 31007, and AW139 helicopters, S/N 31055 through 31067, S/N 31070, and S/N 31071, certificated in any category.

Reason

(d) The mandatory continuing airworthiness information (MCAI) states that during the installation of a fire extinguisher bottle, part number 3G2620V00131, on a helicopter during manufacture, it was found that the electrical receptacle/connectors on the bottle which commands the firing of the extinguishing agent were swapped between engines No. 1 and No. 2. This condition could affect helicopters already in service and fire extinguisher bottles of the same part number in stock as spare parts. If not corrected, an improperly wired fire extinguishing bottle might cause the extinguishing agent to be discharged toward the unselected engine when the system is activated, rather than toward the engine with the fire. The proposed AD would require determining if each engine has the proper outlet end on the electrical receptacle/connector that attaches the firing cartridge to the fire extinguisher bottle, and if not, replacing the fire extinguisher bottle. The proposed AD is intended to prevent the fire extinguishing agent from not discharging toward the engine with the fire, which could result in loss of the helicopter due to an engine fire.

Actions and Compliance

(e) Within 100 hours time-in-service (TIS) or 3 months, whichever occurs first, unless already done, do the following actions.

(1) Determine whether the fire extinguishing bottle (bottle) for engines No. 1 and No. 2 have the proper outlet end on the electrical receptacle/connector, which attaches the firing cartridge to the bottle, by following steps 4. and 5. of the Compliance Instructions in Agusta Bollettino Tecnico No. 139–085, dated May 18, 2007 (BT).

(2) If a bottle has an electrical receptacle/connector for the firing cartridge with an improper outlet end, before further flight, replace the bottle with a bottle that has an electrical receptacle/connector with a proper outlet end in accordance with step 6. of the Compliance Instructions in the BT.

Differences Between the FAA AD and the MCAI

(f) This AD uses the term ''hours time-in-service'' rather than ''flight hours.''

Other FAA Information

(g) Alternative Methods of Compliance (AMOCs): The Manager, Safety Management Group, Rotorcraft Directorate, FAA, ATTN: John Strasburger, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76193–0111; telephone (817) 222–5167; fax (817) 222–5961, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) MCAI Ente Nazionale Per L'Aviazione Civile Airworthiness Directive No. 2007–227, dated June 18, 2007, contains related information.

Air Transport Association of America (ATA) Tracking Code

(i) ATA Code 2621: Fire Bottle, Fixed.

Issued in Fort Worth, Texas, on February 19, 2009.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E9–4943 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0127; Airspace Docket No. 09–AGL–4]

Proposed Amendment of Class E Airspace; Cleveland, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Cleveland, OH. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Lorain County Regional Airport, Lorain, OH. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Lorain County Regional Airport.

DATES: 0901 UTC. Comments must be received on or before April 23, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–0127/Airspace Docket No. 09–AGL–4, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments

are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2009–0127/Airspace Docket No. 09–AGL–4.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by adding additional Class E airspace in the Cleveland, OH area for SIAPs operations at Lorain County Regional Airport, Lorain, OH. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would add additional controlled airspace in the Cleveland, OH area.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL OH E5 Cleveland, OH [Amended]

That airspace extending upward from 700 feet above the surface bounded by a line beginning at lat. 41°25′00″ N., long. 82°23′00″ W., to lat. 41°56′00″ N., long. 81°22′00″ W., to lat. 41°48′00″ N., long. 81°02′00″ W., to lat. 41°32′00″ N., long. 81°03′00″ W., to lat. 41°11′00″ N., long. 81°48′00″ W., to lat. 41°11′00″ N., long. 82°21′00″ W., to lat. 41°14′39″ N., long. 82°21′44″ W., to lat. 41°18′06″ N., long. 82°23′52″ W., to lat. 41°18′42″ N., long. 82°22′07″ W., thence to the point of beginning.

* * * * *

Issued in Fort Worth, TX, on February 26, 2009.

Walter L. Tweedy.

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E9–4895 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0115; Airspace Docket No. 09–AGL–3]

Proposed Amendment of Class E Airspace; Mount Sterling, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Mount Sterling, IL. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Mount Sterling Municipal Airport, Mount Sterling, IL. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Mount Sterling Municipal Airport.

DATES: 0901 UTC. Comments must be received on or before April 23, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–0115/Airspace Docket No. 09–AGL–3, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through

Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2009–0115/Airspace Docket No. 09–AGL–3.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by adding additional Class E airspace for SIAPs operations at Mount Sterling Municipal Airport, Mount Sterling, IL. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would add additional controlled airspace at Mount Sterling Municipal Airport, Mount Sterling, IL.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL IL E5 Mount Sterling, IL [Amended]

Mount Sterling Municipal Airport, IL
(Lat. 39°59′07″ N., long. 90°48′15″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Mount Sterling Municipal Airport.

* * * * *

Issued in Fort Worth, TX, on February 23, 2009.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E9–4937 Filed 3–9–09; 8:45 am]

BILLING CODE 4901–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AM84

Vocational Rehabilitation and Employment Program—Periods of Eligibility

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend regulations of the Department of Veterans Affairs (VA) concerning periods of eligibility applicable to VA's provision of Vocational Rehabilitation and Employment benefits and services. The proposed amendments are intended to reflect changes in law, to reflect VA's interpretation of statutory requirements, to make clarifying changes, and to make other changes that are nonsubstantive.

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

ADDRESSES: Written comments may be submitted through *http://*

www.Regulations.gov; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AM84—Vocational Rehabilitation and Employment Program—Periods of Eligibility.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Alvin Bauman, Senior Policy Analyst, Vocational Rehabilitation and Employment Service (28), Department of Veterans Affairs, Veterans Benefits Administration, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461–9613.

SUPPLEMENTARY INFORMATION: We propose to amend VA's regulations in 38 CFR Part 21, Subpart A—Vocational Rehabilitation Under 38 U.S.C. Chapter 31. These amendments concern periods of eligibility applicable to VA's provision of Vocational Rehabilitation and Employment (VR&E) benefits and services.

Specifically, we propose to restate and interpret the provisions of 38 U.S.C. 3102 and 3103 in 38 CFR 21.41 by defining the term ''basic period of eligibility,'' clarifying its significance, identifying the provisions for deferring or extending the basic period of eligibility, and stating that a servicemember's basic period of eligibility does not begin before his or her discharge or release from active military, naval, or air service.

We propose to revise § 21.42 to make clarifying changes in its provisions. These include specifying who is authorized to determine that the veteran's participation in a vocational rehabilitation program is reasonably feasible, after the basic period of eligibility had been delayed or interrupted due to any medical condition(s) of the veteran. It would also specify that the basic period of eligibility would begin or resume on the date of written notice to the veteran of that determination.

We propose to revise § 21.44. Pursuant to 38 U.S.C. 3103(c)(3), we would add provisions in a new paragraph (b) to more clearly state the length of time that an extension of the basic period of eligibility for a veteran with a serious employment handicap may be granted. Proposed § 21.44 also would specify who is authorized to extend the basic period of eligibility for the reasons described in this section and would make other clarifying changes.

We propose to revise and restructure § 21.45 to conform this section to statutory requirements and more clearly state the length of extension of the basic period of eligibility for a veteran in a program of independent living services.

We propose to add a new § 21.46 to reflect and interpret an amendment to 38 U.S.C. 3103 by section 103(c)(2) of Public Law 107–103 for a veteran who VA determines ''was prevented from participating'' in a vocational rehabilitation program under chapter 31 of title 38, United States Code, because they are recalled to active duty. The section would reflect our interpretation that ''prevented from participating'' includes those who are prevented from commencing or continuing in a program of vocational rehabilitation. This section would also describe—

- The reasons for recall that allow VA to extend the period of eligibility; and
- The length of extension of the period of eligibility, which under 38 U.S.C. 3103(e) is the length of time the veteran served on active duty plus 4 months.

Finally, we propose to rewrite these sections in reader-focused plain English and make other nonsubstantive changes in their provisions.

Paperwork Reduction Act of 1995

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a regulatory action as a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, if it is a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not affect any small entities. Only individuals would be affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The program that this rule would affect has the following Catalog of Federal Domestic Assistance number and title: 64.116, Vocational Rehabilitation for Disabled Veterans.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools,

Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: February 24, 2009.

John R. Gingrich,

Chief of Staff.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 21 (subpart A) as follows:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

1. Revise the authority citation for part 21, subpart A to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

2. Revise the subpart A heading as set forth above.

3. Revise §§ 21.41, 21.42, 21.44, and 21.45 to read as follows:

§ 21.41 Basic period of eligibility.

(a) *Time limit for eligibility to receive vocational rehabilitation.* (1) For purposes of §§ 21.41 through 21.46, the term *basic period of eligibility* means the 12-year period beginning on the date of a veteran's discharge or release from his or her last period of active military, naval, or air service, and ending on the date that is 12 years from the veteran's discharge or release date, but the beginning date may be deferred or the ending date extended under the sections referred to in paragraph (b) of this section. (See §§ 21.70 through 21.79 concerning duration of rehabilitation programs.)

(2) Except as provided in paragraph (b) or (c) of this section, the period during which an individual may receive a program of vocational rehabilitation benefits and services under 38 U.S.C. chapter 31 is limited to his or her basic period of eligibility.

(b) *Deferral and extension of the basic period of eligibility.* VA may defer the beginning date of a veteran's basic period of eligibility under § 21.42. VA may extend the ending date of a veteran's basic period of eligibility under § 21.42 (extension due to medical condition); § 21.44 (extension for a veteran with a serious employment handicap), § 21.45 (extension during a program of independent living services and assistance), and § 21.46 (extension for a veteran recalled to active duty).

Authority: 38 U.S.C. 3103.

(c) *Servicemember entitled to vocational rehabilitation services and assistance before discharge.* The basic period of eligibility for a servicemember who is entitled to vocational rehabilitation services and assistance under 38 U.S.C. chapter 31 for a period before discharge does not run while the servicemember remains on active duty, but begins on the date of discharge from the active military, naval, or air service. The period of eligibility requirements of this section are not applicable to provision of vocational rehabilitation services and assistance under chapter 31 during active duty.

Authority: 38 U.S.C. 3102, 3103.

§ 21.42 Deferral or extension of the basic period of eligibility.

The basic period of eligibility does not run as long as any of the following reasons prevents the veteran from commencing or continuing a vocational rehabilitation program:

(a) *Qualifying compensable service-connected disability(ies) not established.* The basic period of eligibility does not commence until the day VA notifies a veteran of a rating determination by VA that the veteran has a qualifying compensable service-connected disability under § 21.40.

Authority: 38 U.S.C. 3103(b)(3).

(b) *Character of discharge is a bar to benefits.*

(1) The basic period of eligibility does not commence until the veteran meets the requirement of a discharge or release under conditions other than dishonorable. (For provisions regarding character of discharge, see § 3.12 of this chapter.)

(2) If VA has considered a veteran's character of discharge to be a bar to benefits, the basic period of eligibility commences only when one of the following happens:

(i) An appropriate authority changes the character of discharge or release; or

(ii) VA determines that the discharge or release was under conditions other than dishonorable or that the discharge or release was, but no longer is, a bar to benefits.

(3) If there is a change in the character of discharge, or the discharge or release otherwise is determined, as provided in paragraph (b)(2) of this section, not to be a bar to benefits, the beginning date of the basic period of eligibility will be the effective date of the change or VA determination.

Authority: 38 U.S.C. 3103(b)(2).

(c) Commencement or continuation of participation prevented by medical condition(s).

(1) The basic period of eligibility does not run during any period when a veteran's participation in a vocational rehabilitation program is determined to be infeasible for 30 days or more because of any medical condition(s) of the veteran, including the disabling effects of chronic alcoholism (see paragraphs (c)(2) through (c)(5) of this section).

(2) For purposes of this section, the term *disabling effects of chronic alcoholism* means alcohol-induced physical or mental disorders or both, such as habitual intoxication, withdrawal, delirium, amnesia, dementia, and other like manifestations that:

(i) Have been diagnosed as manifestations of alcohol dependency or chronic alcohol abuse; and

(ii) Have been determined to prevent the affected veteran from beginning or continuing in a program of vocational rehabilitation and employment.

(3) A diagnosis of alcoholism, chronic alcoholism, alcohol dependency, or chronic alcohol abuse, in and of itself, does not satisfy the definition of disabling effects of chronic alcoholism.

(4) Injuries sustained by a veteran as a proximate and immediate result of activity undertaken by the veteran while physically or mentally unqualified to do so due to alcoholic intoxication are not considered disabling effects of chronic alcoholism. An injury itself, however, may prevent commencement or continuation of a rehabilitation program.

(5) For purposes of this section, after November 17, 1988, the disabling effects of chronic alcoholism do not constitute willful misconduct. See 38 U.S.C. 105(c).

(6) If the basic period of eligibility is delayed or interrupted under this paragraph (c) due to any medical condition(s) of the veteran, it will begin or resume on the date a Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC) notifies the veteran in writing that the CP or VRC has determined, based on the evidence of record, that participation in a vocational rehabilitation program is reasonably feasible for the veteran.

Authority: 38 U.S.C. 3103(b)(1).

§ 21.44 Extension of the basic period of eligibility for a veteran with a serious employment handicap.

(a) *Conditions for extension.* A Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC) may extend the basic period of eligibility of a veteran with a serious employment handicap when the veteran's current employment handicap and need for rehabilitation services and

assistance necessitate an extension under the following conditions:

(1) *Not rehabilitated to the point of employability.* The veteran has not been rehabilitated to the point of employability; or

Authority: 38 U.S.C. 3103(c).

(2) *Rehabilitated to the point of employability.* The veteran was previously declared rehabilitated to the point of employability, but currently meets one of the following three conditions:

(i) One or more of the veteran's service-connected disabilities has worsened, preventing the veteran from working in the occupation for which he or she trained, or in a related occupation;

(ii) The veteran's current employment handicap and capabilities clearly show that the occupation for which the veteran previously trained is currently unsuitable; or

(iii) The occupational requirements in the occupation for which the veteran trained have changed to such an extent that additional services are necessary to enable the veteran to work in that occupation, or in a related field.

Authority: 38 U.S.C. 3103(c).

(b) *Length of eligibility extension.* For a veteran with a serious employment handicap, a CP or VRC may extend the basic period of eligibility for such additional period as the CP or VRC determines is needed for the veteran to accomplish the purposes of his or her individualized rehabilitation program.

Authority: 38 U.S.C. 3103(c).

§ 21.45 Extending the period of eligibility for a program of independent living beyond basic period of eligibility. A Counseling Psychologist (CP) or Vocational Rehabilitation Counselor (VRC) may extend the period of eligibility for a veteran's program of independent living services beyond the veteran's basic period of eligibility if the CP or VRC determines that an extension is necessary for the veteran to achieve maximum independence in daily living. The extension may be for such period as the CP or VRC determines is needed for the veteran to achieve the goals of his or her program of independent living. (See § 21.76(b) concerning duration of independent living services.)

Authority: 38 U.S.C. 3103(d).

4. Add § 21.46 to read as follows:

§ 21.46 Veteran ordered to active duty; extension of basic period of eligibility. If VA determines that a veteran is prevented from participating in, or continuing in, a program of vocational rehabilitation as a result of being ordered to active duty under 10 U.S.C. 688, 12301(a), 12301(d), 12301(g), 12302, or 12304, the veteran's basic period of eligibility will be extended by the length of time the veteran serves on active duty plus 4 months.

Authority: 38 U.S.C. 3103(e); sec. 308(h), Public Law 107–330, 116 Stat. 2829.

[FR Doc. E9–4935 Filed 3–6–09; 8:45 am]

BILLING CODE 8320–01–P

Notices

Federal Register
Vol. 74, No. 44
Monday, March 9, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Supplemental Nutrition Assistance Program: Agency Information Collection Activities: Proposed Collection; Comment Request; Disaster Supplemental Nutrition Assistance Program

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collections. This information collection is based on the Robert T. Stafford Disaster Relief and Emergency Assistance Act and Section 5(h) of the Food and Nutrition Act of 2008, which provide the Secretary of Agriculture with the authority to develop a Disaster Supplemental Nutrition Assistance Program (D–SNAP) to address the needs of families temporarily in need of food assistance after a disaster. The information collection under this notice is required for the establishment and operation of a D–SNAP.

DATES: Written comments must be received on or before May 8, 2009.

ADDRESSES: *Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who respond to this information collection, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Sandra Clark, Chief, Certification Policy Branch, Program Development Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302. Comments may also be faxed to the attention of Ms. Clark at (703) 305–2486. The Internet address is: *Sandy.Clark@FNS.USDA.GOV.* All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia, 22302, Room 812.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Ms. Clark at (703) 305–2495.

SUPPLEMENTARY INFORMATION:

Title: Disaster Supplemental Nutrition Assistance Program (D–SNAP).

OMB Number: 0584–0336.

Expiration Date: June 30, 2009.

Type of Request: Extension of a previously approved collection.

Abstract: Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 100–707, and Section 5(h) of the Food and Nutrition Act of 2008, 7 U.S.C. 2014(h), the Secretary of Agriculture has the authority to develop a Disaster Supplemental Nutrition Assistance Program (D–SNAP) to address the temporary food needs of families following a disaster. The information collection under this notice is required to be provided by State agencies in order to receive approval from the Food and Nutrition Service (FNS) to operate a D–SNAP in response to a disaster.

The number of disasters that occur annually and the average number of households affected by the disasters cannot be predicted. During the period from calendar year 2003 through calendar year 2008, the number of State requests to operate disaster programs has ranged from a low of five in calendar year 2006 to a high of 26 in calendar year 2005, which included program modifications requested by some States to accommodate evacuees from disasters which did not directly affect the States themselves. The information collection under this reporting burden is limited to the burden experienced by State agencies in preparing their requests to operate D–SNAPs. The burden associated with the actual operation of D–SNAPs, including the processing of applications from households affected by disasters, is included under OMB docket #0584–0064 rather than this information collection. FNS estimates that approximately 10 hours of State agency personnel time are required to prepare such requests. The burden associated with preparing requests to operate D–SNAPs does not vary significantly from disaster to disaster and is relatively independent of the scope of the disaster. Major disasters require little additional document preparation time than relatively minor disasters. Based on an estimate of 14 State agency requests per year to operate D–SNAPs and 10 hours of State agency personnel time to prepare each application, FNS has calculated an estimated burden of 140 hours per year in an average year. This represents a significant increase from our previous estimate, which was based on an annual average of eight disaster programs.

Affected Public: State and local governments.

Estimated Number of Responses: 14.

Estimated Number of Respondents: 14.

Estimated Number of Responses per Recipient: 1.

Estimated Time per Response: 10 hours.

Estimated Total Annual Burden: 140 hours.

Dated: March 3, 2009.

E. Enrique Gomez,

Acting Administrator, Food and Nutrition Service.

[FR Doc. E9–4824 Filed 3–6–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—School Nutrition Dietary Assessment Study–IV (SNDA–IV)

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Food and Nutrition Service (FNS) invites the general public and other public agencies to comment on this proposed information collection. This collection is a reinstatement with change of a previously approved collection for which approval has expired.

DATES: Written comments on this notice must be received on or before May 8, 2009.

ADDRESSES: *Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Fred Lesnett, Contracting Officer's Representative, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Fred Lesnett at 703–305–2576 or via e-mail to *Fred.Lesnett@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Fred Lesnett at 703–605–0811.

SUPPLEMENTARY INFORMATION:

Title: School Nutrition Dietary Assessment Study–IV (SNDA–IV).

OMB Number: 0584–0527.

Expiration Date: 1/31/2008.

Type of Request: This is a reinstatement with change of a previously approved data collection for which approval has expired.

Abstract: The School Nutrition Dietary Assessment–IV (SNDA–IV) will collect data from nationally representative samples of School Food Authorities (SFAs) and schools that participate in the National School Lunch Program (NSLP) (7 CFR Part 210), OMB No.: 0584–0006, Expiration Date: 03/31/2009. These data will provide federal, state, and local policymakers with information about how federally sponsored school meal programs (the NSLP and the School Breakfast Program (7 CFR Part 220), OMB No.: 0584–0012, Expiration Date: 3/31/2009) operate, how the nutrient and food content of meals and snacks offered and served in these programs conform with program standards, and how school meal programs have changed since the SNDA–III study was conducted and since the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L 108–265). SNDA–III data were collected in school year 2004–2005.

The study will collect information from nationally representative samples of SFAs and schools. SFAs will be selected as a sample with probability proportional to size. SFA directors will be asked to complete a web-based survey, with the option for telephone completion. A subsample of SFA directors will be recruited to participate in school-level data collection. Directors who agree to participate in school-level data collection will complete a brief telephone interview to provide key information about the SFA and about the schools sampled for data collection. Approximately three schools will be sampled in each SFA. School foodservice managers in sampled schools will complete a five-day menu survey, providing detailed information about the foods and beverages offered and served in school breakfasts, lunches, and, if offered, after school snacks. The menu survey will also collect information, for one day, about foods available for a la carte purchase at breakfast and lunch. Foodservice managers will also complete a separate survey that covers topics related to school food service operations. Principals in sampled schools will complete a web-based survey, with the option for telephone completion. Finally, school staff appointed by principals (referred to as school liaisons) will complete an observation checklist to document availability of competitive foods in vending machines, fundraisers, and venues outside the cafeteria, such as school stores and snack bars.

Affected Public: Respondent groups include: (1) SFA directors; (2) school foodservice managers; (3) principals; and (4) school staff appointed by principals to complete observation checklist (school liaisons).

Estimated Number of Respondents: The total estimated number of respondents is 3,591 which includes: (1) 750 SFA directors (80% will complete survey); (2) a random subsample of 375 of these SFA directors who will be asked to have their SFA participate in school-level data collection (80% will complete a telephone interview and agree to school-level data collection); (3) 947 school foodservice managers in SFAs that agree to school-level data collection (95% will complete two separate surveys, including a five-day menu survey); (4) 947 principals in SFAs that agree to school-level data collection (95% of principals in schools that complete a menu survey will complete a survey); and (5) 947 school liaisons in SFAs that agree to school-level data collection (95% of liaisons in schools that complete a menu survey will complete an observation checklist).

Estimated Number of Responses per Respondent: All respondents will be asked to respond to each instrument only once. However, SFA directors (600) will be asked to respond to the SFA director survey and a subsample of SFA directors (300) will be asked to complete the recruitment survey, required for the sampling of elementary, middle and high schools. In addition, school food service managers (900) will be asked to respond to the manager survey and the 5 day menu survey. School principals (855) and school liaisons (855) will be asked to complete only one survey instrument per respondent.

Estimated Total Annual Responses: 4,913.

Estimated Total Annual Burden on Respondents: 6,869.680 hours. See the table below for the estimated total annual burden for each type of respondent.

REPORTING BURDEN

Respondent	Estimated number of respondents	Responses annually per respondent	Total annual responses	Estimated average number of hours per response	Estimated total annual hours of response burden
SFA Directors					
SFA Director Survey					
Completed interviews	600	1.00	600	0.4175	250.500
Attempted interviews	150	1.00	150	0.0500	7.500
SFA Recruitment Interview					
Completed interviews	300	1.00	300	0.3006	90.180
Attempted interviews	75	1.00	75	0.0500	3.750
Total for SFA Directors					
Completed interviews	600	1.00	900	0.3785	340.680
Attempted interviews	150	1.00	225	0.0500	11.250
School Foodservice Managers					
School Food Service Manager Survey					
Completed interviews	900	1.00	900	0.3340	300.600
Attempted interviews	47	1.00	47	0.0500	2.350
Menu Survey					
Completed interviews	900	1.00	900	6.1002	5,490.180
Attempted interviews	47	1.00	47	0.0500	2.350
Total for School Food Service Managers					
Completed interviews	900	1.00	1,800	3.2171	5,790.780
Attempted interviews	47	1.00	94	0.0500	4.700
Principals					
Completed interviews	855	1.00	855	0.3340	285.570
Attempted interviews	92	1.00	92	0.0500	4.600
School Liaisons					
Completed checklists	855	1.00	855	0.5000	427.500
Attempted checklists	92	1.00	92	0.0500	4.600
Total Responding Burden	3,591	1.37	4,913	1.3983	6,869.680

Estimated Time per Response: 1.3983 hours. As shown in the above table, the estimated time of response varies from 20 minutes (0.3340 hours) to 6.1002 hours for responders and 5 minutes for non-responders, depending on the respondent group and instrument.

Dated: March 3, 2009.

E. Enrique Gomez,

Acting Administrator, Food and Nutrition Service.

[FR Doc. E9–4838 Filed 3–6–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Umatilla National Forest, Pomeroy Ranger District, Pomeroy, WA; South George Vegetation and Fuels Management Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service will prepare an environmental impact statement (EIS) to disclose environmental effects on proposed resource management actions in South George project planning area. This project would improve the health and vigor of upland forest stands by managing vegetation composition, structure, stand density, and diversity, and decrease the susceptibility to future wildland fires of uncharacteristic intensity by reducing ladder, surface, and canopy fuels. The project planning area is approximately 21,000 acres in size. Proposed project activities consist of commercial timber harvest, including treatment of activity and natural fuels within harvest units, non commercial thinning for fuels reduction purposes, temporary road construction (that will be decommissioned after project use), danger tree removal along haul routes, and landscape prescribed burning.

DATES: Comments concerning the scope of the analysis must be received by April 8, 2009. The draft environmental impact statement is expected September

2009 and the final environmental impact statement is expected December 2009.

ADDRESSES: Send written comments to Monte Fujishin, District Ranger, Pomeroy Ranger District, 71 West Main Street, Pomeroy, WA 99347. Comments may also be sent via e-mail to *comments-pacificnorthwest-umatilla-pomeroy@fs.fed.us* or via facsimile to (509) 843–4621. Comments may be hand delivered to the Pomeroy Ranger District office between the hours of 7:30 a.m. and 4:30 p.m., Monday through Friday, excluding Federal holidays.

It is important that reviewers provide their comments at such times and in such a manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and comments. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative appeal or judicial review.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to participate in subsequent administrative appeal or judicial review.

FOR FURTHER INFORMATION CONTACT: Ed Koberstein, Project Team Leader, Pomeroy Ranger District, telephone (509) 843–1891 or e-mail *ekoberstein@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: South George project planning area is primarily located in Asotin County, Washington with a small portion in Garfield County, Washington. The legal description of the area is as follows: portions of T.7N., R.44E., section 1; T.7N., R.43E., sections 1–2; T.8N., R.43E., sections 1, 2, 10–15, 21–28, 33-36; T.8N., R.44E., sections 5–8, 17–20, 26–36; and T. 9N., R.43E., section 35. It is within South Fork Asotin Creek and Upper George Creek Subwatersheds of Asotin Watershed. Asotin Creek and Wenatchee Creek inventoried roadless areas (IRAs) are adjacent on the west and south sides of the project planning area. Existing forest roads (4400, 4300, and 4304) separate the IRAs from the project planning area boundary. Anatone Wildland Urban Interface (WUI) area is near the eastern boundary of the project planning area and is identified in the Asotin County Community Wildfire Protection Plan (CWPP). Approximately 550 acres within the project planning area is owned by Washington State Department of Fish and Wildlife.

Purpose and Need for Action

The purpose and need for action in this project is to improve health, vigor, and resilience to fire, insects, and disease in upland forests that are outside their historical 3 pre-fire suppression conditions for species composition, structural diversity, stocking densities, and fuel loads. Additionally there is a need to provide sawlogs and wood fiber products for utilization by regional and local industry.

Findings from historical range of variability analysis show that dry upland forest sites once dominated by old forest stands of ponderosa pine have closed in with shade tolerant species such as Douglas-fir and grand fir. Species composition on dry-forest sites indicates that Douglas-fir and grand fir are over-represented, and ponderosa pine is under-represented. For moist forest sites, species composition analysis shows that Douglas-fir, western larch, and lodgepole pine are under-represented and below their historical range, while grand fir and spruce-fir are over-represented. Findings also show that existing insect and disease susceptibility based upon historical range of variability is well above normal levels for defoliators (western spruce budworm and Douglas-fir tussock moth), fir engraver beetles, and root diseases (Armillaria and laminated root disease). The following statements summarize the purpose of and need for action in South George project planning area:

Vegetation—There is a need to manage vegetation composition, structure, stand density, and diversity of landscape patterns toward desired future conditions across the landscape by favoring fire tolerant species, increasing old forest structure, and reducing stocking density to levels that resist insects, diseases, and stand-replacing wildfire(s).

Fuels—There is a need to improve suppression capability near private lands, and treat forest stands that deviate from natural fire regimes in terms of fire return interval and vegetative change from historical composition and density, specifically in condition class 2 (moderately altered from historical range) and condition class 3 (significantly altered from historical range). This would decrease the potential risk to wildfires of uncharacteristic intensity by reducing fuel loads to levels expected under natural fire disturbance regimes. This would be achieved by lowering stand densities, increasing the relative abundance of fire tolerant species, reducing existing ladder, surface, and canopy fuels, and reintroducing landscape prescribed fire into the ecosystem.

Timber Production—There is a need to provide sawlogs and wood fiber for utilization by regional and local economies.

Proposed Action—Following are brief descriptions of activities proposed for implementation, along with associated activities that would occur concurrently.

Timber Harvest—Commercially harvest approximately 4,200 acres. Free thinning (an unevenaged prescription utilized when remaining structure and composition is paramount and suited for restoring old-growth character of forests as well as reducing risk of wildfire) would be the primary silviculture prescription (approximately 3,300 acres). Some shelterwood and seed-tree prescriptions (approximately 900 acres) would be used in declining stands where thinning would not restore stand health or vigor. Treatments would tend to favor early seral tree species such as ponderosa pine and western larch. Harvest methods would include conventional ground based tractor logging (approximately 3,000 acres), skyline logging (approximately 900 acres) and helicopter logging (approximately 300 acres). Some treatment units may include the removal of sawlogs, small diameter trees (generally less than 7.0 inches diameter at breast height), and excess down wood for use as woody biomass products. Harvest objectives would vary by stand condition and fuel management objectives. The focus of treatment would be based on the desired quality of each treatment area after management rather than the quantity of products removed from each area.

Fuel Treatments (activity and natural)—Treat to convert stands in condition classes 2 and 3 to condition class 1 (within historical range). Treatments would be designed to reduce ladder fuels to lower the risk of fire spread into the upper canopy, and reduce ground fuel that could contribute to uncharacteristic wildfire intensity and resource damage. Treatments would

also reduce fuel continuity in areas adjacent to private lands. Treatment objectives would be achieved though a combination of the following activities (more than one treatment may occur on a single acre): mechanical thinning (approximately 1,300 acres), prescribed burning of activity fuels (approximately 2,100 acres), grapple piling of activity fuels (approximately 1,000 acres) and yarding with tops attached. Non-commercial thinning by hand or mechanical methods would remove trees that are less than 10 inches diameter at breast height in stands with excess ladder fuels (approximately 200 acres).

Road Management—To accomplish implementation of proposed activities approximately 32 miles of closed system roads and 45 miles of seasonally open roads would be used as haul routes. All system roads would remain the same after project implementation, closed roads would continue to be closed and seasonally open roads would continue with that designation. Approximately 3.0 miles of temporary road would be constructed, of which 1.4 miles would be constructed over previous road templates. All temporary roads would be decommissioned after project activity use. No new road construction is proposed.

Danger Tree Removal—Danger trees would be felled and removed along all previously described haul routes used for timber sale activity. If considered economically feasible, they would be sold as part of a timber sale. Danger trees within Riparian Habitat Conservation Areas (RHCAs) would not be removed; they would be cut and left to provide additional coarse woody debris.

Landscape Prescribed Fire—Landscape prescribed fire would occur across approximately 3,000 acres within the project planning area. This treatment would reintroduce fire to a fire-dependent ecosystem to lessen the effects of a future uncharacteristic large wildfire and improve forage quality for big game. In the project planning area, fire intensities would be kept low by keeping fire out of the overstory and burning mainly surface fuels. Individual tree and group torching would likely occur in areas where there is sufficient ladder fuels and in timber stands with high occurrences of mistletoe. Upon completion the area would likely be a mosaic of unburned, lightly burned, moderately burned, and intensely burned patches.

Responsible Official

Monte Fujishin, District Ranger, Pomeroy Ranger District, Umatilla National Forest, 71 West Main Street, Pomeroy, Washington 99347.

Nature of Decision To Be Made

The decision to be made is whether to approve the proposed action or any alternative way to achieve the desired outcome. No Forest Plan amendment is proposed.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. Comments and input regarding this proposed action are being requested from the public and other interested parties in conjunction with this notice of intent. The comment period will be open for thirty days, beginning on the date of publication of this notice of intent. Response to the draft environmental impact statement will be sought from interested tribes and public beginning approximately in September 2009.

It is important that reviewers provide their comments at such times and in such a manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and comments. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative appeal or judicial review.

Dated: March 2, 2009.

Monte Fujishin,

District Ranger.

[FR Doc. E9–4764 Filed 3–6–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Southwest Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000, as amended, (Pub. L. 110–343), the Boise and Payette National Forests' Southwest Idaho Resource Advisory Committee will conduct a business meeting. The meeting is open to the public.

DATES: Thursday, March 19, beginning at 10:30 a.m.

ADDRESSES: Idaho Counties Risk Management Program Building, 3100 South Vista Avenue, Boise, Idaho.

SUPPLEMENTARY INFORMATION: Agenda topics will include review and approval of project proposals, and is an open public forum.

FOR FURTHER INFORMATION CONTACT: Kimberly Brandel, Designated Federal Official, at (208) 347–0301 or e-mail *kbrandel@fs.fed.us.*

Dated: February 27, 2009.

Suzanne C. Rainville,

Forest Supervisor, Payette National Forest.

[FR Doc. E9–4765 Filed 3–6–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

A–331–802

Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp from Ecuador with respect to 81 companies. The respondents which the Department selected for individual examination are Promarisco, S.A. (Promarisco) and Sociedad Nacional de Galapagos, S.A. (Songa). The respondents which were not selected for individual examination are listed in the ''Preliminary Results of Review'' section of this notice. This is the third administrative review of this order. The period of review (POR) covers February 1, 2007, through August 14, 2007.

We preliminarily determine that sales made to the United States by Promarisco and Songa have been made below normal value (NV). In addition, based on the preliminary results for the respondents selected for individual examination, we have determined a preliminary weighted–average margin for those companies that were not individually examined.

If the preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: David Goldberger or Gemal Brangman, AD/CVD Operations, Office 2, Import Administration–Room 1117, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4136 or (202) 482–3773, respectively.

SUPPLEMENTARY INFORMATION:

Background

In February 2005, the Department published in the **Federal Register** an antidumping duty order on certain frozen warmwater shrimp from Ecuador. *See Notice of Amended Final Determination and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador*, 70 FR 5156 (February 1, 2005). On February 4, 2008, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on certain frozen warmwater shrimp from Ecuador for the period February 1, 2007, through August 14, 2007.[1] *See Antidumping and Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 6477 (February 4, 2008). In response to timely requests from interested parties, pursuant to 19 CFR 351.213(b)(1) and (2), to conduct an administrative review of the sales of certain frozen warmwater shrimp made by numerous companies during the POR, the Department initiated an administrative review for 81 companies. These companies are listed in the Department's notice of initiation. *See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand: Notice of Initiation of Administrative Reviews*, 73 FR 18754 (April 7, 2008) (*Notice of Initiation*).

Based upon the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. As a result, on May 27, 2008, we selected the two largest producers/exporters of certain frozen warmwater shrimp from Ecuador during the POR, Promarisco and Songa, for individual examination in this segment of the proceeding. *See* Memorandum entitled, ''2007 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Ecuador: Selection of Respondents for Individual Review,'' dated May 27, 2008. On June 2, 2008, we issued the antidumping duty questionnaire to Promarisco and Songa. In addition, we instructed Promarisco to respond to section D of the questionnaire because we had disregarded sales by Promarisco made below the cost of production (COP) in the most recently completed segment of this proceeding. *See* ''Cost of Production Analysis'' section below.

We received responses to sections A, B, and C of the questionnaire from Promarisco and Songa in July and August 2008. We also received a response to section D of the questionnaire from Promarisco in August 2008.

On August 18, 2008, the petitioner requested that the Department initiate a sales–below-cost investigation of Songa. On September 22, 2008, we initiated this investigation. *See* Memorandum entitled ''The Petitioner's Allegation of Sales Below the Cost of Production for Songa S.A.,'' dated October 30, 2007 (Songa COP Initiation Memo). On that date, we instructed Songa to respond to section D of the Department's questionnaire. Songa submitted its response to section D of the questionnaire on October 27, 2008.

During the period of July to September 2008, the petitioner submitted general comments regarding the selection of the appropriate comparison market in this review with regard to Promarisco and Songa. In September 2008, Promarisco and Songa responded to these comments.

In October 2008, we determined that Spain constitutes the appropriate comparison market for Promarisco and Songa in this review. *See* Memorandum entitled ''Selection of the Appropriate Third Country Market for Promarisco,'' dated October 24, 2008 (Promarisco Comparison Market Memo), and Memorandum entitled ''Selection of the Appropriate Third Country Market for Songa,'' dated October 6, 2008 (Songa Comparison Market Memo).

On October 8, 2008, the Department postponed the preliminary results in this review until no later than March 2, 2009. *See Certain Frozen Warmwater Shrimp From Ecuador, India, the People's Republic of China, and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Third Administrative Reviews*, 73 FR 58931 (October 8, 2008).

During the period July 2008 through February 2009, we issued supplemental questionnaires to Promarisco and Songa. We received responses to these supplemental questionnaires during the period August 2008 through February 2009.

We conducted a verification of Promarisco's sales data in December 2008, and verifications of Promarisco's and Songa's COP data in January and February 2009, respectively.

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the Penaeidae family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); 2) shrimp

[1] The antidumping duty order was revoked with an effective date of August 15, 2007. *See Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador*, 72 FR 48257 (August 23, 2007) (*Section 129 Final Results*). Accordingly, this administrative review covers the period prior to the effective revocation date.

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Period of Review

The POR is February 1, 2007, through August 14, 2007.

Facts Available

Section 776(a) of the Tariff Act of 1930, as amended (the Act) provides that the Department will apply ''facts otherwise available'' if, *inter alia*, necessary information is not available on the record or an interested party: 1) withholds information that has been requested by the Department; 2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; 3) significantly impedes a proceeding; or 4) provides such information, but the information cannot be verified. During the verification of Promarisco's sales data, we found that Promarisco had failed to report in its questionnaire response the full range of payment terms or arrangements applicable to its sales during the POR, as requested in the Department's questionnaire. In its questionnaire response, Promarisco reported one payment date for each sale, and stated that the date represented the date of customer payment. However, we found that, for several sales examined at verification, Promarisco had obtained cash advances from its banks for most, if not all, of the invoiced amounts prior to the receipt of the customer's payment. In other cases, the customer paid the invoiced amount in multiple partial payments. Neither of these payment arrangements was identified for the record prior to verification, and we did not discover them until we examined several sales at verification. Promarisco did not indicate or explain why it was not possible to provide this information prior to verification. Moreover, at the commencement of verification, Promarisco presented a list of corrected payment dates for certain sales. However, most of the actual payment dates for the sales examined at verification did not match the reported payment dates, as revised at the commencement of verification. *See* Memorandum entitled ''Verification of the Sales Questionnaire Response of Promarisco S.A. in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Ecuador,'' dated February 10, 2008 (Promarisco Sales Verification Report) at pages 15 – 20.

Due to the fact that Promarisco did not disclose these payment arrangements prior to verification and the time constraints at verification, we were unable to determine the full impact of these sales payment discrepancies across the entire U.S. and Spanish sales databases. Moreover, the large number of such discrepancies discovered among the sales examined at verification undermines the reliability of the reported payment information for the remaining sales not specifically examined at verification. Additionally, these discrepancies affect the calculation of imputed credit expenses. For these reasons, we find that it is appropriate to resort to facts otherwise available to account for the unreported information. *See Notice of Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Not Revoke Order in Part: Canned Pineapple Fruit from Thailand*, 68 FR 65247 (November 19, 2003), and accompanying Issues and Decision Memorandum at Comment 20b (where the Department applied facts otherwise available to a respondent that did not provide requested information). Therefore, we have preliminarily determined that the date of payment and imputed credit expenses for Promarisco's U.S. and Spanish sales should be based on facts available in accordance with section 776(a)(2)(B) and section 776(a)(2)(D) of the Act.

In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with the request for information. *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025–26 (September 13, 2005); *see also Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794–96 (August 30, 2002). The Statement of Administrative Action provides guidance by explaining that adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. 1, at 870 (1994). Furthermore, ''affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27340 (May 19, 1997); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon*). Because: 1) Promarisco had the necessary information within its control and it did not report this information; and 2) it failed to put forth its maximum effort as required by the Department's questionnaire, we preliminarily find that Promarisco failed to cooperate to the best of its ability. Therefore, for the preliminary results we are using facts available with an adverse inference to determine imputed credit expenses. Specifically, with respect to all U.S. sales, we are calculating imputed credit expenses based on the longest period between shipment date and payment date either reported in the U.S. sales database, or observed at verification. With respect to all Spanish sales, we are

calculating imputed credit expenses based on the shortest period between shipment date and payment date either reported in the Spanish sales database, or observed at verification. *See* Memorandum entitled ''Promarisco S.A. Preliminary Results Notes and Margin Calculation,'' dated March 2, 2009 (Promarisco Sales Calculation Memo).

Comparisons to Normal Value

To determine whether sales of certain frozen warmwater shrimp by Promarisco and Songa to the United States were made at less than NV, we compared export price (EP) to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice.

Pursuant to section 777A(d)(2) of the Act, we compared the EPs of individual U.S. transactions to the weighted–average NV of the foreign like product where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section below.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by Promarisco and Songa covered by the description in the ''Scope of the Order'' section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared U.S. sales of shrimp to sales of shrimp made to Spain for Promarisco and Songa within the contemporaneous window period, which extends from three months prior to the month of the U.S. sale until two months after the sale. *See* ''Home Market Viability and Selection of Comparison Markets'' section below. Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we made product comparisons using constructed value (CV).

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by Promarisco and Songa in the following order: cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

With respect to sales comparisons involving broken shrimp, we compared Promarisco's and Songa's sales of broken shrimp in the United States to its sales of comparable quality shrimp in the comparison market. Where there were no sales of identical broken shrimp in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales of broken shrimp to sales of the most similar broken shrimp made in the ordinary course of trade. Where there were no sales of identical or similar broken shrimp, we made product comparisons using CV.

With respect to the product characteristic of count size, Songa requests in its February 10, 2009, submission that the Department modify the reporting of count–size ranges for certain head–on shrimp products. Songa notes that the Department's methodology for converting products sold on a per–kilogram basis to the per–pound count–size ranges specified in the Department's questionnaire results in two distinct per–kilogram count–size ranges being classified into the same per–pound count–size range. According to Songa, this grouping results in significant price distortions when comparing products. To reduce these distortions, Songa proposes that one of the two affected groups of products be reclassified into the next larger count–size range.

We have not accepted Songa's proposed revision. As we explained in *Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 39940 (July 11, 2008), and accompanying Issues and Decision Memorandum at Comment 2, ''{o}ur normal practice is to consider proposed changes to product–matching criteria in the very early stages of a proceeding, to allow adequate time for all parties to comment on such proposed changes and for the Department to properly analyze them before making a determination.'' Moreover, issues involving product–matching characteristics, including classifications within a given characteristic, cannot be analyzed only in the context of one respondent's reported data, as they have the potential to impact other respondents in this segment of the proceeding and the current segments of the companion proceedings involving shrimp from India, the People's Republic of China, Thailand, and Vietnam. In this case, as noted above, Songa did not raise this matter until February 10, 2009, less than a month prior to these preliminary results, and more than eight months after the antidumping duty questionnaire was issued in this review (*i.e.*, June 2, 2008). Accordingly, there is insufficient time remaining in this and the companion shrimp reviews to solicit and consider comments on the change to the count–size product characteristic proposed by Songa, as well as to obtain and analyze any revised sales and COP data that may be necessary.

Export Price

For all U.S. sales made by Songa and Promarisco, we applied the EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold by the producer/exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and constructed export price (CEP) methodology was not otherwise warranted based on the facts of record.

A. Promarisco

We based EP on delivered, duty–paid (DDP) prices to the first unaffiliated purchaser in the United States. We made deductions to the starting price for billing adjustments, foreign inland freight expenses, bill of lading fees, ocean freight expenses, marine insurance expenses, U.S. customs duties (including merchandise processing and harbor maintenance fees), U.S. brokerage and handling expenses, and U.S. warehousing expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

We made various minor revisions to the reported U.S. sales data, as identified by Promarisco in its December 17, 2008, submission and verified by the Department. *See* Promarisco Sales Verification Report.

Promarisco reported bill of lading fees as part of its indirect selling expense calculation. These fees are more appropriately classified as movement expenses, as they are associated with the shipment of the subject merchandise to the United States. We recalculated the bill of lading fees as separate movement expenses, based on information obtained during verification. *See* Promarisco Sales Calculation Memo.

Although Promarisco did not report that it granted any billing adjustments during the POR, we observed at verification that billing adjustments were made on certain U.S. sales. We calculated the billing adjustments for these sales based on information obtained at verification, and took them into account in our calculation of the net U.S. price, where appropriate. *See* Promarisco Sales Calculation Memo.

B. Songa

We based EP on C&F or DDP prices to the first unaffiliated purchaser in the United States. Where appropriate, we made adjustments to the starting price for billing adjustments. We made deductions to the starting price, where appropriate, for foreign inland freight expenses, foreign inland insurance, Ecuadorian brokerage and handling expenses, ocean freight expenses, marine insurance expenses, U.S. customs duties (including merchandise processing and harbor maintenance fees), and U.S. brokerage and handling expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

Normal Value

A. Home Market Viability and Selection of Comparison Markets

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

In the less–than–fair–value (LTFV) investigation segment of this proceeding, the Department determined that a particular market situation existed which rendered the Ecuadorian market inappropriate for purposes of determining NV for the three respondents in the LTFV investigation, including Promarisco. *See* Memorandum entitled ''Home Market as Appropriate Comparison Market,'' dated June 7, 2004, as included at Exhibit A–2 of Promarisco's July 24, 2008, response to section A of the questionnaire. Promarisco reported that the particular market situation still applies to its home market sales and there is no information on the record to suggest otherwise. Accordingly, although the aggregate volume of Promarisco's home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales for the subject merchandise, because of the particular market situation, we could not rely on Promarisco's home market sales for determining NV. Therefore, we used Promarisco's sales to Spain, Promarisco's largest third–country market, as the basis for comparison–market sales, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. *See* Promarisco Comparison Market Memo, for a more detailed discussion of this issue.

Furthermore, based on our analysis of Songa's questionnaire responses, we determined that Songa's aggregate volume of home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise.[3] Therefore, with respect to Songa, we used sales to Spain, which was Songa's largest third–country market during the POR, as the basis for comparison–market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. *See* Songa Comparison Market Memo, for a more detailed discussion of this issue.

B. Level of Trade

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *See id; see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997) (*Plate from South Africa*). In order to determine whether the comparison sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison–market sales (*i.e.*, NV based on either home market or third–country prices),[4] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Technology, Inc. v. United States*, 243 F. 3d 1301, 1314 (Fed. Cir. 2001).

When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sale to sales at a different LOT in the comparison–market. In comparing EP or CEP sales at a different LOT in the comparison–market, where available data make it practicable, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment was practicable), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See Plate from South Africa*, 62 FR at 61732–33.

In this administrative review, we obtained information from each respondent regarding the marketing stages involved in making the reported foreign market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company–specific LOT findings are summarized below.

1. Promarisco

Promarisco made direct sales of frozen warmwater shrimp to retailers, food processors, restaurant chains, and distributors in the U.S. market, and food processors and distributors in the Spanish market. Promarisco reported that it made EP sales in the U.S. market on a DDP basis through one channel of distribution. We examined the selling activities performed for this channel, and found that Promarisco performed the following selling functions: sales forecasting, sales promotion, order input/processing, freight and delivery, and claim services. These selling activities can be generally grouped into two selling function categories for analysis: 1) sales and marketing (*e.g.*, order input/processing, sales promotion, claim services); and 2) freight and delivery. Accordingly, we find that Promarisco performed the selling functions of sales and marketing, and freight and delivery for all customers in the U.S. market. Because all sales in the U.S. market are made through a single distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the Spanish market, Promarisco reported that it made sales on an FOB, CIF, or CFR basis through one channel of distribution. We examined the selling activities performed for this channel, and found that Promarisco performed the following selling functions: sales forecasting, sales promotion, order input/processing,

[3] Because Songa's sales in the home market did not meet the viability threshold, it was unnecessary to address whether a particular market situation existed with respect to such sales.

[4] Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (SG&A) expenses, and profit for CV, where possible.

payment of commissions, freight and delivery, and claim services. These selling activities can be generally grouped into two selling function categories for analysis: 1) sales and marketing (*e.g.*, order input/processing, sales promotion, claim services); and 2) freight and delivery. Accordingly, we find that Promarisco performed sales and marketing for all Spanish sales, and freight and delivery services for certain Spanish sales. We do not find that the provision of freight and delivery services for some sales is sufficient to distinguish it as a separate LOT. Accordingly, we preliminarily determine that there is one LOT in the Spanish market.

Finally, we compared the EP LOT to the comparison–market LOT and found that the selling functions performed for U.S. and Spanish market customers are virtually identical. Therefore, we determined that sales to the U.S. and Spanish markets during the POR were made at the same LOT, and as a result, no LOT adjustment was warranted.

2. Songa

Songa sold frozen warmwater shrimp to distributors and wholesalers in the Spanish and U.S. markets. Songa reported that it made EP sales in the U.S. market through a single channel of distribution. We examined the selling activities performed for this channel, and found that Songa performed the following selling functions: packing, order input/processing, sales promotion, payment of commissions, and freight and delivery arrangements. These selling activities can be generally grouped into two selling function categories for analysis: 1) sales and marketing *(e.g.*, order input/processing, sales promotion); and 2) freight and delivery. Accordingly, we find that Songa performed the same sales functions for all customers in the U.S. market. Because all sales in the U.S. market are made through a single distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the Spanish market, Songa reported that it made sales through a single channel of distribution. We examined the selling activities performed for this channel, and found that Songa performed the following selling functions: packing, order input/processing, sales promotion, payment of commissions, and freight and delivery arrangements. These selling activities can be generally grouped into two selling function categories for analysis: 1) sales and marketing (*e.g.*, order input/processing, sales promotion); and 2) freight and delivery. Accordingly, we find that Songa performed the same sales functions for all customers in the Spanish market. Because all sales in the Spanish market are made through a single distribution channel, we preliminarily determine that there is one LOT in the Spanish market.

Finally, we compared the EP LOT to the comparison–market LOT and found that the selling functions performed for U.S. and Spanish market customers are identical. Therefore, we determined that sales to the U.S. and Spanish markets during the POR were made at the same LOT, and as a result, no LOT adjustment was warranted.

C. Cost of Production Analysis

Based on our analysis of the petitioner's allegation, we found that there were reasonable grounds to believe or suspect that Songa's sales of frozen warmwater shrimp in the third–country market were made at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated a sales–below-cost investigation to determine whether Songa's sales were made at prices below their respective COPs. *See* Songa COP Initiation Memo.

Calculation of Cost of Production

We found that Promarisco had made sales below the COP in the 2004–2006 administrative review, the most recently completed segment of this proceeding as of the date this administrative review was initiated, and such sales were disregarded. *See Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 10658 (March 9, 2007); unchanged in *Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review*, 72 FR 52070 (September 12, 2007). Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that Promarisco made sales in the third–country market at prices below the cost of producing the merchandise in the current review period. Accordingly, we instructed Promarisco to respond to section D (cost of production) of the questionnaire.

In accordance with section 773(b)(3) of the Act, we calculated each respondent's COP based on the sum of its costs of materials and conversion for the foreign like product, plus amounts for general and administrative (G&A) expenses and interest expenses (*see* ''Test of Comparison Market Sales Prices'' section below for treatment of third–country selling expenses). The Department relied on the COP data submitted by each respondent in its most recent supplemental response to section D of the questionnaire for the COP calculation, except for the following instances where the information was not appropriately quantified or valued.

A. Promarisco

We relied on the COP data submitted by Promarisco except as follows.
1. We recalculated Promarisco's G&A and financial expense ratios to reflect the reclassification of write–offs of affiliated party transactions, and certain miscellaneous income and expenses.
2. We recalculated the financial expense ratio to exclude long–term interest income and certain selling expenses.
For additional details, see Memorandum entitled ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Promarisco, S.A.,'' dated March 2, 2009.

B. Songa

We relied on the COP data submitted by Songa except as follows.
1. We revised Songa's fixed overhead costs to include the depreciation expense related to the revaluation of fixed assets.
2. We revised Songa's G&A expense rate to include employee profit sharing costs and to reverse the claimed offset for duty drawback income.
3. We revised Songa's financial expense rate to include the amortization of exchange rate loss and the amortization of export certificates.
For additional details, see Memorandum entitled ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - Sociedad Nacional de Galapagos S.A.,'' dated March 2, 2009.

Test of Comparison Market Sales Prices

On a product–specific basis, we compared the adjusted weighted–average COP to the third–country sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices (inclusive of billing adjustments, where appropriate) were exclusive of any applicable movement charges, and direct and indirect selling expenses and packing expenses, revised where appropriate, as discussed below under the ''Price–to–Price Comparisons'' section.

Results of the COP Test

In determining whether to disregard third–country sales made at prices

below the COP, we examine, in accordance with sections 773(b)(1)(A) and (B) or the Act: 1) whether, within an extended period of time, such sales were made in substantial quantities; and 2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. Where less than 20 percent of the respondent's third–country sales of a given product are at prices less than the COP, we do not disregard any below–cost sales of that product because we determine that in such instances the below–cost sales were not made within an extended period of time and in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below–cost sales because: 1) they were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act; and 2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain specific products, more than 20 percent of Promarisco's and Songa's third–country sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no useable third country sales in the ordinary course of trade, we compared EPs to the CV in accordance with section 773(a)(4) of the Act. *See* ''Calculation of Normal Value Based on Constructed Value'' section below.

D. Calculation of Normal Value Based on Comparison–Market Prices

1. Promarisco

We calculated NV based on CIF, CFR or FOB prices to unaffiliated customers in the Spanish market. We made adjustments to the starting price for billing adjustments. We made deductions from the starting price for movement expenses, including inland freight, bill of lading fees, marine insurance, and international freight, under section 773(a)(6)(B)(ii) of the

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale (COS) for imputed credit expenses, commissions, and analysis and inspection fees.

We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, as commissions were granted in the Spanish market but not in the U.S. market, we deducted commissions paid in the Spanish market from the starting price, and made an upward adjustment to NV for the lesser of 1) the amount of commission paid in the Spanish market, or 2) the amount of indirect selling expenses incurred in the U.S. market.

We made various minor revisions to the reported Spanish sales data, as identified by Promarisco in its December 17, 2008 submission and verified by the Department. *See* Promarisco Sales Verification Report.

Although Promarisco did not report that it granted any billing adjustments during the POR, we observed at verification that billing adjustments were made on certain Spanish sales. We calculated the billing adjustments for these sales based on information obtained at verification, and took them into account in our calculation of NV, where appropriate. *See Promarisco Sales Calculation Memo*.

Promarisco reported bill of lading fees as part of its indirect selling expense calculation. These fees are more appropriately classified as movement expenses, as they are associated with the shipment of the subject merchandise to Spain. We recalculated the bill of lading fees as separate movement expenses based on information obtained during verification. *See* Promarisco Sales Calculation Memo.

Promarisco did not include analysis and inspection fees associated with U.S. and comparison–market sales in its sales databases. We calculated these fees as direct selling expenses, based on information obtained during verification. *See* Promarisco Sales Calculation Memo.

Promarisco reported indirect selling expenses inclusive of bill of lading fees. Because we have calculated the bill of lading fees separately, as discussed above, we recalculated indirect selling expenses exclusive of these fees. *See* Promarisco Sales Calculation Memo.

As discussed in the ''Facts Available'' section above, we relied on facts available with an adverse inference to determine Promarisco's imputed credit expense for U.S. and Spanish sales. Specifically, with respect to U.S. sales, we calculated imputed credit expenses based on the longest period between shipment date and payment date either reported in the U.S. sales database, or observed at verification. With respect to Spanish sales, we calculated imputed credit expenses based on the shortest period between shipment date and payment date either reported in the Spanish sales database, or observed at verification. For those U.S. sales for which Promarisco had not received payment as of the sales verification, we calculated imputed credit expenses using the date of the first day of the sales verification, December 15, 2008, as the date of payment.

We also deducted comparison–market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

2. Songa

We based NV for Songa on FOB or C&F prices to unaffiliated customers in Spain. We made adjustments, where appropriate, to the starting price for billing adjustments. We made deductions to the starting price, where appropriate, for foreign inland freight expenses, foreign inland insurance, Ecuadorian brokerage and handling expenses, and ocean freight expenses, under section 773(a)(6)(B)(ii) of the Act.

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in COS for imputed credit expenses, bank fees, analysis and inspection fees, and commissions.

We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market. If the commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment

to NV for the lesser of: 1) the amount of commission paid in the comparison market; or 2) the amount of indirect selling expenses incurred in the U.S. market.

We also deducted comparison market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

F. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison–market sales, NV may be based on CV. Accordingly, for those frozen warmwater shrimp products for which we could not determine the NV based on comparison–market sales because there were no useable sales of a comparable product or all sales of comparable products failed the COP test, we based NV on CV.

Section 773(e) of the Act provides that the CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for SG&A expenses, profit, and U.S. packing costs. For each respondent, we calculated the cost of materials and fabrication based on the methodology described in the ''Cost of Production Analysis'' section, above. We based SG&A and profit for each respondent on the actual amounts incurred and realized by the respondents in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

We made adjustments to CV for differences in COS in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made COS adjustments by deducting direct selling expenses incurred on comparison market sales from, and adding U.S. direct selling expenses to, CV, revised where appropriate, as discussed above.

Currency Conversion

We did not make any currency conversions pursuant to section 773A of the Act and 19 CFR 351.415 because all sales and cost data for both respondents were reported in U.S. dollars.

Preliminary Results of the Review

We preliminarily determine that weighted–average dumping margins exist for the respondents for the period February 1, 2007, through August 14, 2007, as follows:

Manufacturer/Exporter	Percent Margin
Promarisco, S.A.	2.00
Sociedad Nacional de Galapagos C.A. (Songa)	2.20
Review–Specific Average Rate Applicable to the Following Companies:[5].	

[5] this rate is based on the weighted average of the margins calculated for those companies selected for individual examination, excluding de minimis margins or margins based entirely on adverse facts available.

Manufacturer/Exporter	Percent Margin
Agricola e Industrial Ecuaplantation SA	2.09
Agrol SA	2.09
Alberto Xavier Mosquera Rosado	2.09
Alquimia Marina SA	2.09
Babychic SA	2.09
Biolife SA	2.09
Braistar	2.09
Camaronera Jenn Briann	2.09
Camarones	2.09
Comar Cia Ltda.	2.09
Doblertel SA	2.09
Dumary SA	2.09
Dunci SA	2.09
El Rosario Ersa SA	2.09
Empacadora Bilbo SA (Bilbosa)	2.09
Empacadora del Pacifico SA (EDPACIF SA)	2.09
Empacadora Dufer Cia. Ltda. (DUFER)	2.09
Empacadora Grupo Gran Mar (Empagran) SA	2.09
Empacadora Nacional CA	2.09
Empacadora y Exportadora Calvi Cia. Ltda.	2.09
Emprede SA	2.09
Estar CA	2.09
Exporclam SA	2.09
Exporklore SA	2.09
Exportadora Bananera Noboa	2.09
Exportadora de Productos de Mar (Produmar)	2.09
Exportadora del Oceano (Oceanexa) CA	2.09
Exportadora Langosmar SA	2.09
Exportadora del Oceano Pacifico SA (OCEANPAC)	2.09
Exports Langosmar SA	2.09
Fortumar Ecuador SA	2.09
Gambas del Pacifico SA 2.09.	
Gondi SA	2.09
Hector Canino Marty	2.09
Hectorosa SA	2.09
Industrial Pesquera Santa Priscila SA (Santa Priscila)	2.09
Inepexa SA	2.09
Jorge Luis Benitez Lopez	2.09
Karpicorp SA	2.09
Luis Loaiza Alvarez	2.09
Mardex Cia. Ltda.,/ ENT≤	2.09
Marine	2.09
Marines CA	2.09
Mariscos de Chupadores Chupamar	2.09
Mariscos del Ecuador C. Ltda. (Marecuador)	2.09
Natural Select SA	2.09
Negocios Industriales Real Nirsa SA (NIRSA)	2.09
Novapesca SA	2.09
Ocean Fish	2.09
Oceaninvest SA	2.09
Oceanmundo SA	2.09
Oceanpro SA	2.09
Operadora y Procesadora de Productos Marinos SA (Omarsa)	2.09
Oyerly SA	2.09
P.C. Seafood SA	2.09
Pacfish SA	2.09
PCC Congelados &Frescos SA	2.09
Pescazul SA	2.09
Peslasa SA	2.09
Phillips Seafoods of Ecuador CA (Phillips)	2.09
Pisacua SA	2.09
Procesadora del Rio SA (Proriosa)	2.09
Productos Cultivados del Mar Proc.	2.09
Productos Cultivados del Mar Proculmar Cia. Ltda.	2.09
Productos del Mar Santa Rosa Cia. Ltda. (Promarosa)	2.09
Propemar SA	2.09
Provefrut	2.09
Rommy Roxana Alvarez Anchundia	2.09
Sea Pronto Hector Marty Canino (Sea Pronto)	2.09
Sociedad Atlantico Pacifico SA	2.09
Soitgar SA	2.09
Studmark SA	2.09
Tecnica y Comercio de la Pesca CA (TECOPESCA)	2.09
Tolyp SA	2.09
Trans Ocean	2.09
Transcity SA	2.09
Transmarina CA	2.09
Transocean Ecuador SA	2.09
Uniline Transport System	2.09

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in

connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Interested parties may submit case briefs not later than 30 days after the date of publication of this notice. *See* 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. *See* 19 CFR 351.309(d)(1). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities.

Interested parties, who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, HCHB Room 1870, within 30 days of the date of publication of this notice. Requests should contain: 1) the party's name, address and telephone number; 2) the number of participants; and 3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in the respective case briefs.

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

Regarding Promarisco, because it reported the entered value of all of its U.S. sales, we will calculate an importer–specific *ad valorem* duty assessment rate based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer. We will calculate a single importer–specific assessment rate for Promarisco, consistent with our practice in *AR2 Final Results; see also Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore: Final Results of the Antidumping Administrative Reviews, Rescission of Administrative Review in part, and Determination Not to Revoke Order in Part*, 68 FR 35623 (June 16, 2003), and accompanying Issues and Decision Memorandum at Comment 9B; *Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada*, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 13.

Regarding Songa, because it reported the entered value of all of its U.S. sales, we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer.

For the responsive companies which were not selected for individual examination, we will calculate an assessment rate based on the weighted average of the margin rates calculated for the companies selected for individual examination excluding any which are de minimis or determined entirely on AFA.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific or customer–specific assessment rate calculated in the final results of this review is above *de minimis (i.e.*, at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis (i.e.*, less than 0.50 percent). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review.

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) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate in effect during the POR if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

Cash Deposit Requirements

On August 15, 2007, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the Uruguay Round Agreements Act (URAA), the U.S. Trade Representative, after consulting with the Department and Congress, directed the Department to implement its determination to revoke the antidumping duty order on certain frozen warmwater shrimp from Ecuador. *See Section 129 Final Results*. Accordingly, the antidumping duty order on certain frozen warmwater shrimp from Ecuador was revoked effective August 15, 2007. As a result, the collection of cash deposits of antidumping duties on entries of the subject merchandise is no longer required.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) 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.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221.

March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4916 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

A–533–840

Certain Frozen Warmwater Shrimp From India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from

India with respect to 170 companies.[1] The respondents which the Department selected for individual review are Devi Sea Foods Limited (Devi) and Falcon Marine Exports Limited (Falcon). The respondents which were not selected for individual review are listed in the ''Preliminary Results of Review'' section of this notice. This is the third administrative review of this order. The period of review (POR) is February 1, 2007, through January 31, 2008.

We preliminarily determine that sales made by Devi have not been made at below normal value (NV), while those made by Falcon have. In addition, based on the preliminary results for the respondents selected for individual review, we have preliminarily determined a margin for those companies that the Department did not select for individual review.

If the preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or 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) 482–3874 or (202) 482–0049, respectively.

SUPPLEMENTARY INFORMATION:

Background

In February 2005, the Department published in the **Federal Register** an antidumping duty order on certain frozen warmwater shrimp from India. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India*, 70 FR 5147 (Feb. 1, 2005) (*Shrimp Order*). On February 4, 2008, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order of certain frozen warmwater shrimp from India for the period February 1, 2007, through January 31, 2008. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 6477 (Feb. 4, 2008). In response to timely requests from interested parties pursuant to 19 CFR 351.213(b)(1) and (2) to conduct an administrative review of the U.S. sales of certain frozen warmwater shrimp by numerous producers/exporters, the Department published a notice of initiation of administrative review for 336 companies. *See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand: Notice of Initiation of Administrative Reviews*, 73 FR 18754, 18757–18762 (Apr. 7, 2008) (*Initiation Notice*).

In our initiation notice we indicated that we would select mandatory respondents for review based upon CBP entry data, and that we would limit the respondents selected for individual review in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act). *See Initiation Notice*, 73 FR at 18765. In April 2008, we received comments on the issue of respondent selection from Devi, Falcon, and the petitioner.[2]

In April and May 2008, we received statements from 18 companies that indicated that they had no shipments of subject merchandise to the United States during the POR.

In May 2008, after considering the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. As a result, we selected the two largest producers/exporters of certain frozen warmwater shrimp from India during the POR (i.e., Devi and Falcon) for individual review in this segment of this proceeding (see the May 27, 2008, Memorandum to James Maeder from Elizabeth Eastwood entitled, ''2007–2008 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India: Selection of Respondents for Individual Review''), and we issued the antidumping duty questionnaire to them.

In July 2008 we received responses from Devi and Falcon to section A of the questionnaire (*i.e.*, the section related to general information), as well as to sections B and C (*i.e.*, the sections covering comparison market and U.S. sales, respectively) and D (*i.e.*, the section covering cost of production (COP)). Also in July 2008, the petitioner submitted comments regarding the appropriate third–country comparison market for Falcon, and it withdrew its review requests for 144 companies, in accordance with 19 CFR 351.213(d)(1).

In September 2008, we selected Japan as the third country comparison market for Falcon. For a discussion, *see* the September 3, 2008, memorandum to James Maeder, Director, Office 2, AD/CVD Operations from the team entitled, ''2007–2008 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India – Selection of the Appropriate Third Country Market for Falcon Marine Exports Limited'' (Third Country Market Memo). As Devi had only one viable comparison market, Canada, no further market selection process was necessary for Devi.

Also in September 2008, we requested that Falcon provide additional information regarding its relationship with an affiliated shrimp producer, KR Enterprises, in order to determine whether it was appropriate to collapse these two companies (*i.e.*, treat them as a single entity) for purposes of our analysis. In addition, we issued a supplemental questionnaire covering section D to Devi, as well as supplemental questionnaires covering sections A and D to Falcon.

On October 8, 2008, the Department postponed the preliminary results in this review until no later than March 2, 2008. *See Certain Frozen Warmwater Shrimp from Ecuador, India, the People's Republic of China, and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Third Administrative Reviews*, 73 FR 58931 (Oct. 8, 2008).

In October 2008, the Department issued supplemental questionnaires covering sections A through C for Devi and sections B and C for Falcon. In October and November 2008, Devi and Falcon responded to these supplemental questionnaires, as well as to the supplemental questionnaires issued in September 2008, and Falcon also provided the additional information requested by the Department with respect to its relationship with KR Enterprises.

Also in October 2008, the Department issued a memorandum indicating that it intended to rescind the administrative review with respect to 168 respondent companies, and it invited comments on this action from interested parties. *See* the October 16, 2008 memorandum to the file from Elizabeth Eastwood entitled, ''Intent to Rescind in Part the 2007–2008 Antidumping Duty Administrative Review on Frozen Warmwater Shrimp from India'' (Intent to Rescind Memo). In response, the Department received comments from: 1) Ananda Aqua Exports (AAE), Ananda Foods (AF), and Ananda Aqua Applications (AAA) (collectively, the ''Ananda Group'') objecting to the rescission with respect to AF and AAA; 2) Sai Marine Exports Pvt. Ltd.

[1] This figure does not include those companies for which the Department is rescinding the administrative review.

[2] The petitioner is the Ad Hoc Shrimp Trade Action Committee.

confirming the proper address for that company; 3) 32 U.S. producers opposing the rescission with respect to 144 companies for which the petitioner withdrew its review request; and 4) the petitioner objecting to the opposition by the 32 U.S. producers.

In November 2008, the Department requested, and received, information regarding the relationship among the Ananda Group during the POR, in order to permit the Department to perform a collapsing analysis.

In December 2008, we published a notice rescinding the administrative review with respect to 166 companies,[3] based on the following reasons: 1) timely withdrawals of the review requests; 2) confirmed statements of no shipments during the POR; and/or 3) duplicated names and/or addresses in our notice of initiation. *See Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 77610 (Dec. 19, 2008) (*Partial Rescission Notice*). *See also* the Intent to Rescind Memo. In rescinding the review with respect to the companies for which the petitioner withdrew its review request, we disregarded the 32 U.S. producers' opposition because the underlying review requests were made on behalf of the petitioner, and not on behalf of any individual U.S. producer. *See Partial Rescission Notice*, 73 FR at 77612.

From December 2008 through January 2009, we conducted a sales verification of Devi's U.S. affiliate, Devi Seafoods, Inc., as well as sales and cost verifications of Devi and Falcon.

In February 2009, we requested that AAE provide additional information about its ownership in order to facilitate the Department's collapsing analysis. Also in this month, we determined that it was appropriate to collapse Falcon and its affiliate KR Enterprises, and thus we are treating these companies as the same entity for purposes of this proceeding. For further discussion, *see* the February 19, 2009, memorandum from The Team to James Maeder, Director, Office 2, entitled, ''Whether to Collapse KR Enterprises and Falcon Marine Exports Limited in the 2007–2008 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India'' (Falcon Collapsing Memo).

In February 2009, at the request of the Department, Falcon submitted revised U.S. and third country sales databases.

[3] The Department did not rescind this review with respect to the two Ananda Group Companies listed in the Intent to Rescind Memo, based on their objection. For further discussion see the ''Collapsing Certain Respondents'' section of this notice.

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the Penaeidae family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

Partial Rescission of Review

As noted above, on April 7, 2008, the Department initiated this review with respect to 336 companies. With respect to two of these companies, Asvini Fisheries Limited and Surya Marine Exports, we stated that we intended to rescind the review for these two companies if we found in the final results of the 2006–2007 administrative review that these companies are the successors–in-interest to two additional Indian shrimp exporters included in this review. See Initiation Notice, 73 FR at 18761–18762. In the final results of the 2006–2007 administrative review, we found Asvini Fisheries Private Limited to be the successor–in-interest to Asvini Fisheries Limited and found Suryamitra Exim (P) Ltd. to be the successor–in-interest to Surya Marine Exports. See Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 40492, 40493–40494 (July 15, 2008) (2006–2007 Final Results). Accordingly, consistent with our stated intention in our Initiation Notice, we are rescinding this administrative review with respect to Asvini Fisheries Limited and Surya Marine Exports.

Collapsing Certain Respondents

A. The Ananda Group

As noted above, on October 28, 2008, AAE informed the Department that it is affiliated with two producers/exporters of shrimp in India listed in the Department's Intent to Rescind Memo, and it requested that the Department: 1) maintain the review with respect to these two companies; and 2) treat itself and these two companies as a single entity for purposes of this administrative review.

In order to assess the merits of the Ananda Group's claim, on November 7, 2008, we requested information regarding the relationship between AAE, AF, and AAA during the POR. In response, on November 25, 2008, the Ananda Group provided information demonstrating that the three companies had numerous common members on their boards of directors, and that two of the companies shared common ownership. Moreover, the Ananda Group indicated that the companies had intertwined operations via common management and shared sales and production information. Finally, the Ananda Group indicated that two of the three companies had production facilities capable of producing in–scope merchandise, while the third sold in–scope merchandise to the United States and abroad.

In February 2009, we requested that the Ananda Group provide additional information with respect to the ownership of the three companies and the relationships among the owners. This information was not received in time to consider for purposes of the preliminary results. Nonetheless, we intend to consider it for the final results and will revise the analysis presented below, if necessary.

After considering the information currently on the record, we have preliminarily determined that, in accordance with 19 CFR 351.401(f), it is appropriate to collapse the companies in the Ananda Group for purposes of this proceeding because: 1) entities within the group are affiliated and two of these entities have production facilities for identical or similar merchandise that would not require significant retooling in order to restructure manufacturing priorities; and 2) a significant potential for manipulation exists due to common ownership, overlapping management and board of directors, and intertwined operations. For the analysis underlying these conclusions, *see* the March 2, 2009, memorandum from The Team to James Maeder, Director, Office 2, entitled, ''Whether to Collapse Ananda Aqua Exports, Ananda Foods, and Ananda Aqua Applications in the 2007–2008 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India.'' Therefore, we have preliminarily treated the three companies as a single entity and assigned them the same antidumping duty rate (*i.e.*, the weighted–average rate assigned to companies not selected for individual review) as outlined below.

B. Falcon

As noted above, in its July 11, 2008, response to section A of the questionnaire, Falcon informed the Department that it was affiliated during the POR with another shrimp producer, KR Enterprises. On September 11, 2008, we requested further information regarding the relationship between Falcon and KR Enterprises, in order to permit the Department to perform a collapsing analysis. In response, on October 1, 2008, Falcon stated that the two companies are affiliated via familial relationships among their directors, shareholders, and partners. Further, Falcon indicated the two companies share administrative and production facilities.

After an analysis of this information, we determined that, in accordance with 19 CFR 351.401(f), it is appropriate to collapse these entities for purposes of this review because: 1) Falcon and KR Enterprises are affiliated and have production facilities for identical or similar merchandise that would not require significant retooling in order to restructure manufacturing priorities; and 2) a significant potential for manipulation exists due to common ownership, overlapping management and board of directors, and intertwined operations. For further discussion, *see* the Falcon Collapsing Memo. Therefore, we have treated these companies as a single entity and have assigned them the antidumping duty rate calculated for Falcon, as outlined below.

Comparisons to Normal Value

To determine whether sales of certain frozen warmwater shrimp from India to the United States were made at less than NV, we compared the export price (EP) or constructed export price (CEP) to the NV, as described in the ''Constructed Export Price/Export Price'' and ''Normal Value'' sections of this notice.

Pursuant to sections 773(a)(1)(B)(i) and 777A(d)(2) of the Act, for Devi and Falcon, we compared the EPs or CEPs of individual U.S. transactions, as applicable, to the weighted–average NV of the foreign like product in the appropriate corresponding calendar month where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section below.

Product Comparisons

In accordance with section 771(16)(A) of the Act, we considered all products produced by Devi and Falcon covered by the description in the ''Scope of the Order'' section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared U.S. sales of shrimp to sales of shrimp made in Canada (for Devi) and Japan (for Falcon) within the contemporaneous window period, which extends from three months prior to the month of the first U.S. sale until two months after the month of the last U.S. sale. Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, according to section 771(16)(B) of the Act, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. For Devi and Falcon, where there were no sales of identical or similar merchandise, we made product comparisons using constructed value (CV). *See* section 773(a)(4) of the Act.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by Devi and Falcon in the following order: cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

Constructed Export Price/Export Price

For all U.S. sales made by Falcon, and for certain U.S. sales made by Devi, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold by the producer/exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and CEP methodology was not otherwise warranted based on the facts of record.

For the remaining U.S. sales made by Devi, we calculated CEP in accordance with section 772(b) of the Act because the subject merchandise was sold for the account of this company by its subsidiary in the United States to unaffiliated purchasers. With respect to one CEP sale, however, we discovered at verification that Devi had inadvertently failed to include this transaction in its U.S. sales listing. Therefore, we based the margin for this transaction on facts

available. As facts available, we assigned the weighted–average margin calculated on Devi's reported U.S. sales, in accordance with our practice. *See, e.g., Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 50933 (Aug. 29, 2008), and accompanying Issues and Decision Memorandum at Comment 14.

We revised the data reported by Devi to take into account minor corrections found at verification.

A. Devi

We based EP on packed prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price for discounts in accordance with 19 CFR 351.401(c). We also made deductions from the starting price for foreign inland freight expenses, export inspection agency (EIA) fees, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges, international freight expenses, terminal handling charges, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. brokerage and handling expenses, U.S. warehousing expenses, and U.S. inland freight expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. We based CEP on the packed delivered prices to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for discounts in accordance with 19 CFR 351.401(c). We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, EIA fees, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges, international freight expenses, terminal handling charges, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. brokerage and handling expenses, U.S. inland freight expenses (including both freight from port to warehouse and freight from warehouse to the customer), and U.S. warehousing expenses.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, imputed credit expenses and other direct selling expenses), commissions, sales and marketing allowance expenditures, and indirect selling expenses (including inventory carrying costs and other indirect selling expenses). Finally, where commissions were paid in the U.S. market but not in the comparison market, we offset these commissions by the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses (including inventory carrying costs) incurred in the comparison market.

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by Devi and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

B. Falcon

We based EP on packed prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price for discounts in accordance with 19 CFR 351.401(c). We also made deductions from the starting price for cold storage expenses, loading and unloading expenses, trailer hire expenses, foreign inland freight expenses, port charges, export survey charges, terminal and handling charges, other miscellaneous shipment charges, foreign brokerage and handling expenses, international freight expenses, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. brokerage and handling expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

Normal Value

A. Home Market Viability and Selection of Comparison Markets

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

We determined that the aggregate volume of home market sales of the foreign like product for Devi and Falcon was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. For Devi, as noted above, we used Canada as the comparison market because this was Devi's only viable comparison market during the POR. For Falcon, we selected Japan as the comparison market because, among other things, sales of foreign like product in Japan were the most similar to the subject merchandise. See the Third Country Market Memo for further discussion. Therefore, we used sales to Canada and Japan as the basis for comparison market sales for Devi and Falcon, respectively, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

B. Level of Trade

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *Id*; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (Nov. 19, 1997) (*Plate from South Africa*). In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices),[5] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314–16 (Fed. Cir. 2001).

[5] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (G&A) expenses, and profit for CV, where possible.

When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it possible, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment was possible), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See*, *e.g.*, *Plate from South Africa*, 62 FR at 61732–33.

In this administrative review, we obtained information from each respondent regarding the marketing stages involved in making the reported foreign market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company–specific LOT findings are summarized below.

1. Devi

Devi reported that it made sales through two channels of distribution in the United States (*i.e.*, EP sales made directly to unaffiliated customers and CEP sales via an affiliated reseller); however, it stated that the selling activities it performed and the relative level of intensity of each selling activity did not vary by channel of distribution. Devi reported performing the following selling functions for its U.S. sales: sales planning, personnel training, sales promotion, packing, inventory maintenance in India, handling of sales inquiries, order processing, freight and delivery services (including pre–shipment inspection, foreign transportation, and export customs clearance), extension of credit to U.S. customers, providing discounts and rebates, and providing post–sale warranties and guarantees. These selling activities can be generally grouped into four selling function categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and, 4) warranty and technical support. Accordingly, based on the selling functions, we find that Devi performed sales and marketing, freight and delivery services, inventory maintenance and warehousing, and warranty and technical support for all U.S. sales. Because Devi's selling activities did not vary by distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to Canada, Devi reported that it made sales through a single channel of distribution (*i.e.*, sales made directly to unaffiliated customers) and that all selling functions were performed at the same levels of intensity as in the U.S. market. We examined the selling activities performed for third country sales and found that Devi performed the following selling functions: sales planning, personnel training, sales promotion, packing, inventory maintenance in India, handling of sales inquiries, order processing, freight and delivery services (including pre–shipment inspection and foreign transportation), extension of credit to Canadian customers, providing discounts and rebates, and providing post–sale warranties and guarantees. Accordingly, based on the selling functions noted above, we find that Devi performed sales and marketing, freight and delivery services, inventory maintenance and warehousing, and warranty and technical services for third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Devi's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Devi.

Finally, we compared the U.S. LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Devi performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment or CEP offset is warranted.

2. Falcon

Falcon reported that it made EP sales in the U.S. market to trading companies and distributors. Because Falcon reported no difference in the selling activities it performed or the relative level of intensity of each selling activity for these two customer categories, we find that there is only one channel of distribution for Falcon's EP sales. We examined the selling activities performed for this channel and found that Falcon performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services (in India and the United States); cold storage and inventory maintenance; quality–assurance-related activities; and banking–related activities. These selling activities can be generally grouped into four selling function categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Accordingly, based on the selling functions, we find that Falcon performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales. Because all sales in the United States are made through a single distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the third country market, Falcon reported that it made sales to trading companies and that all selling functions were performed at the same levels of intensity as in the U.S. market. We examined the selling activities performed for third country sales, and found that Falcon performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services (in India); cold storage and inventory maintenance; quality–assurance-related activities; and banking–related activities. Accordingly, based on the selling functions, we find that Falcon performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for all third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Falcon's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Falcon.

Finally, we compared the EP LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Falcon performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment is warranted.

C. Cost of Production Analysis

We found that Devi and Falcon made sales below the COP in the most recently completed segment of this proceeding, as of the date of initiation of this review, in which each respondent was examined, and such sales were disregarded. *See Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of*

Antidumping Duty Administrative Review, 72 FR 52055, 52058 (Sept. 12, 2007) (finding that Falcon made below–cost sales); and *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (Dec. 23, 2004) (*LTFV Final Determination*) (finding that Devi made below–cost sales). Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that Devi and Falcon made sales in the third country market at prices below the cost of producing the merchandise in the current review period.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the respondents' COPs based on the sum of their costs of materials and conversion for the foreign like product, plus amounts for G&A expenses and interest expenses (*see* ''Test of Comparison Market Sales Prices'' section, below, for treatment of third country selling expenses).

The Department relied on the COP data submitted by each respondent in its most recently submitted cost database for the COP calculation, except for the following instances:

a. Devi

i. In calculating Devi's G&A expense ratio, we included the loss on the sale of fixed assets in the numerator, and we offset the numerator for proceeds from the sale of shrimp heads and shell waste.

ii. We recalculated Devi's financial expense ratio to reclassify certain Export Credit Guarantee Corporation (ECGC) fees related to sales activity as selling expenses.

For further discussion of these adjustments, *see* the memorandum from Laurens van Houten, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Devi Sea Foods Limited,'' dated March 2, 2009.

b. Falcon

i. We recalculated Falcon's G&A expense ratios to: 1) include wealth and fringe benefit taxes as G&A expenses; and 2) use cost of goods sold as the denominator.

ii. We recalculated Falcon's financial expense ratio to use cost of goods sold as the denominator.

iii. We recalculated KR Enterprises' G&A expense ratio to: 1) include fringe benefit taxes and insurance expenses as G&A expenses; and 2) use cost of goods sold as the denominator.

iv. We recalculated KR's financial expense ratio to: 1) include letter of credit opening charges as financial expenses; and 2) use cost of goods sold as the denominator.

For further discussion of these adjustments, see the memorandum from Ji Young Oh, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results Falcon Marine Exports Limited,'' dated March 2, 2009.

2. Test of Comparison Market Sales Prices

On a product–specific basis, we compared the adjusted weighted–average COP to the comparison market sales prices of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices (inclusive of billing adjustments, where appropriate) were exclusive of any applicable movement charges, discounts, direct and indirect selling expenses and packing expenses.

3. Results of the COP Test

In determining whether to disregard third country sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act: 1) whether, within an extended period of time, such sales were made in substantial quantities; and 2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with section 773(b)(2)(C)(i) of the Act, where less than 20 percent of the respondent's third country sales of a given product are at prices less than the COP, we do not disregard any below–cost sales of that product because we determine that in such instances the below–cost sales were not made within an extended period of time and in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below–cost sales when: 1) they were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act; and 2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain products, more than 20 percent of Devi's and Falcon's third country sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no third country sales in the ordinary course of trade, we compared CEPs or EPs, as appropriate, to CV in accordance with section 773(a)(4) of the Act. *See* ''Calculation of Normal Value Based on Constructed Value'' section below.

D. Calculation of Normal Value Based on Comparison Market Prices

1. Devi

For Devi, we calculated NV based on delivered prices to unaffiliated customers in Canada. We made adjustments to the starting price, where appropriate, for discounts in accordance with 19 CFR 351.401(c). We also made deductions for foreign inland freight expenses, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges and international freight expenses (including terminal handling charges) under section 773(a)(6)(B) of the Act.

For comparisons to EP sales, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses (including bank charges, ECGC fees, EIA fees, imputed credit expenses, and other direct selling expenses), and commissions. Where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market. *See* 19 CFR 351.410(e). If the commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV for the lesser of: 1) the amount of commission paid in the comparison market; or 2) the amount of indirect selling expenses incurred in the U.S. market. *Id.*

For comparisons to CEP sales, in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, we deducted from NV direct selling expenses (*i.e.*, imputed credit expenses and other direct selling expenses), commissions, sales and marketing allowance expenditures, and indirect selling expenses (including inventory carrying costs and other indirect selling expenses). Where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market. *See* 19 CFR 351.410(e). If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology. *Id.*

For all price–to-price comparisons, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

2. Falcon

We based NV for Falcon on delivered prices to unaffiliated customers in Japan. We made adjustments, where appropriate, to the starting price for discounts in accordance with 19 CFR 351.401(c). We also made deductions, where appropriate, from the starting price for cold storage expenses, loading and unloading expenses, trailer hire expenses, foreign inland freight expenses, port charges, export survey charges, terminal and handling charges, foreign miscellaneous shipment charges, foreign brokerage and handling expenses, and international freight expenses, under section 773(a)(6)(B)(ii) of the Act.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for commissions, imputed credit expenses, bank fees, EIA fees, ECGC premiums, outside inspection/lab expenses, letter of credit amendment charges, and other miscellaneous selling expenses. For those U.S. sales for which Falcon had not received payment as of the date of the sales verification, we recalculated U.S. credit expenses using the date first day of verification as the date of payment. Finally, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses (including inventory carrying costs) incurred in the comparison market. *See* 19 CFR 351.410(e). If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology. *Id.*

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

E. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison market sales, NV may be based on CV. Accordingly, for those frozen warmwater shrimp products for which we could not determine the NV based on comparison market sales because all sales of the comparable products failed the COP test, we based NV on CV.

Section 773(e) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for selling, general, and administrative (SG&A) expenses, profit, and U.S. packing costs. For each respondent, we calculated the cost of materials and fabrication based on the methodology described in the ''Cost of Production Analysis'' section, above. We based SG&A and profit for each respondent on the actual amounts incurred and realized by it in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

We made adjustments to CV for differences in circumstances of sale in accordance with section 773(a)(6)(iii) and (a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made circumstance–of-sale adjustments by deducting direct selling expenses incurred on comparison market sales from, and adding U.S. direct selling expenses to, CV. *See* 19 CFR 351.410(c). For comparisons to Devi's CEP, we made circumstance–of-sale adjustments by deducting comparison market direct selling expenses from CV. *Id.* We also made adjustments, when applicable, for comparison market indirect selling expenses to offset U.S. commissions in EP and CEP comparisons. *See* 19 CFR 351.410(e).

Currency Conversion

We made currency conversions into U.S. dollars for all spot transactions by Devi and Falcon in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank. In addition, both Devi and Falcon reported that they purchased forward exchange contracts which were used to convert the currency in which certain sales transactions were made into home market currency. Under 19 CFR 351.415(b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department is directed to use the exchange rate specified with respect to such foreign currency in the forward sale agreement to convert the foreign currency. *See LTFV Final Determination* and accompanying Issues and Decision Memorandum at Comment 6; *see also Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 12103, 12113 (Mar. 6, 2008), unchanged in *2006–2007 Final Results*. Therefore, for Devi and Falcon we used the reported forward exchange rates for currency conversions where applicable.

Preliminary Results of the Review

We preliminarily determine that weighted–average dumping margins exist for the respondents for the period February 1, 2006, through January 31, 2007, as follows:

Manufacturer/Exporter	Percent Margin
Devi Sea Foods Limited	0.39
Falcon Marine Exports Limited/ KR Enterprises	0.79

Review–Specific Average Rate Applicable to the Following Companies:[6]

Manufacturer/Exporter	Percent Margin
Abad Fisheries	0.79
Accelerated Freeze–Drying Co.	0.79
Allana Frozen Foods Pvt. Ltd.	0.79
Allanasons Ltd.	0.79
AMI Enterprises	0.79
Amulya Sea Foods	0.79
Anand Aqua Exports	0.79

[6] This rate is based on the weighted average of the margins calculation for those companies selected for individual review, excluding *de minimis* margins or margins based entirely on adverse facts available (AFA).

Manufacturer/Exporter	Percent Margin
Ananda Aqua Exports (P) Ltd./ Ananda Foods/Ananda Aqua Applications	0.79
Andaman Seafoods Pvt. Ltd.	0.79
Angelique Intl	0.79
Anjaneya Seafoods	0.79
Apex Exports	0.79
Asvini Exports	0.79
Asvini Fisheries Private Limited	0.79
Avanti Feeds Limited	0.79
Ayshwarya Seafood Private Limited	0.79
Baby Marine International	0.79
Baby Marine Sarass	0.79
Bhatsons Aquatic Products	0.79
Bhavani Seafoods	0.79
Bijaya Marine Products	0.79
Blue Water Foods & Exports P. Ltd.	0.79
Bluefin Enterprises	0.79
Bluepark Seafoods Pvt. Ltd.	0.79
BMR Exports	0.79
Britto Exports	0.79
Calcutta Seafoods	0.79
Calcutta Seafoods Pvt. Ltd.	0.79
Castlerock Fisheries Ltd.	0.79
Chemmeens (Regd)	0.79
Choice Canning Company	0.79
Choice Trading Corporation Pvt. Ltd.	0.79
Coastal Corporation Ltd.	0.79
Corlim Marine Exports Pvt. Ltd.	0.79
Coreline Exports	0.79
Devi Fisheries Limited	0.79
Digha Seafood Exports	0.79
Esmario Export Enterprises	0.79
Exporter Coreline Exports	0.79
Five Star Marine Exports Private Limited	0.79
Forstar Frozen Foods Pvt. Ltd.	0.79
Frigerio Conserva Allana Limited	0.79
Frontline Exports Pvt. Ltd.	0.79
G A Randerian Ltd.	0.79
Gadre Marine Exports	0.79
Galaxy Maritech Exports P. Ltd.	0.79
Gayatri Seafoods	0.79
Geo Aquatic Products (P) Ltd.	0.79
Geo Seafoods	0.79
Grandtrust Overseas (P) Ltd.	0.79
GVR Exports Pvt. Ltd.	0.79
HIC ABF Special Foods Pvt. Ltd.	0.79
Haripriya Marine Export Pvt. Ltd.	0.79
Hindustan Lever, Ltd.	0.79
Hiravata Ice & Cold Storage	0.79
Hiravati Exports Pvt. Ltd.	0.79
Hiravati International Pvt. Ltd. (located at Jawar Naka, Porbandar, Gujarat – 360 575, India)	0.79
Hiravati International Pvt. Ltd. (located at APM–Mafco Yard, Sector – 18 Vashi, Navi, Mumbai – 400 705, India)	0.79
IFB Agro Industries Limited	0.79
Indian Aquatic Products	0.79
Indo Aquatics	0.79
Innovative Foods Limited	0.79
International Freezefish Exports	0.79
Interseas	0.79
ITC Ltd.	0.79
Jagadeesh Marine Exports	0.79
Jaya Satya Marine Exports	0.79
Jaya Satya Marine Exports Pvt. Ltd.	0.79
Jayalakshmi Sea Foods Private Limited	0.79
Jinny Marine Traders	0.79
Jiya Packagings	0.79
K R M Marine Exports Ltd.	0.79
Kalyanee Marine	0.79
Kay Kay Exports	0.79
Kings Marine Products	0.79
Koluthara Exports Ltd.	0.79
Konark Aquatics & Exports Pvt. Ltd.	0.79
Libran Cold Storages (P) Ltd.	0.79
Magnum Estate Private Limited	0.79
Magnum Export	0.79
Magnum Sea Foods Pvt. Ltd.	0.79
Malabar Arabian Fisheries	0.79
Malnad Exports Pvt. Ltd.	0.79
Mangala Marine Exim India Private Ltd.	0.79
Mangala Sea Products	0.79
Manufacturer Falcon Marine Exports	0.79
MSC Marine Exporters	0.79
MTR Foods	0.79
Naga Hanuman Fish Packers	0.79
Naik Frozen Foods	0.79
Navayuga Exports Ltd.	0.79
Nekkanti Sea Foods Limited	0.79
NGR Aqua International	0.79
Nila Sea Foods Pvt. Ltd.	0.79
Overseas Marine Export	0.79
Penver Products (P) Ltd.	0.79
Pijikay International Exports P Ltd.	0.79
Pisces Seafood International	0.79
Premier Seafoods Exim (P) Ltd.	0.79
Raa Systems Pvt. Ltd.	0.79
Raju Exports	0.79
Ram's Assorted Cold Storage Ltd.	0.79
Raunaq Ice & Cold Storage	0.79
Raysons Aquatics Pvt. Ltd.	0.79
Razban Seafoods Ltd.	0.79
RBT Exports	0.79
Riviera Exports Pvt. Ltd.	0.79
Rohi Marine Private Ltd.	0.79
RVR Marine Products Private Limited	0.79
S A Exports	0.79
S Chanchala Combines	0.79
S & S Seafoods	0.79
Safa Enterprises	0.79
Sagar Foods	0.79
Sagar Grandhi Exports Pvt. Ltd.	0.79
Sagarvihar Fisheries Pvt. Ltd.	0.79
Sai Marine Exports Pvt. Ltd.	0.79
Sai Sea Foods	0.79
Sai Sea Foods a.k.a. Sai Marine Exports Pvt. Ltd.	0.79
Sandhya Aqua Exports Pvt. Ltd.	0.79
Sandhya Aqua Exports	0.79
Sandhya Marines Limited	0.79
Santhi Fisheries & Exports Ltd.	0.79
Satya Seafoods Private Limited	0.79
Sawant Food Products	0.79
Seagold Overseas Pvt. Ltd.	0.79
Selvam Exports Private Limited	0.79
Shippers Exports	0.79
Shroff Processed Food & Cold ZStorage P Ltd.	0.79
Silver Seafood	0.79
Sita Marine Exports	0.79
Sprint Exports Pvt. Ltd.	0.79
Sri Chandrakantha Marine Exports, Ltd.	0.79
Sri Sakkthi Cold Storage	0.79
Sri Sakthi Marine Products P Ltd.	0.79
Sri Satya Marine Exports	0.79
Sri Venkata Padmavathi Marine Foods Pvt. Ltd.	0.79
SSF Ltd.	0.79
Star Agro Marine Exports Private Limited	0.79
Sun Bio–Technology Ltd.	0.79
Suryamitra Exim (P) Ltd.	0.79
Suvarna Rekha Exports Private Limited	0.79
Suvarna Rekha Marines P Ltd.	0.79
TBR Exports Pvt Ltd.	0.79
Teekay Maine P. Ltd	0.79
The Kadalkanny Group (Kadalkanny Frozen Foods, Edhayam Frozen Foods Pvt. Ltd., Diamond Seafoods Exports, and Theva & Company)	0.79
The Liberty Group (Devi Marine Food Exports Private Limited/ Kader Exports Private Limited/ Kader Investment and Trading Company Private Limited/Liberty Frozen Foods Pvt. Ltd./ Liberty Oil Mills Ltd./Premier Marine Products/Universal Cold Storage Private Limited)	0.79
The Waterbase Limited	0.79
Tejaswani Enterprises	0.79
Usha Seafoods	0.79
V.S Exim Pvt Ltd.	0.79
Veejay Impex	0.79
Victoria Marine & Agro Exports Ltd.	0.79
Vinner Marine	0.79
Vishal Exports	0.79
Wellcome Fisheries Limited	0.79

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities. *See* 19 CFR 351.309(c)(2) and (d)(2).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written

request to the Assistant Secretary for Import Administration, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: 1) the party's name, address and telephone number; 2) the number of participants; and 3) a list of issues to be discussed. *Id*. Issues raised in the hearing will be limited to those raised in the respective case briefs. *Id*. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212(b)(1). The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For Devi and Falcon we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales. *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we will calculate importer–specific *ad valorem* ratios based on the estimated entered value.

For the companies which were not selected for individual review, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review excluding any which are *de minimis* or determined entirely on AFA.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this review is above *de minimis*. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis*. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable. *See* 751(a)(2)(C) of the Act.

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) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: 1) the cash deposit rate for each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; 2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company–specific rate published for the most recent period; 3) if the exporter is not a firm covered in this review, or the original less–than-fair–value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 4) the cash deposit rate for all other manufacturers or exporters will continue to be 10.17 percent, the all–others rate made effective by the LTFV investigation. *See Shrimp Order*, 70 FR at 5148. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) 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.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

Dated: March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4920 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

A–549–822

Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp from Thailand with respect to 136 companies. The two respondents which the Department selected for individual examination are Andaman Seafood Co., Ltd. (Andaman), Wales & Co. Universe Limited, Chanthaburi Frozen Food Co., Ltd. (CFF), Chanthaburi Seafoods Co., Ltd. (CSF), Phattana Seafood Co., Ltd. (PTN), Phattana Frozen Food Co., Ltd. (PFF), Thailand Fishery Cold Storage Public Co., Ltd. (TFC), Thai International Seafoods Co., Ltd. (TIS), and Sea Wealth Frozen Food Co., Ltd. (Sea Wealth) (collectively, the Rubicon Group), and Pakfood Public Company Limited and its affiliates, Asia Pacific (Thailand) Company, Limited and Takzin Samut Company, Limited (collectively, Pakfood). The respondents which were not selected for individual examination are listed in the ''Preliminary Results of Review'' section of this notice. This is the third administrative review of this order. The review covers the period February 1, 2007, through January 31, 2008.

We preliminarily determine that sales were made by Pakfood and the Rubicon Group below normal value (NV). In addition, based on the preliminary results for the respondents selected for

individual examination, we have preliminarily determined a weighted–average margin for those companies that were not individually examined.

If the preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or David Goldberger, 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) 482–4929 and (202) 482–4136, respectively.

SUPPLEMENTARY INFORMATION:

Background

In February 2005, the Department published in the **Federal Register** an antidumping duty order on certain frozen warmwater shrimp from Thailand. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 FR 5145 (Feb. 1, 2005). On February 4, 2008, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order of certain frozen warmwater shrimp from Thailand for the period February 1, 2007, through January 31, 2008. *See Antidumping and Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 6477 (February 4, 2008). In response to timely requests from interested parties, pursuant to 19 CFR 351.213(b)(1) and (2), to conduct an administrative review of the sales of certain frozen warmwater shrimp made by numerous companies during the period of review (POR), the Department initiated an administrative review for 165 companies. These companies are listed in the Department's notice of initiation. *See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand: Notice of Initiation of Administrative Reviews*, 73 FR 18754 (April 7, 2008).

Between March and May 2008, the Department received submissions from certain companies that indicated they had no shipments of subject merchandise to the United States during the POR.

Based upon the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. As a result, on May 27, 2008, we selected the two largest producers/exporters of certain frozen warmwater shrimp from Thailand during the POR, Pakfood and the Rubicon Group, for individual examination in this segment of the proceeding. *See* Memorandum to James Maeder from Irina Itkin entitled, ''2007–2008 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand: Selection of Respondents for Individual Review,'' dated May 27, 2008. On May 28, 2008, we issued the antidumping duty questionnaire to Pakfood and the Rubicon Group.

On July 7, 2008, in accordance with 19 CFR 351.213(d)(1), the petitioner withdrew its request for review for the following eighteen companies: Anglo–Siam Seafoods Co., Ltd.; Applied DB Ind; Chonburi LC; Gallant Ocean (Thailand) Co., Ltd. (Gallant Ocean)[1]; Haitai Seafood Co., Ltd.; High Way International Co., Ltd.; Li–Thai Frozen Foods Co., Ltd.; Merkur Co., Ltd.; Ming Chao Ind Thailand; Nongmon SMJ Products; Queen Marine Food Co., Ltd.; SCT Co., Ltd.; Search & Serve; Smile Heart Foods Co., Ltd.; Shianlin Bangkok Co., Ltd.; Star Frozen Foods Co., Ltd.; Thai World Imports & Exports; and Wann Fisheries Co., Ltd.

We received responses to sections A, B, C, and D of the questionnaire from Pakfood and the Rubicon Group in July and August 2008.

On October 8, 2008, the Department postponed the preliminary results in this review until no later than March 2, 2008. *See Certain Frozen Warmwater Shrimp From Ecuador, India, the People's Republic of China, and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Third Administrative Reviews*, 73 FR 58931 (October 8, 2008).

During the period September 2008 through January 2009, we issued to Pakfood and the Rubicon Group supplemental questionnaires regarding sections A, B, C, and D of the original questionnaire. We received responses to these questionnaires during the period October 2008 through February 2009.

On October 27, 2008, the Department issued a memorandum indicating that it intended to rescind the administrative review with respect to 29 respondent companies, and it invited comments on this action from interested parties. *See* Memorandum to The File from Kate Johnson entitled ''Intent to Rescind in Part the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand,'' dated October 27, 2008 (Intent to Rescind Memorandum). On November 3, 2008, and November 13, 2008, the Department received comments from 32 U.S. producers opposing the rescission with respect to the companies for which the petitioner withdrew its review request. On November 6, 2008, the petitioner responded to the comments filed on November 3, 2008.

On December 19, 2008, we published a notice rescinding the administrative review with respect to 29 companies for the following reasons, where applicable: 1) the request for an administrative review for the company was withdrawn in a timely manner; 2) the company had no shipments of subject merchandise to the United States during the POR; or 3) although there appeared to be U.S. customs entries of subject merchandise, we determined that the entries were not reportable transactions. *See Certain Frozen Warmwater Shrimp from Thailand; Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 77612 (December 19, 2008). *See also* Intent to Rescind Memorandum.

We conducted a verification of the Rubicon Group's cost responses in February 2009.

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size. The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (Penaeus vannemei), banana prawn (*Penaeus merguiensis*), fleshy prawn

[1] Gallant Ocean has not withdrawn its February 29, 2008, request for review.

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

(*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalida*e family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Period of Review

The POR is February 1, 2007, through January 31, 2008.

Comparisons to Normal Value

To determine whether sales of certain frozen warmwater shrimp from Thailand to the United States were made at less than NV, we compared the export price (EP) or constructed export price (CEP) to the NV, as described in the ''Constructed Export Price/Export Price'' and ''Normal Value'' sections of this notice, below.

Pursuant to section 777A(d)(2) of the Tariff Act of 1930, as amended (the Act), for Pakfood and the Rubicon Group we compared the EPs or CEPs of individual U.S. transactions to the weighted–average NV of the foreign like product where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section, below.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by Pakfood and the Rubicon Group covered by the description in the ''Scope of the Order'' section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared U.S. sales of shrimp to sales of shrimp made in the comparison market for Pakfood (home market) and the Rubicon Group (Canada) within the contemporaneous window period, which extends from three months prior to the month of the U.S. sale until two months after the sale. Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales of shrimp to sales of shrimp of the most similar foreign like product made in the ordinary course of trade. For the Rubicon Group, where there were no sales of identical or similar merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we made product comparisons using constructed value (CV).

With respect to sales comparisons involving broken shrimp, we compared Pakfood's and the Rubicon Group's sales of broken shrimp in the United States to its sales of comparable quality shrimp in the comparison market. Where there were no sales of identical broken shrimp in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales of broken shrimp to sales of the most similar broken shrimp made in the ordinary course of trade. Where there were no sales of identical or similar broken shrimp, we made product comparisons using CV.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by Pakfood and the Rubicon Group in the following order: cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

Constructed Export Price/Export Price

For all U.S. sales made by Pakfood, as well as certain U.S. sales made by the Rubicon Group, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation and CEP methodology was not otherwise warranted based on the facts of record.

For certain U.S. sales made by the Rubicon Group, we calculated CEP in accordance with section 772(b) of the Act because the subject merchandise was sold for the account of the Rubicon Group by its subsidiary in the United States to unaffiliated purchasers.

A. Pakfood

We based EP on FOB, C&F or DDP (delivered, duty paid) prices to the first unaffiliated purchaser in the United States. Where appropriate, we made adjustments to the starting price for discounts. We made deductions, where appropriate, for foreign inland freight expenses, pre–sale warehousing expenses, survey fees, foreign brokerage and handling expenses, ocean freight expenses (offset by freight adjustments, where appropriate), marine insurance expenses, U.S. brokerage and handling expenses, and U.S. customs duties (including harbor maintenance fees and merchandise processing fees) in accordance with section 772(c)(2)(A) of the Act

B. The Rubicon Group

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. Where appropriate, we made adjustments to the starting price for billing adjustments and discounts. We made deductions for movement expenses in accordance with section

772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign warehousing expenses, foreign inland insurance expenses, foreign brokerage and handling expenses, ocean freight expenses (offset by freight refunds, where appropriate), marine insurance expenses, U.S. brokerage and handling expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. inland freight expenses (*i.e.*, freight from port to warehouse).

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. We used the earlier of shipment date from Thailand to the customer or the U.S. affiliate's invoice date to the customer as the date of sale for CEP sales, in accordance with our practice. *See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 11; *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10 (*Thai Shrimp LTFV Investigation Final); Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

Where appropriate, we made adjustments for billing adjustments, discounts and rebates. We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign warehousing expenses, foreign inland insurance expenses, foreign brokerage and handling expenses, ocean freight expenses (offset by freight refunds, where appropriate), marine insurance expenses, U.S. brokerage and handling expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. inland insurance expenses, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), and U.S. warehousing expenses.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*e.g.*, bank charges, advertising, commissions, and imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by the Rubicon Group and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

Normal Value

A. Home Market Viability and Selection of Comparison Markets

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Based on this comparison, we determined that Pakfood had a viable home market during the POR. Consequently, we based NV on home market sales for Pakfood.

Regarding the Rubicon Group, we determined that this respondent's aggregate volume of home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, we used the Rubicon Group's sales to Canada, its largest third–country market, as the basis for comparison–market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

B. Affiliated–Party Transactions and Arm's–Length Test

During the POR, Pakfood sold the foreign like product to affiliated customers. To test whether these sales were made at arm's–length prices, we compared, on a product–specific basis, the starting prices of sales to affiliated and unaffiliated customers, net of all discounts and rebates, movement charges, direct selling expenses, and packing expenses. Pursuant to 19 CFR 351.403(c) and in accordance with the Department's practice, where the price to the affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to unaffiliated parties, we determined that sales made to the affiliated party were at arm's length. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69187 (Nov. 15, 2002) (establishing that the overall ratio calculated for an affiliate must be between 98 percent and 102 percent in order for sales to be considered in the ordinary course of trade and used in the NV calculation). Sales to affiliated customers in the comparison market that were not made at arm's–length prices were excluded from our analysis because we considered these sales to be outside the ordinary course of trade. *See* 19 CFR 351.102(b).

C. Level of Trade

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *See Id.; see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997) (*Plate from South Africa*). In order to determine whether the comparison sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices),[3] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Technology, Inc. v. United States*, 243 F. 3d 1301, 1314 (Fed. Cir. 2001). When the Department is unable to match U.S.

[3] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (G&A) expenses, and profit for CV, where possible.

sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sales to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it practicable, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment was practicable), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See Plate from South Africa*, 62 FR at 61732–33.

In this administrative review, we obtained information from each respondent regarding the marketing stages involved in making the reported foreign market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company–specific LOT findings are summarized below.

1. Pakfood

Pakfood reported that it made EP sales in the U.S. market through a single channel of distribution (*i.e.*, direct sales to distributors). We examined the selling activities performed for this channel and found that Pakfood performed the following selling functions: sales forecasting/market research, sales promotion/advertising, price negotiation, order processing, invoice issuance, payment receipt, delivery services, and packing. Accordingly, we find that Pakfood performed sales and marketing, and freight and delivery services at the same relative level of intensity for all U.S. sales. Because all sales in the United States are made through a single distribution channel, we preliminarily determine that there is one LOT in the U.S. market. With respect to the home market, Pakfood made sales to processors, distributors, retailers, and end–users. Pakfood stated that its home market sales were made through a single channel of distribution, regardless of customer category. We examined the selling activities performed for this channel, and found that Pakfood performed the following selling functions: sales forecasting/market research, sales promotion/advertising, price negotiation, order processing, invoice issuance, delivery services, payment receipt, and packing. Accordingly, we find that Pakfood performed sales and marketing, and freight and delivery services at the same relative level of intensity for all customers in the home market. Because all sales in the home market are made through a single distribution channel, we preliminarily determine that there is one LOT in the home market.

Finally, we compared the EP LOT to the home market LOT and found that the selling functions performed for U.S. and home market customers are virtually identical. Therefore, we determined that sales to the U.S. and home markets during the POR were made at the same LOT, and as a result, no LOT adjustment was warranted.

2. The Rubicon Group

The Rubicon Group reported that it made both EP and CEP sales in the U.S. market to distributors/wholesalers, retailers, and food service industry customers. For EP sales, the Rubicon Group reported sales through one channel of distribution (*i.e.*, direct from the Thai exporters to unaffiliated U.S. customers). For CEP sales, the Rubicon Group reported that its U.S. affiliate made sales through two channels of distribution: 1) from a warehouse; and 2) direct shipments to customers (''drop shipments'').

We examined the selling activities performed for each channel. For direct EP sales, the Rubicon Group reported the following selling functions: sales forecasting/market research, sales promotion/trade shows, inventory maintenance, order input/processing, freight and delivery arrangements, visits/calls and correspondence to customers, development of new packaging (with customer), packing and after–sales services. Accordingly, we found that the Rubicon Group performed sales and marketing, freight and delivery, and inventory maintenance and warehousing activities. As there was only one channel of distribution for EP sales, we found that there was one LOT for EP sales.

For both warehoused and drop–shipment CEP sales, the Rubicon Group reported the following selling functions: inventory maintenance, order input/processing, freight and delivery arrangements, and packing. As the selling functions performed for both warehoused and drop- shipment sales were identical, we found that there was one LOT for CEP sales.

With respect to the Canadian market, the Rubicon Group reported sales to distributors/wholesalers, retailers, and end users. The Rubicon Group stated that its Canadian sales were made through two channels of distribution: 1) direct to Canadian customers; and 2) through its U.S. affiliate from a Canadian warehouse. We examined the reported selling activities and found that the Rubicon Group performed the following selling functions for direct sales to Canada: sales forecasting; market research; sales promotion; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging (with customer); packing; and after–sales services. For warehoused sales to Canada, we found that the Rubicon Group, via its U.S. affiliate, performed the following selling functions: sales forecasting; market research; advertising; sales promotion; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); and after–sales services. Furthermore, we found that the Rubicon Group performed selling functions related to sales and marketing, freight and delivery, and inventory maintenance and warehousing at the same relative level of intensity for all customers in the comparison market. Therefore, based on our overall analysis, we found that all of the Rubicon Group's sales in the Canadian market constituted one LOT and that this LOT was the same as the LOT for EP sales. Consequently, we matched EP sales to comparison–market sales at the same LOT and no LOT adjustment was warranted.

In comparing the Canadian LOT to the CEP LOT, we found that the selling activities performed by the Thai packers[4] for CEP sales were significantly fewer than the selling activities that were performed for the Canadian sales. The Thai packers provided the following selling functions: sales forecasting; market research; sales promotion; advertising; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); packing; and after–sales services for Canadian sales. The only selling functions that the Thai packers provided for CEP sales were inventory maintenance, order input/processing, freight and delivery

[4] The following companies in the Rubicon Group produced subject merchandise during the POR and are collectively referred to as the ''Thai packers'': Andaman, CSF, CFF, PTN, PFF, TFC, TIS, and Sea Wealth.

arrangements, and packing. Therefore, the Thai packers provided many more selling functions for Canadian sales than they provided for CEP sales, thus making the Canadian LOT more advanced than the CEP LOT.

The Rubicon Group provided evidence on the record of this review supporting its contention that the selling activities that the Thai packers performed for Canadian customers were much more extensive than those performed for U.S. sales to its affiliate Rubicon Resources. While sales to Canada consumed a great deal of the Thai packers' time and resources, the interaction between the Thai packers and Rubicon Resources appeared to be perfunctory, consuming very little of the Thai packers' time and resources. *See* pages 11 through 20 of the Rubicon Group's October 29, 2008, response to the Department's supplemental Sections A, B, and C questionnaire.

The record of this review also contains information concerning Wales & Co. Universe Ltd.'s (Wales')[5] activities with respect to sales made by the Thai packers to Rubicon Resources. According to Wales, it had limited communications with Rubicon Resources on behalf of the Thai packers because the Thai packers did not communicate directly with Rubicon Resources regarding U.S. sales made during the POR. As stated above, the Thai packers regularly communicated with unaffiliated customers to provide market analysis, negotiate sales opportunities, promote products, schedule in–person meetings, and develop new packaging designs. The Thai packers engaged in this level of service because it was necessary in order to compete for sales to unaffiliated customers. However, because the Thai packers created Rubicon Resources for the purpose of marketing and distributing their seafood products in the United States, and Rubicon Resources is required to purchase shrimp from the Thai packers, the Thai packers did not need to compete for business with Rubicon Resources as they did with unaffiliated customers. Accordingly, the Thai packers did not need to perform the same high level of service (*e.g.*, market analysis, sales forecasting, or packaging design) for Rubicon Resources that they provided to unaffiliated customers, including Canadian customers, because Rubicon Resources performed these services for U.S. customers itself, using its sales and marketing staff based in the United States.

Finally, the Rubicon Group provided documentation on the record of this review confirming the limited selling activities with respect to the Thai packers' sales to Rubicon Resources (*i.e.*, invoices and documentation associated with the shipment of the merchandise to Rubicon Resources) as well as documentation concerning Rubicon Resources' sales to Canada (*e.g.*, a sample report Rubicon Resources prepared to help a customer identify sales trends and make informed judgments on future purchases).

Based on the above analysis, we considered the CEP LOT to be different from the Canadian LOT and to be at a less advanced stage of distribution than the Canadian LOT. Accordingly, we could not match CEP sales to sales at the same LOT for Canadian sales, nor could we determine a LOT adjustment based on the Rubicon Group's Canadian sales because there was only one LOT in Canada. Therefore, it is not possible to determine if there was a pattern of consistent price differences between the sales on which NV is based and Canadian sales at the LOT of the export transaction. *See* section 773(a)(7)(A) of the Act. Furthermore, we have no other information that provides an appropriate basis for determining a LOT adjustment. Consequently, because the data available did not form an appropriate basis for making a LOT adjustment but the Canadian LOT was at a more advanced stage of distribution than the CEP LOT, we made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset was calculated as the lesser of: (1) the indirect selling expenses incurred on the third–country sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

D. Cost of Production Analysis

We found that Pakfood had made sales below the cost of production (COP) in the 2004–2006 administrative review, the most recently completed segment of this proceeding as of the date of the initiation of the 2007–2008 administrative review, and such sales were disregarded. *See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 10669 (March 9, 2007); unchanged in *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065 (September 12, 2007). Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that Pakfood made sales in the home market at prices below the cost of producing the merchandise in the current review period.

We found that the Rubicon Group had made sales below the COP in the LTFV investigation, the most recently completed segment of this proceeding as of the date of the initiation of the 2007–2008 administrative review, and such sales were disregarded. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 47100, 47107 (Aug. 4, 2004); unchanged in the *Thai Shrimp LTFV Investigation Final*. Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that the Rubicon Group made sales in the third–country market at prices below the cost of producing the merchandise in the current review period.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the respondents' COPs based on the sum of their costs of materials and conversion for the foreign like product, plus amounts for G&A expenses and interest expenses (*see* ''Test of Comparison Market Sales Prices'' section below for treatment of comparison market selling expenses).

The Department relied on the COP data submitted by Pakfood and the Rubicon Group for the cost reporting period in their most recent supplemental section D questionnaire responses for the COP calculations, except for the following instances where the information was not appropriately quantified or valued:

Pakfood

We did not make any adjustments to Pakfood's reported COP data.

The Rubicon Group

For CFF and CSF, we offset the total reported G&A expenses by the value of packaging scrap sold during the cost reporting period. In addition, for CFF, CSF and PTN, we adjusted the respective financial expense rate calculations to correct a minor calculation error and to reduce the applied interest income offset amount by the interest income earned from non–current assets. *See* Memorandum to Neal Halper, Director, Office of Accounting from Angela Strom, ''Cost of Production and Constructed Value

[5] Wales and Co. Universe Ltd. is a member of the Rubicon Group.

Calculation Adjustments for the Preliminary Results the Rubicon Group,'' dated March 2, 2009.

2. Test of Comparison–Market Sales Prices

On a product–specific basis, we compared the weighted–average COP to the home market sales (for Pakfood) or third–country sales (for the Rubicon Group) of the foreign like product, adjusted where applicable, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices, adjusted for any applicable billing adjustments, were exclusive of any applicable movement charges, rebates, discounts, and direct and indirect selling expenses, and packing expenses.

3. Results of the COP Test

In determining whether to disregard comparison–market sales made at prices below the COP, we examine, in accordance with sections 773(b)(1)(A) and (B) or the Act: 1) whether, within an extended period of time, such sales were made in substantial quantities; and 2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. Where less than 20 percent of the respondent's comparison–market sales of a given product are at prices less than the COP, we do not disregard any below–cost sales of that product because we determine that in such instances the below–cost sales were not made within an extended period of time and in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below–cost sales because: 1) they were made within an extended period of time in ''substantial quantities,'' in accordance with sections 773(b)(2)(B) and (C) of the Act, and 2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain specific products, more than 20 percent of Pakfood's and the Rubicon Group's comparison–market sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no useable comparison–market sales in the ordinary course of trade, we compared EPs or CEPs to the CV in accordance with section 773(a)(4) of the Act. *See* ''Calculation of Normal Value Based on Constructed Value'' section below.

E. Calculation of Normal Value Based on Comparison–Market Prices

1. Pakfood

We based NV for Pakfood on ex–factory or delivered prices to unaffiliated customers in the home market, or prices to affiliated customers in the home market that were determined to be at arm's length. Where appropriate, we made adjustments for billing adjustments and discounts. We made deductions, where appropriate, from the starting price for inland freight and pre–sale warehousing expenses, under section 773(a)(6)(B)(ii) of the Act.

We made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances–of-sale for imputed credit expenses, bank/wire fee charges, commissions, and express mail charges, where appropriate. We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

We also deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6)(A) and (B) of the Act.

2. The Rubicon Group

For the Rubicon Group, we calculated NV based on prices to unaffiliated customers. Where appropriate, we made adjustments for billing adjustments and rebates. We also made deductions for movement expenses, including inland freight (plant to warehouse and warehouse to port), warehousing, inland insurance, brokerage and handling, ocean freight (offset by freight refunds, where appropriate), third–country inland insurance, third–country customs fees, third–country brokerage and handling expenses, and third–country warehousing expenses, under section 773(a)(6)(B)(ii) of the Act.

For third–country price–to-EP comparisons, we made circumstance–of-sale adjustments for differences in credit expenses, bank charges, and commissions, pursuant to section 773(a)(6)(C) of the Act.

For third–country price–to-CEP comparisons, we made deductions for third–country credit expenses, bank charges, commissions, advertising expenses, and repacking expenses, pursuant to 773(a)(6)(C) of the Act. In addition, we made a CEP offset in accordance with section 773(a)(7)(B) of the Act, as discussed above in the ''Level of Trade'' section.

We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market. If the commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV for the lesser of: 1) the amount of commission paid in the comparison market; or 2) the amount of indirect selling expenses incurred in the U.S. market.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

We also deducted third–country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

F. Calculation of Normal Value Based on Constructed Value

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison–market sales, NV may be based on CV. Accordingly, for those frozen warmwater shrimp products for Pakfood and the Rubicon Group for which we could not determine the NV based on comparison–market sales, either because there were no useable sales of a comparable product or all sales of comparable products failed the COP test, we based NV on CV.

Section 773(e) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for SG&A expenses, profit, and U.S. packing costs. For the Rubicon Group, we calculated the cost of materials and fabrication based on the methodology described in the ''Cost of Production Analysis'' section, above, and we based SG&A and profit for each respondent on the actual amounts incurred and realized by it in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act. For comparisons to the Rubicon Group's EP, we made circumstances–of-sale adjustments by deducting direct selling expenses incurred on comparison–market sales from, and adding U.S. direct selling expenses to CV, in accordance with section 773(a)(8) of the Act and 19 CFR 351.410.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A of the Act and 19 CFR 351.415 based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Preliminary Results of the Review

We preliminarily determine that weighted–average dumping margins exist for the respondents for the period February 1, 2006, through January 31, 2007, as follows:

Manufacturer/Exporter	Percent Margin
Pakfood Public Company Limited / Asia Pacific (Thailand) Company Limited / Takzin Samut Company Limited (collectively, Pakfood)	4.25
Andaman Seafood Co., Ltd. / Chanthaburi Frozen Food Co., Ltd. / Chanthaburi Seafoods Co., Ltd. / Phattana Seafood Co., Ltd. / Phattana Frozen Food Co., Ltd. / Seawealth Frozen Food Co. Ltd. / Thailand Fishery Cold Storage Public Co., Ltd. / Thai International Seafoods Co., Ltd. /Wales & Co. Universe Limited (collectively, the Rubicon Group)	4.64
Review–Specific Average Rate Applicable to the Following Companies:[6].	

[6]This rate is based on the weighted average of the margins calculated for those companies selected for individual examination, excluding de minimis margins or margins based entirely on AFA.

Manufacturer/Exporter	Percent Margin
ACU Transport Co., Ltd.	4.51
Ampai Frozen Food Co., Ltd.	4.51
A.S. Intermarine Foods Co., Ltd	4.51
Asian Seafoods Coldstorage Public Co., Ltd.	4.51
Asian Seafoods Coldstorage (Suratthani) Co., Ltd.	4.51
Assoc. Commercial Systems	4.51
A. Wattanachai Frozen Products Co., Ltd.	4.51
Bangkok Dehydrated Marine Product Co., Ltd.	4.51
Bright Sea Co., Ltd.	4.51
C P Mdse	4.51
C Y Frozen Food Co., Ltd.	4.51
Chaiwarut Co., Ltd.	4.51
Chaivaree Marine Products Co., Ltd.	4.51
Charoen Pokphand Foods Public Co., Ltd.	4.51
Chue Eie Mong Eak Ltd. Part.	4.51
Core Seafood Processing Co., Ltd.	4.51
Crystal Seafood	4.51
Daedong (Thailand) Co. Ltd.	4.51
Daiei Taigen (Thailand) Co., Ltd.	4.51
Daiho (Thailand) Co., Ltd.	4.51
Earth Food Manufacturing Co., Ltd.	4.51
Euro–Asian International Seafoods Co., Ltd.	4.51
F.A.I.T. Corporation Limited	4.51
Far East Cold Storage Co., Ltd.	4.51
Findus (Thailand) Ltd.	4.51
Fortune Frozen Foods (Thailand) Co., Ltd.	4.51
Frozen Marine Products Co., Ltd.	4.51
Gallant Ocean (Thailand) Co., Ltd.	4.51
Gallant Ocean Seafood Corporation	4.51
Good Fortune Cold Storage Co., Ltd.	4.51
Good Luck Product Co., Ltd.	4.51
Gulf Coast Crab Intl	4.51
H.A.M. International Co., Ltd.	4.51
Heng Seafood Limited Partnership	4.51
Heritrade Co., Ltd.	4.51
HIC (Thailand) Co., Ltd.	4.51
I.T. Foods Industries Co., Ltd.	4.51
Inter–Oceanic Resources Co., Ltd.	4.51
Inter–Pacific Marine Products Co., Ltd.	4.51
Intersia Foods Co., Ltd.	4.51
K .D. Trading Co., Ltd.	4.51
K Fresh	4.51
KF Foods	4.51
K.L. Cold Storage Co., Ltd.	4.51
Kiang Huat Sea Gull Trading Frozen Food Public Co., Ltd.	4.51
Kingfisher Holdings Ltd.	4.51
Kibun Trdg	4.51
Klang Co., Ltd.	4.51
Kitchens of the Ocean (Thailand) Ltd.	4.51
Kongphop Frozen Foods Co., Ltd.	4.51
Kosamut Frozen Foods Co., Ltd.	4.51
Lee Heng Seafood Co., Ltd.	4.51
Leo Transports	4.51
Maersk Line	4.51
Magnate & Syndicate Co., Ltd.	4.51
Mahachai Food Processing Co., Ltd.	4.51
Marine Gold Products Limited	4.51
May Ao Co., Ltd.	4.51
May Ao Foods Co., Ltd.	4.51
N&N Foods Co., Ltd.	4.51
Namprik Maesri Ltd. Part.	4.51
Narong Seafood Co., Ltd.	4.51
Ongkorn Cold Storage Co., Ltd.	4.51
Pacific Queen Co., Ltd.	4.51
Penta Impex Co., Ltd.	4.51
Pinwood Nineteen Ninety Nine	4.51
Piti Seafoods Co., Ltd.	4.51
Premier Frozen Products Co., Ltd.	4.51
Preserved Food Specialty Co., Ltd.	4.51
Rayong Coldstorage (1987) Co., Ltd.	4.51
S&D Marine Products Co., Ltd.	4.51
S&P Aquarium	4.51
S&P Syndicate Public Company Ltd.	4.51
S. Chaivaree Cold Storage Co., Ltd.	4.51
S.C.C. Frozen Seafood Co., Ltd.	4.51
S. Khonkaen Food Industry Public Co., Ltd.	4.51
SMP Foods Products Co., Ltd.	4.51

Manufacturer/Exporter	Percent Margin
Samui Foods Company Limited	4.51
Sea Bonanza Food Co., Ltd.	4.51
Seafoods Enterprise Co., Ltd.	4.51
Seafresh Fisheries	4.51
Seafresh Industry Public Co., Ltd.	4.51
Siam Food Supply Co., Ltd.	4.51
Siam Intersea Co., Ltd.	4.51
Siam Marine Products Co. Ltd.	4.51
Siam Ocean Frozen Foods Co. Ltd.	4.51
Siam Union Frozen Foods	4.51
Siamchai International Food Co., Ltd.	4.51
Southport Seafood	4.51
STC Foodpak Ltd.	4.51
Suntechthai Intertrading Co., Ltd.	4.51
Surapon Foods Public Co., Ltd.	4.51
Surapon Nichirei Foods Co., Ltd.	4.51
Surapon Seafood	4.51
Suratthani Marine Products Co., Ltd.	4.51
Suree Interfoods Co., Ltd.	4.51
T.S.F. Seafood Co., Ltd.	4.51
Tanaya International Co., Ltd.	4.51
Teppitak Seafood Co., Ltd.	4.51
Tey Seng Cold Storage Co., Ltd.	4.51
Thai–Ger Marine Co., Ltd.	4.51
Thai Agri Foods Public Co., Ltd.	4.51
Thai I–Mei Frozen Foods Co., Ltd.	4.51
Thai Mahachai Seafood Products Co., Ltd.	4.51
Thai Ocean Venture Co., Ltd.	4.51
Thai Patana Frozen	4.51
Thai Prawn Culture Center Co., Ltd.	4.51
Thai Royal Frozen Food Co. Ltd.	4.51
Thai Spring Fish Co., Ltd.	4.51
Thai Union Frozen Products Public Co., Ltd.	4.51
Thai Union Seafood Co., Ltd.	4.51
Thai Yoo Ltd., Part.	4.51
The Siam Union Frozen Food Co., Ltd.	4.51
The Union Frozen Products Co., Ltd.	4.51
Trang Seafood Products Public Co., Ltd.	4.51
Transamut Food Co., Ltd.	4.51
Tung Lieng Trdg	4.51
United Cold Storage Co., Ltd.	4.51
V Thai Food Product	4.51
Wales & Co. Universe Ltd.	4.51
Xian–Ning Seafood Co., Ltd.	4.51
Y2K Frozen Foods Co., Ltd.	4.51
Yeenin Frozen Foods Co., Ltd.	4.51
YHS Singapore Pte	4.51
ZAFCO TRDG	4.51

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. See 19 CFR 351.224(b). Pursuant to 19 CFR 351.309, interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities.

Interested parties who wish to request a hearing or to participate if one is requested must submit a written request to the Assistant Secretary for Import Administration, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: 1) the party's name, address and telephone number; 2) the number of participants; and 3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in the respective case briefs.

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For the majority of the Rubicon Group's and Pakfood's U.S. sales, we note that these companies reported the entered value for the U.S. sales in question. We will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer.

For certain of the Rubicon Group's and Pakfood's U.S. sales, we note that these companies did not report the entered value for the U.S. sales in question. We will calculate importer–specific per–unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. With respect to Pakfood's and the Rubicon Group's U.S. sales of shrimp with sauce, for which no entered value was reported, we will include the total quantity of the merchandise with sauce in the denominator of the calculation of the importer–specific rate because CBP will apply the per–unit duty rate to the total quantity of merchandise entered, including the sauce weight. To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we will calculate importer–specific *ad valorem* ratios based on the estimated entered value.

For the responsive companies which were not selected for individual examination, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual examination excluding any which are *de minimis* or determined entirely on AFA.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this review is above *de minimis (i.e.*, at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis (i.e.*, less than 0.50 percent). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

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) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise

during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate effective during the POR (*i.e.*, 5.95 percent) if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: 1) the cash deposit rate for each specific company listed above[7] will be that established in the final results of this review, except if the rate is less than 0.50 percent, and therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; 2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company–specific rate published for the most recent period; 3) if the exporter is not a firm covered in this review or the original 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 be 5.34 percent, the all–others rate made effective by the *Section 129 determination*. These requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) 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.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221.

Dated: March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4924 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–DS–S

[7] Effective January 16, 2009, there is no longer a cash deposit requirement for certain producers/exporters in accordance with the *Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Thailand: Notice of Determination under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand*, 74 FR 5638 (January 30, 2009) (*Section 129 Determination*).

DEPARTMENT OF COMMERCE

International Trade Administration

A–552–802

Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Request for Revocation, In Part, of the Third Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam (''Vietnam''), covering the period of review (''POR'') of February 1, 2007, through January 31, 2008. As discussed below, we preliminarily determine that sales have been made below normal value (''NV''). If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on entries of subject merchandise during the POR for which the importer–specific assessment rates are above *de minimis*.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–6905.

SUPPLEMENTARY INFORMATION:

General Background

On February 1, 2005, the Department published in the **Federal Register** the antidumping duty order on frozen warmwater shrimp from Vietnam. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 70 FR 5152 (February 1, 2005) (''Order''). On February 4, 2008, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on frozen warmwater shrimp from Vietnam for the period February 1, 2007, through January 31, 2008. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 73 FR 6477 (February 4, 2008).

On February 29, 2008, we received requests to conduct administrative reviews of 145 companies from Petitioner,[1] two companies from the Louisiana Shrimp Association (''LSA''), and requests by certain Vietnamese companies.[2] *See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China* 73 FR 18739 (April 7, 2008) (''*Initiation Notice*'').

On April 7, 2008, the Department initiated an administrative review of 170 producers/exporters of subject merchandise from Vietnam. *See Initiation Notice*. However, after accounting for duplicate names and additional trade names associated with certain exporters, the number of companies upon which we initiated is actually 110 companies/groups. On April 8, 2008, the Department posted the separate rate certification and separate rate application on its website for Vietnamese exporters for whom a review was initiated to complete and submit to the Department.

On April 14, 2008, May 5, 2008, and May 7, 2008, the Department received letters from Vinh Hoan Corporation (formerly Vinh Hoan Co., Ltd.) (''Vinh Hoan''), Kim Anh Co., Ltd. (''Kim Anh''), Quoc Viet Seaproducts Processing Trading Import and Export Co., Ltd., (''Quoc Viet''), and C.P. Vietnam Livestock Company Limited (''CP Vietnam''), respectively, indicating that they made no shipments of subject merchandise during the POR.

Of the 110 companies/groups upon which we initiated an administrative review, 78 companies did not submit separate rate certifications or

[1] The Ad Hoc Shrimp Trade Action Committee is the Petitioner.

[2] Some of these requests created an overlap in the number of companies upon which an administrative review was requested.

applications. 28 companies submitted separate–rate certifications, and four companies stated that they did not export subject merchandise to the United States during the POR. The Department addresses the review status of each grouping of companies below.

Respondent Selection

On April 8, 2008, the Department placed on the record data obtained from CBP with respect to the selection of respondents, inviting comments from interested parties. *See* Letter from the Department to Interested Parties, re: CBP data for respondent selection, dated April 8, 2008. On April 21, 2008, Petitioner provided comments on the Department's respondent selection methodology. On April 22, 2008, a number of Vietnamese companies[3] provided comments on the Department's respondent selection methodology. On April 24, 2008, Petitioner provided additional comments with respect to the Department's respondent selection methodology.

On June 9, 2008, the Department issued its respondent selection memorandum. Based upon section 777A(c)(2)(B) of the Tariff Act of 1930 as amended, (''the Act''), the Department selected Camimex, Minh Phu Group[4] (''MPG''), and Phuong Nam Co., Ltd. for individual review (hereinafter ''mandatory respondents'') because they were the largest exporters, by volume, within the CBP data. *See Memorandum to James C. Doyle, Office Director, Office 9, from Paul Walker, Senior Analyst, Re: Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Selection of Respondents for Individual Review* (''*Respondent Selection Memo*'').

Questionnaires

On June 9, 2008, the Department issued its non–market economy questionnaire to the mandatory respondents, Camimex, MPG, and Phuong Nam. Camimex, MPG, and Phuong Nam responded to the Department's non–market economy questionnaire and subsequent supplemental questionnaires between July 2008 and February 2009.

Extension of the Preliminary Results

On September 18, 2008, the Department extended the deadline for the preliminary results until March 2, 2009. *See Third Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Extension of Time Limit for the Preliminary Results*, 73 FR 54139 (September 18, 2008).

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for

[3] These were: Grobest & I-Mei Industrial (Vietnam) Co., Ltd.; and Ca Mau Seafood Joint Stock Company (''SEAPRIMEXICO''); Cadovimex Seafood Import-Export and Processing Joint-Stock Company (''Cadovimex-Vietnam''); Cafatex Fishery Joint Stock Corporation (''CAFATEX CORP''); Camau Frozen Seafood Processing Import Export Corporation (''CAMIMEX''); Can Tho Agricultural and Animal Products Import Export Company (''CATACO''); Cuulong Seaproducts Company (''Cuulong Seapro''); Danang Seaproducts Import Export Corporation (and its affiliate Tho Quong Seafood Processing and Export Company) (''Seaprodex Danang''); Minh Hai Export Frozen Seafood Processing Joint-Stock Company (''Minh Hai Jostoco''); Minh Hai Joint-Stock Seafoods Processing Company (''Sea Minh Hai''); Minh Phu Seafood Export Import Corporation (and its affiliates Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.) (collectively ''Minh Phu Group''); Ngoc Sinh Private Enterprise; Nha Trang Seaproduct Company (''NHA TRANG SEAFOODS''); Phu Cuong Seafood Processing & Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Company (''FIMEX''); Soc Trang Aquatic Products and General Import-Export Company (''STAPIMEX''); Thuan Phuoc Seafoods and Trading Corportion (and its affiliates Frozen Seafoods Fty, Frozen Seafoods Factor No. 32, Seafoods and Foodstuff Factory); UTXI Aquatic Products Processing Company; Viet Foods Co., Ltd.; Vinh Loi Import Export Company (''VIMEX''); Coastal Fisheries Development Corporation (''COFIDEC''); Investment Commerce Fisheries Corporation (''INCOMFISH''); Nha Trang Fisheries Joint Stock Company (''Nha Trang FISCO''); and Bac Lieu Fisheries Company Limited (''Bac Lieu'').

[4] Minh Phu Group includes the following companies: Minh Phu Seafood Export Import Corporation (and affiliated Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.); Minh Phu Seafood Corporation; Minh Phu Seafood Corp.; Minh Qui Seafood Co., Ltd.; Minh Qui Seafood; Minh Phat Seafood Co., Ltd.; Minh Phat Seafood.

[5] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Preliminary Partial Rescission of Administrative Review

As stated above, Vinh Hoan, Kim Anh, Quoc Viet, and CP Vietnam informed the Department that they did not export subject merchandise to the United States during the POR. The Department sent an inquiry to CBP to determine whether CBP entry data is consistent with these statements.[6] With respect to Vinh Hoan and Quoc Viet, CBP has not provided any information that contradicted these companies' claims. Therefore, because the record indicates that Vinh Hoan and Quoc Viet did not sell subject merchandise to the United States during the POR, we are preliminarily rescinding this administrative review with respect to Vinh Hoan and Quoc Viet. *See* 19 CFR 351.213(d)(3). However, we are not preliminarily rescinding the instant administrative review with respect to Kim Anh and CP Vietnam, because CBP provided a response to the Department's inquiry that contradicted the no–shipment claims from Kim Anh and CP Vietnam. *See* Memorandum to the File, from Irene Gorelik, Senior Analyst, re: CBP Inquiry Results, dated March 2, 2009. We have requested information from the companies to address the discrepancy between the CBP data and the no–shipments certifications.[7] Thus, pending additional information from the companies and CBP, we are not preliminarily rescinding the reviews with respect to Kim Anh and CP Vietnam. Therefore, the Department must preliminarily assign a rate to these companies. We note that Kim Anh and CP Vietnam have not provided any information on the record to indicate their eligibility for a rate separate from the Vietnam–wide entity. Consequently, we are preliminarily assigning Kim Anh and CP Vietnam the Vietnam–wide entity rate.

Vietnam–Wide Entity

Upon initiation of the administrative review, we provided the opportunity for all companies upon which the review was initiated to complete either the separate–rates application or certification. The separate–rate certification and separate–rate applications are available at: http://ia.ita.doc.gov/download/nme–sep-rates/vietnam–shrimp/AR0708/vietnam–shrimp-sr–cert–040708.pdf.

As noted above, Kim Anh and CP Vietnam did not apply for a separate rate in this administrative review. Therefore, Kim Anh and CP Vietnam will be part of the Vietnam–wide entity. Additionally, as stated above, 78[8] additional companies upon which a review was initiated did not apply for a separate rate. Because the Department preliminarily determines that there were exports of subject merchandise under review from Vietnamese producers/exporters that did not demonstrate their eligibility for separate–rate status, the Vietnam–wide entity is now under review.

Request for Revocation, In Part

On February 29, 2008, Fish One, one of the non–selected separate rate respondents in this proceeding, requested an administrative review and revocation of the *Order*. Although the Department acknowledged the review request within the Initiation Notice, we inadvertently omitted Fish One's request for revocation within the Initiation Notice. On October 8, 2008, and January 2, 2009, Fish One filed comments arguing that the Department must comply with certain statutory and regulatory obligations related to revocation requests. Further, on January 8, 2009, Petitioner filed comments opposing Fish One's request for verification of its data.

In its initial request for revocation, Fish One argued that it has maintained three consecutive years of sales at not less than normal value. Fish One argued that, as a result of its alleged three consecutive years of no dumping, it is eligible for revocation under section 751(d)(1) of the Act and section 351.222(b)(2) of the Department's regulations.

We preliminarily determine not to revoke the *Order* with respect to Fish One. The Act affords the Department broad discretion to limit the number of respondents selected for individual review when the large number of review requests makes the individual calculation of dumping margins for all companies under review impracticable. Specifically, section 777A(c)(2) of the Act provides that if it is not practicable for the Department to make individual dumping margin determinations because of the large number of exporters or producers involved, the Department may determine margins for a reasonable number of exporters or producers. Although the Department's regulations set out rules and requirements for possible revocation of a dumping order, in whole or in part, based on an absence of dumping, it is silent on the applicability of this regulation when the Department has limited its examination under section 777A(c)(2) of the Act. The Department does not interpret the regulation as requiring it to conduct an individual examination of Fish One, or a verification of Fish One's data, where, as here, the Department determined to limit its examination to a reasonable number of exporters in accordance with section 777A(c)(2)(B), and Fish One was not one of the companies selected under this provision. To interpret the regulation as Fish One has proposed, *i.e.*, requiring the Department to analyze

[6] The no-shipments-inquiry to CBP is at *http://addcvd.cbp.gov/index.asp?docID=9035204&qu=&vw=detail.*

[7] On February 18, 2009, and February 19, 2009, the Department released under administrative protective order (''APO'') the proprietary CBP data to counsel for Kim Anh and CP Vietnam, respectively. *See* Memoranda to the File from Irene Gorelik, Senior International Trade Compliance Analyst; re: Kim Anh Response Deadline and CP Vietnam No Shipments Inquiry, dated February 18, 2009, and February 19, 2009, respectively.

[8] These companies are: AAAS Logistics; Agrimex; Amerasian Shipping Logistics Corp.; American Container Line; An Giang Fisheries Import and Export Joint Stock Company (Agifish); An Xuyen, Angiang Agricultural; Technology Service Company; Aquatic Products Trading Company; Bentre Aquaproduct Imports & Exports; Bentre Forestry and Aquaproduct Import-Export Company (''FAQUIMEX''); Bentre Frozen Aquaproduct Exports; Bentre Seafood Joint Stock; Beseaco, Binh Dinh Fishery Joint Stock; Ca Mau Seaproducts Exploitation and Service Corporation (''SES''); Camau Seafood Fty; Can Tho Seafood Exports; Cautre Enterprises; Chun Cheng Da Nang Co., Ltd.; Co Hieu; Cong Ty Do Hop Viet Cuong; Dao Van Manh; Dong Phuc Huynh; Dragon Waves Frozen Food Fty.; Duyen Hai Bac Lieu Company (''T.K. Co.''); Duyen Hai Foodstuffs Processing Factory (''COSEAFEX''); General Imports & Exports; Hacota; Hai Ha Private Enterprise; Hai Thuan Export Seaproduct Processing Co., Ltd. ; Hai Viet; Hai Viet Corporation (''HAVICO''); Hanoi Seaproducts Import Export Corporation (''Seaprodex Hanoi''); Seaprodex Hanoi; Hatrang Frozen Seaproduct Fty; Hoa Nam Marine Agricultural; Hoan An Fishery; Hoan Vu Marine Product Co., Ltd.; Hua Heong Food Ind Vietnam; Khanh Loi Trading; Kien Gang Sea Products Import - Export Company (Kisimex); Kien Gang Seaproduct Import and Export Company (''KISIMEX''); Konoike Vinatrans Logistics; Lamson Import-Export Foodstuffs Corporation; Long An Food Processing Export Joint Stock Company (''LAFOOCO''); Lucky Shing; Nam Hai; Nha Trang Company Limited; Nha Trang Fisheries Co. Ltd.; Pataya Food Industry (Vietnam) Ltd.; Phat Loc Seafood; Phung Hung Private Business; Saigon Orchide; Sea Product; Sea Products Imports & Exports; Seafood Company Zone II (''Thusaco2''); Seafood Processing Joint Stock Company No.9 (previously Seafood Processing Imports Exports); Seafoods and Foodstuff Factory; Seaprodex; Seaprodex Quang Tri; Sonacos; Song Huong ASC Import-Export Company Ltd.; Song Huong ASC Joint Stock Company; Special Aquatic Products Joint Stock Company (''Seaspimex''); SSC; T & T Co., Ltd.; Tacvan Frozen Seafoods Processing Export Company; Thami Shipping & Airfreight; Thang Long; Thanh Long; Thanh Doan Seaproducts Import; Thien Ma Seafood; Tourism Material and Equipment Company (Matourimex Hochiminh City Branch); Truc An Company; Trung Duc Fisheries Private Enterprise; V N Seafoods; Vien Thang Private Enterprise; Viet Nhan Company; Vietfracht Can Tho; Vietnam Northern Viking Technologie Co.; Vietnam Northern Viking Technology Co. Ltd.; Vietnam Tomec Co., Ltd.; Vilfood Co.; and Vita.

and verify Fish One's reported data, would undermine the authority Congress provided the Department to limit its examination in cases, such as shrimp from Vietnam, where there are many respondents under review (over 100 in this case). Under Fish One's interpretation, the Department would be required to conduct individual reviews and verifications for any company requesting revocation, no matter how many such requests are received. The Department does not believe that such an interpretation is correct, nor warranted, under the Act. Nothing in the regulation requires the Department to conduct an individual examination and verification when the Department has limited its review, under section 777A(c)(2). As explained above, Fish One was not selected for individual review because, pursuant to 777A(c)(2)(B) of the Act, the Department selected the three largest exporters, by volume. *See Respondent Selection Memo*. Thus, because we have not selected Fish One for individual examination, we preliminarily determine not to revoke the *Order* with respect to Fish One.

However, Fish One filed a timely separate–rate certification, as evidence of its continued eligibility for a separate rate. Thus, the Department considers Fish One a cooperative respondent eligible for a separate rate. Moreover, as the Department has calculated positive margins for all three selected respondents in these preliminary results, we are assigning a separate rate to all SR respondents equal to the weighted average of the three calculated margins. *See* ''Rate for Non–Selected Companies'' section below.

Verification

Pursuant to 19 CFR 351.307(b)(iv), between January 12 and January 16, 2009, we conducted a verification of Phuong Nam's sales and factors of production (''FOP''). *See Certain Frozen Warmwater Shrinp from the Socialist Republic of Vietnam: Verification of Sales and Factors of Production for Phuong Nam Co., Ltd. (''Phuong Nam'')*, dated March 2, 2009.

Surrogate Country and Surrogate Values

On September 11, 2008, the Department sent interested parties a letter requesting comments on surrogate country selection and information pertaining to valuing factors of production. Camimex and MPG submitted surrogate country comments on January 5, 2009. Petitioner filed rebuttal surrogate country comments on January 8, 2009, opposing Camimex and MPG's request for the Department to select Bangladesh as the surrogate country.

On January 30, 2009, Phuong Nam, MPG, Camimex and Petitioner submitted surrogate value data. On February 3, 2009, MPG and Camimex commented on Petitioner's surrogate value data submission dated January 30, 2009. On February 4, 2009, Petitioner filed additional surrogate value data. On February 10, 2009, Petitioner filed pre–preliminary results comments with respect to the calculation methodology used to convert the shrimp surrogate values to the same basis as the respondents' reported data. On February 11, 2009, Phuong Nam filed comments rebutting Petitioner's surrogate value data dated February 10, 2009.

For a detailed account of the Department's surrogate country selection, please *see* the ''Surrogate Country'' section below.

Non–Market Economy Country Status

In every case conducted by the Department involving Vietnam, Vietnam has been treated as a non–market economy (''NME'') country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 72 FR 53527 (September 19, 2007) (unchanged in final results). None of the parties to this proceeding have contested such treatment. Accordingly, we calculated the NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates Determination

A designation as an NME remains in effect until it is revoked by the Department. See section 771(18)(C) of the Act. Accordingly, there is a rebuttable presumption that all companies within Vietnam are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in the *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*'').

For this administrative review, the Department received a total of 28 separate–rate certifications.[9] Of those 28 separate–rate certifications, three were submitted by the mandatory respondents, whose eligibility for a separate rate was analyzed within their respective questionnaire responses. Therefore, the Department analyzed 25 separate–rate certifications for companies upon which the administrative review was initiated, but not selected for individual review. Of those 25 separate–rate certifications, the Department noted that separate–rate certifications filed by seven exporters[10] showed that these seven companies claimed to have undergone changes in name, legal and/or corporate structure during the POR. A separate–rate certification is not the proper vehicle by which a company that has undergone name or other corporate changes should request a separate rate. Accordingly, for purposes of these preliminary results, the Department has examined the separate–rate eligibility of the respondents prior to any name or other corporate change. On December 9, 2008, the Department notified these seven respondents that any claims of successor–in-interest by these companies must be requested within the context of a changed circumstance review request. *See* Department's letter dated December 9, 2009. The Department intends to take into account the final results of any changed circumstances review that has been requested, initiated, and completed before the final results of this review.

Lastly, one separate rate company, Amanda Foods (Vietnam) Limited, reported that it is wholly owned by

[9] For firms previously awarded separate rate status, the Department allows those firms to file a separate-rate certification, provided that the company did not undergo changes in status since the previous granting period. Additionally, firms that did not hold a separate rate in a previous granting period may not use a separate-rate certification, but, instead must submit a separate-rate application for separate rate status. *See* separate-rate certificate issued by the Department on April 8, 2008; available at: http://ia.ita.doc.gov/download/nme-sep-rates/vietnam-shrimp/AR0708/vietnam-shrimp-sr-cert-040708.pdf.

[10] These exporters are: Cadovimex, CATACO, Stapimex, UTXI, Bac Lieu, Minh Hai Export Frozen Seafood Processing Joint Stock Company, and Thuan Phuoc.

individuals or companies located in a market economy in its separate–rate application. Therefore, because it is wholly foreign–owned, and we have no evidence indicating that its export activities are under the control of the Vietnamese government, a further separate rates analysis is not necessary to determine whether this company is independent from government control.[11] Accordingly, we have preliminarily granted a separate rate to Amanda Foods (Vietnam) Limited.

A. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; and (2) any legislative enactments decentralizing control of companies.

Although the Department has previously assigned a separate rate to the companies eligible for a separate rate in the instant proceeding, it is the Department's policy to evaluate separate rates questionnaire responses each time a respondent makes a separate rates claim, regardless of whether the respondent received a separate rate in the past. *See Manganese Metal from the People's Republic of China, Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 63 FR 12440 (March 13, 1998).

In this review, MPG, Camimex, and Phuong Nam submitted complete responses to the separate rates section of the Department's NME questionnaire. The evidence submitted by these companies includes government laws and regulations on corporate ownership, business licenses, and narrative information regarding the companies' operations and selection of management. The evidence provided by these companies supports a finding of a *de jure* absence of government control over their export activities. Additionally, 25 participating separate rate companies/groups[12] submitted timely separate rate certifications. The seven respondents noted in footnote 10 are included in this group of 25. However, as stated above, the Department will examine the separate–rate eligibility of those respondents prior to any name or other corporate change until a successor–in-interest determination is made with respect to the new entities.

We have no information in this proceeding that would cause us to reconsider this determination. Thus, we believe that the evidence on the record supports a preliminary finding of an absence of *de jure* government control based on: (1) an absence of restrictive stipulations associated with the exporter's business license; and (2) the legal authority on the record decentralizing control over the respondents.[13]

B. Absence of *De Facto* Control

The absence of *de facto* government control over exports is based on whether the Respondent: (1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management. *See Silicon Carbide*, 59 FR at 22587; *Sparklers*, 56 FR at 20589; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

In their questionnaire responses, MPG, Camimex, and Phuong Nam submitted evidence indicating an absence of *de facto* government control over their export activities. Specifically, this evidence indicates that: (1) each company sets its own export prices independent of the government and without the approval of a government authority; (2) each company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) each company has a general manager, branch manager or division manager with the authority to negotiate and bind the company in an agreement; (4) the general manager is selected by the board of directors or company employees, and the general manager appoints the deputy managers and the manager of each department; and (5) there is no restriction on any of the companies use of export revenues. Therefore, the Department preliminarily finds that MPG, Camimex, and Phuong Nam, and the separate rate companies have established *prima facie* that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers*.

Rate for Non–Selected Companies

Based on timely requests from individual exporters and Petitioner, the Department originally initiated this review with respect to 110 companies/groups. In accordance with section 777A(c)(2)(B) of the Act, the Department employed a limited examination methodology, as it did not have the resources to examine all companies for which a review request was made. As stated previously, the Department selected three exporters, MPG, Camimex, and Phuong Nam as mandatory respondents in this review. Twenty–five additional companies submitted timely information as requested by the Department and remain subject to review as cooperative separate rate respondents.

We note that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The

[11] *See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate from the People's Republic of China*, 64 FR 71104-05 (December 20, 1999) (where the respondent was wholly foreign-owned and, thus, qualified for a separate rate). *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review* 73 FR 12127 (March 6, 2008), unchanged in *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 52273 (September 9, 2008) (''*Vietnam Shrimp AR2*'').

[12] The non-selected respondents of this administrative review seeking a separate rate are: Amanda Foods (Vietnam) Ltd., Bac Lieu Fisheries Company Limited (''Bac Lieu''), Ca Mau Seafood Joint Stock Company (''SEAPRIMEXCO''), Cadovimex Seafood Import-Export and Processing Joint Stock Company (''CADOVIMEX''), Cantho Animal Fisheries Product Processing Export Enterprise (Cafatex), Cam Ranh Seafoods Processing Enterprise Company (''Camranh Seafoods''), Can Tho Agricultural and Animal Product Import Export Company (''CATACO''), Coastal Fisheries Development Corporation (''COFIDEC''), Cuulong Seaproducts Company (''Cuulong Seapro''), Danang Seaproducts Import Export Corporation (''Seaprodex Danang'') and affiliate Tho Quang Seafood Processing & Export Company, Grobest & I-Mei Industrial (Vietnam) Co., Ltd., Investment Commerce Fisheries Corporation (''Incomfish''), Minh Hai Export Frozen Seafood Processing Joint-Stock Company (''Minh Hai Jostoco''), Minh Hai Joint-Stock Seafoods Processing Company (''Seaprodex Minh Hai''), Ngoc Sinh Private Enterprise, Nha Trang Fisheries Joint Stock Company (''Nha Trang Fisco''), Nha Trang Seaproduct Company (''Nha Trang Seafoods''), Phu Cuong Seafood Processing & Import-Export Co., Ltd., Sao Ta Foods Joint Stock Company (''FIMEX''), Soc Trang Aquatic Products and General Import Export Company (''Stapimex''), Thuan Phuoc Seafoods and Trading Corporation (and its affiliates), UTXI Aquatic Products Processing Company, Viet Foods Co., Ltd., Viet Hai Seafood Co., Ltd. a/k/a Vietnam Fish One Co., Ltd. (Fish One), Vinh Loi Import Export Company (''VIMEX'').

[13] This preliminary finding applies to the three mandatory respondents of this administrative review: MPG, Camimex, and Phuong Nam, and the non-selected respondents eligible for a separate rate listed in the preceding footnote.

Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to look to section 735(c)(5) of the Act, which provides instructions for calculating the all–others rate in an investigation, for guidance. Consequently, the Department generally weight–averages the rates calculated for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on adverse facts available (''AFA''), and applies that resulting weighted–average margin to non–selected cooperative separate–rate respondents. *See, e.g.*, *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review*, 73 FR 8273 (February 13, 2008) (unchanged in final results). Consequently, consistent with our practice, we have preliminarily established a weighted–average margin for the separate–rate respondents based on the rates we calculated for the three mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on AFA. *See Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results Simple–Averaged Margin for Separate Rate Respondents*, dated March 2, 2009. For the Vietnam–wide entity, we have assigned the entity's current rate and only rate ever determined for the entity in this proceeding.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs, valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. The sources of the surrogate factor values are discussed under the ''Normal Value'' section below and in *Memorandum to the File through Catherine Bertrand, Program Manager, Office 9 from Irene Gorelik, Senior Analyst, Office 9; Third Antidumping Duty Administrative Reviews of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results*, dated March 2, 2009 (''*Factor Valuation Memo*'').

Pursuant to its practice, the Department received a list of potential surrogate countries from the Office of Policy (''OP'').[14] The OP determined that Bangladesh, Pakistan, India, Sri Lanka, and Indonesia were at a comparable level of economic development to Vietnam. *See Surrogate Country List*. The Department considers the five countries identified by the OP in its Surrogate Country List as ''equally comparable in terms of economic development.'' *Id*. Thus, we find that Bangladesh, Pakistan, India, Sri Lanka, and Indonesia are all at an economic level of development equally comparable to that of Vietnam.

Also, based on publicly available data published by the Food and Agricultural Organization (''FAO'') of the United Nations' FishStat Database (''FishStat''), we obtained world production data of frozen warmwater shrimp. Specifically, the Department has reviewed the data from FishStat which shows that Bangladesh, Indonesia, India, Pakistan, and Sri Lanka all produce the identical merchandise. *See* Memorandum to the File from Irene Gorelik, Senior Analyst, Re: Third Administrative Review of Certain Warmwater Shrimp from Vietnam: Fishstat Data, dated March 2, 2009. Therefore, all countries are being considered as an appropriate surrogate country for Vietnam because each country produces the identical merchandise. Moreover, according to FishStat, in 2005, the most recent year for which FishStat export statistics are available, Bangladesh, Indonesia, and India, are all significant producers of comparable merchandise. *See id*. Though both Pakistan and Sri Lanka export frozen shrimp, the quantities they export do not qualify them as significant producers of the subject merchandise. As Bangladesh, Indonesia, and India are all significant producers of comparable merchandise, the Department must look to data considerations when choosing the most appropriate surrogate country from among these countries.

With regard to India and Indonesia, the record contains publicly available surrogate factor value information for some factors. MPG and Camimex provided data for both Indonesia and Bangladesh from a study conducted by the Network of Aquaculture Centres in Asia–Pacific (''NACA''), an intergovernmental organization affiliated with the UN's Food and Agriculture Organization (''FAO''). However, unlike the Bangladeshi data within the NACA study, the Indonesian shrimp data is limited and does not satisfy as many factors of the Department's data selection criteria (*e.g.*, broad–market average). Thus, Indonesia is not the most appropriate surrogate country for purposes of this review. With respect to India, the only shrimp value on the record is ranged data obtained from one Indian respondent's data in the current administrative review of warmwater shrimp from India, which also does not satisfy as many factors of the Department's data selection criteria (*e.g.*, public availability, broad–market average).

The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are product–specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties.[15] As a general matter, the Department prefers to use publicly available data representing a broad market average to value surrogate values. *See id*. The Department notes that the value of the main input, head–on, shell–on (''HOSO'') shrimp, is a critical factor of production in the dumping calculation as it accounts for a significant percentage of normal value. Moreover, the ability to value shrimp on a count size basis is a significant consideration with respect to the data available on the record.

The Department notes that the mandatory respondents and Petitioner submitted count–size specific shrimp data and equally comparable surrogate company financial statements from shrimp processors. Therefore, availability of count–size specific data or surrogate financial ratios on this record is not the determining factor in selecting a surrogate country for this review.

However, the Bangladeshi shrimp values within the NACA study are compiled by the UN's FAO from actual pricing records kept by Bangladeshi

[14] *See Memorandum from Carole Showers, Acting Director, Office of Policy, to Catherine Bertrand, Program Manager, AD/CVD Enforcement, Office 9: Administrative Review of Certain Warmwater Shrimp from Vietnam: Request for a List of Surrogate Countries*, dated July 29, 2008 (''*Surrogate Country List*'') from the OP.

[15] *See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews*, 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 2A.

farmers, traders, depots, agents, and processors. *See Factor Valuation Memo*. The Bangladeshi shrimp values within the NACA study represent a broad–market average and are publicly available, unlike those of the single Indian processor. Therefore, with respect to the data considerations, because the record contains shrimp values for Bangladesh that better meet our selection criteria than the India source, we are selecting Bangladesh as the surrogate country.

In this regard, given the above–cited facts, we find that the information on the record shows that Bangladesh is an appropriate surrogate country because Bangladesh is at a similar level of economic development pursuant to section 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has reliable, publicly available data representing a broad–market average for surrogate valuation purposes.

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results in an antidumping administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results.[16]

U.S. Price

A. Export Price

In accordance with section 772(a) of the Act, we calculated the export price (''EP'') for sales to the United States for Camimex and Phuong Nam because the first sale to an unaffiliated party was made before the date of importation and the use of constructed export price (''CEP'') was not otherwise warranted. Additionally, we calculated the EP for a portion of MPG's sales to the United States. We calculated EP based on the price to unaffiliated purchasers in the United States. In accordance with section 772(c) of the Act, as appropriate, we deducted from the starting price to unaffiliated purchasers foreign inland freight and brokerage and handling. Each of these services was either provided by an NME vendor or paid for using an NME currency. Thus, we based the deduction of these movement charges on surrogate values. Additionally, for international freight provided by a market economy provider and paid in U.S. dollars, we used the actual cost per kilogram of the freight. *See Factor Valuation Memo* for details regarding the surrogate values for movement expenses.

B. Constructed Export Price

For the majority of MPG's sales, we based U.S. price on CEP in accordance with section 772(b) of the Act, because sales were made on behalf of the Vietnam–based company by its U.S. affiliate to unaffiliated purchasers in the United States. For these sales, we based CEP on prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price (gross unit price) for foreign movement expenses, international movement expenses, U.S. movement expenses, and appropriate selling adjustments, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act, we also deducted those selling expenses associated with economic activities occurring in the United States. We deducted, where appropriate, commissions, inventory carrying costs, credit expenses, and indirect selling expenses. Where foreign movement expenses, international movement expenses, or U.S. movement expenses were provided by Vietnam service providers or paid for in Vietnamese Dong, we valued these services using surrogate values (*see* ''Factors of Production'' section below for further discussion). For those expenses that were provided by a market–economy provider and paid for in market–economy currency, we used the reported expense. Due to the proprietary nature of certain adjustments to U.S. price, for a detailed description of all adjustments made to U.S. price for all three mandatory respondents, *see Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Irene Gorelik, Senior Analyst, Office 9; Company Analysis Memorandum in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Minh Phu Group*, dated March 2, 2009 (''*MPG Analysis Memo*''); *Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Blaine Wiltse, Analyst, Office 9; Company Analysis Memorandum in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Phuong Nam Co., Ltd.*, dated March 2, 2009 (''*Phuong Nam Analysis Memo*''); and *Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Robert Palmer, Analyst, Office 9; Company Analysis Memorandum in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam; Camimex*, dated March 2, 2009 (''*Camimex Analysis Memo*'').

Normal Value

1. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine the NV using a FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

2. Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by respondents for the POR, except as noted above. To calculate NV, we multiplied the reported per–unit factor–consumption rates by publicly available Bangladeshi surrogate values. In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Bangladeshi import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory of production or the distance from the nearest seaport to the factory of production where appropriate. This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1407–1408 (Fed. Cir. 1997). Where we did not use Bangladeshi Import Statistics, we calculated freight based on the reported distance from the supplier to the factory.

With regard to surrogate values and the market–economy input values, we have disregarded prices that we have

[16] In accordance with 19 CFR 351.301(c)(1), for the final results of this administrative review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

reason to believe or suspect may be subsidized. We have reason to believe or suspect that prices of inputs from Indonesia, South Korea, Thailand, and India may have been subsidized. We have found in other proceedings that these countries maintain broadly available, non–industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004) (''*CTVs from the PRC*''), and accompanying Issues and Decision Memorandum at Comment 7; *see also Certain Cut–to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 12651 (March 15, 2005), and accompanying Issues and Decision Memorandum at Comment 4. The legislative history of the Act provides that in making its determination as to whether input values may be subsidized, the Department is not required to conduct a formal investigation, rather, Congress directed the Department to base its decision on information that is available to it at the time it makes its determination. *See Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompanying, H.R. Rep. 100–576 at 590* (1988).

Therefore, based on the information currently available, we have not used prices from these countries either in calculating the Bangladeshi import–based surrogate values or in calculating market–economy input values. In instances where a market–economy input was obtained solely from suppliers located in these countries, we used Bangladeshi import–based surrogate values to value the input.

With respect to certain purchases made by all three mandatory respondents, the Department noted that the purchase prices for certain inputs used to produce subject merchandise were from a country that we believe or suspect maintains broadly available, non–industry-specific export subsidies. As a result, we have, instead, used a surrogate value for those inputs. For further detail, *see MPG Analysis Memo*, *Phuong Nam Analysis Memo*, and *Camimex Analysis Memo*.

Raw Shrimp Value

The Department notes that the mandatory respondents and Petitioner submitted Bangladeshi shrimp values with which to value the main input, raw shrimp. Phuong Nam submitted Bangladeshi shrimp values obtained from a single processor, Apex Foods Limited. Petitioner submitted shrimp values based on a survey of several Bangladeshi shrimp processors. As stated above, MPG and Camimex submitted data contained in the NACA study compiled by the UN's FAO.

As stated above, the Department's practice when selecting the best available information for valuing FOPs is to select, to the extent practicable, surrogate values which are product–specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties. Phuong Nam's submitted shrimp values from Apex Foods Limited, although publicly available, are from a single Bangladeshi shrimp producer of comparable merchandise, thus does not represent a broad market average of prices. Further, with respect to Petitioner's submitted shrimp values obtained from a survey of several Bangladeshi shrimp producers, we note that the authors of the survey averaged the shrimp prices they collected for business confidentiality reasons, thus the underlying data are not publicly available.[17] The Department prefers using public data, when available, with which to value the FOPs. *See e.g.*, *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews*, 71 FR 26329 (May 4, 2006) and accompanying Issues and Decision Memorandum at Comment 7; *see also Saccharin from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7515 (February 13, 2006) and accompany Issued and Decision Memorandum at Comment 5. Therefore, to value the main input, head–on, shell–on shrimp, the Department used data contained in the NACA study.[18]

Additionally, Petitioners filed pre–preliminary results comments with respect to the calculation steps required to adjust the HOSO shrimp surrogate values to the ''headless, shell–on'' (''HLSO'') shrimp consumption reported by the mandatory respondents. Consequently, we reviewed the adjustment methodology and concluded that the Department has overlooked a calculation step within the methodology in adjusting the surrogate value data to the respondents' shrimp consumption data, taking into account different bases of reported data. Specifically, the surrogate value data is on a HOSO, pieces per kilogram basis, while the respondents' data is on a HLSO, pieces per pound basis. The Department has added an additional step in the HLSO to HOSO adjustment, such that the surrogate value data and shrimp consumption data upon which accurate margin calculations rely are on the same bases with respect to units of measure and HOSO. *See Factor Valuation Memo* for a detailed description of each step within the conversion methodology.

The Department used United Nations ComTrade Statistics, provided by the United Nations Department of Economic and Social Affairs' Statistics Division, as its primary source of Bangladeshi surrogate value data.[19] The data represents cumulative values for the calendar year 2006, for inputs classified by the Harmonized Commodity Description and Coding System number. For each input value, we used the average value per unit for that input imported into Bangladesh from all countries that the Department has not previously determined to be NME countries. Import statistics from countries that the Department has determined to be countries which subsidized exports (*i.e.*, Indonesia, Korea, Thailand, and India) and imports from unspecified countries also were excluded in the calculation of the average value. *See CTVs from the PRC*, 69 FR 20594 (April 16, 2004).

It is the Department's practice to calculate price index adjustors to inflate or deflate, as appropriate, surrogate values that are not contemporaneous with the POR using the wholesale price index (''WPI'') for the subject country. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 FR 29509 (May 24, 2004). However, in this case, a WPI was not available for Bangladesh. Therefore, where publicly available information contemporaneous with the POR with which to value factors could not be obtained, surrogate values were adjusted using the Consumer Price Index rate for Bangladesh, or the WPI for India or Indonesia (for certain surrogate values where Bangladeshi data could not be obtained), as published in the

[17] *See* Petitioner's Submission dated February 4, 2009, at Attachment I, page 3. *See also Vietnam Shrimp AR2* at Comment 2 (where the Department rejected shrimp surrogate values obtained from price quotes or ranged proprietary data).

[18] For a detailed explanation of the Department's valuation of shrimp, see *Factor Valuation Memo*.

[19] This can be accessed online at: *http://www.unstats.un.org/unsd/comtrade/*

International Financial Statistics of the International Monetary Fund.

Certain surrogate values were calculated using data from the 2005 Statistical Yearbook of Bangladesh, published by the Bangladesh Bureau of Statistics, Planning Division, Ministry of Planning. The information represents cumulative values for the period of 2005. Certain other Bangladeshi sources were used as well. *See Factor Valuation Memo*. The unit values were initially calculated in takas/unit. Bangladeshi and other surrogate values denominated in foreign currencies were converted to USD using the applicable average exchange rate based on exchange rate data from the Department's website. To value packing materials, we used UN ComTrade data as the primary source of Bangladeshi surrogate value data. To value factory overhead, Selling, General, & Administrative expenses, and profit, we used the simple average of the 2007–2008 financial statement of Apex Foods Limited and the 2006–2007 financial statement of Gemini Seafood Limited, both of which are Bangladeshi shrimp processors. *See Factor Valuation Memo*, at Exhibit 12.

Preliminary Results of the Review

The Department has determined that the following preliminary dumping margins exist for the period February 1, 2007, through January 31, 2008:

CERTAIN FROZEN WARMWATER SHRIMP FROM VIETNAM

Manufacturer/Exporter	Weighted–Average Margin (Percent)
MPG:Minh Phat Seafood Co., Ltd., akaMinh Phat Seafood akaMinh Phu Seafood Export Import Corporation (and affiliates Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.) akaMinh Phu Seafood Corp. akaMinh Phu Seafood Corporation akaMinh Qui Seafood akaMinh Qui Seafood Co., Ltd.	1.66 %
Camau Frozen Seafood Processing Import Export Corporation ("CAMIMEX"), akaCamimex, akaCamau Seafood Factory No. 4 , akaCamau Seafood Factory No. 5	9.84 %
Phuong Nam Co. Ltd., akaPhuong Nam Seafood Co. Ltd. akaWestern Seafood	5.46 %
Amanda Foods (Vietnam) Ltd.	4.26 %
Bac Lieu Fisheries Company Limited, akaBac Lieu Fisheries Company Limited ("Bac Lieu")[20]	4.26 %
Cadovimex Seafood Import–Export and Processing Joint Stock Company ("CADOVIMEX") akaCai Doi Vam Seafood Import–Export Company (Cadovimex)[21]	4.26 %
Cafatex Fishery Joint Stock Corporation ("Cafatex Corp.") akaCantho Animal Fisheries Product Processing Export Enterprise (Cafatex), akaCafatex, akaCafatex Vietnam, akaXi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho, akaCas, akaCas Branch, akaCafatex Saigon, akaCafatex Fishery Joint Stock Corporation, akaCafatex Corporation, akaTaydo Seafood Enterprise	4.26 %
Cam Ranh Seafoods Processing Enterprise Company ("Camranh Seafoods") akaCamranh Seafoods	4.26 %
Can Tho Agricultural and Animal Product Import Export Company ("CATACO") akaCan Tho Agricultural Products akaCATACO[22]	4.26 %
Coastal Fishery Development akaCoastal Fisheries Development Corporation (Cofidec) akaCoastal Fisheries Development Corporation (Cofidec)	4.26 %
Cuulong Seaproducts Company ("Cuu Long Seapro") akaCuu Long Seaproducts Limited (Cuulong Seapro) akaCuulong Seapro, akaCuulong Seaproducts Company ("Cuulong Seapro") ("Cuu Long Seapro")	4.26 %
Danang Seaproducts Import Export Corporation ("Seaprodex Danang") akaTho Quang Seafood Processing & Export Company, akaSeaprodex Danang, akaTho Quang Seafood Processing And Export Company, akaTho Quang, akaTho Quang Co.	4.26 %
Frozen Seafoods Factory No. 32, akaFrozen Seafoods Fty, akaThuan Phuoc, akaThuan Phuoc Seafoods and Trading Corporation, akaFrozen Seafoods Factory 32, akaSeafoods and Foodstuff Factory[23]	4.26 %
Grobest & I–Mei Industry Vietnam, akaGrobest, akaGrobest & I–Mei Industry (Vietnam) Co., Ltd.	4.26 %
Investment Commerce Fisheries Corporation ("Incomfish")	4.26 %
Minh Hai Export Frozen Seafood Processing Joint Stock Company, akaMinh Hai Jostoco, akaMinh Hai Export Frozen Seafood Processing Joint–Stock Company ("Minh Hai Jostoco"), akaMinh Hai Export Frozen Seafood Processing Joint–Stock Company, akaMinh Hai Joint Stock Seafood Processing Joint–Stock Company, akaMinh Hai Export Frozen Seafood Processing Joint–Stock Co.[24]	4.26 %
Minh Hai Joint–Stock Seafoods Processing Company ("Seaprodex Minh Hai") akaSea Minh Hai, akaMinh Hai Joint–Stock Seafoods Processing Company	4.26 %
Minh Hai Sea Products Import Export Company (Seaprimex Co) , akaCa Mau Seafood Joint Stock Company ("SEAPRIMEXCO") akaSeaprimexco Vietnam, akaSeaprimexcoCa Mau Seafood Joint Stock Company (Seaprimexco)	4.26 %
Ngoc Sinh Private Enterprise, akaNgoc Sinh Seafoods, akaNgoc Sinh Seafoods Processing and Trading Enterprise	4.26 %
Nha Trang Fisheries Joint Stock Company ("Nha Trang Fisco")	4.26 %
Nha Trang Seaproduct Company (Nha Trang Seafoods")	4.26 %
Phu Cuong Seafood Processing and Import–Export Co., Ltd.	4.26 %
Sao Ta Foods Joint Stock Company ("Fimex VN")	4.26 %
Soc Trang Aquatic Products and General Import Export Company ("Stapimex")[25]	4.26 %
UTXI Aquatic Products Processing Company, akaUT XI Aquatic Products Processing Company, akaUT–XI Aquatic Products Processing Company, akaUTXI, akaUTXI Co. Ltd., akaKhanh Loi Seafood Factory, akaHoang Phuong Seafood Factory[26]	4.26 %
Viet Foods Co., Ltd. ("Viet Foods")	4.26 %
Viet Hai Seafood Co., Ltd. akaVietnam Fish One Co., Ltd. (Fish One)	4.26 %
Vinh Loi Import Export Company ("Vimexco"), akaVinh Loi Import Export Company ("VIMEX"), akaVIMEXCO, akaVIMEX	4.26 %
Vietnam–Wide Rate[27]	25.76 %

[20] As indicated above in the "Separate Rates Determination" section, we have not extended Bac Lieu's separate-rate status to Bac Lieu Fisheries Joint Stock Company in these preliminary results.

[21] As indicated above in the "Separate Rates Determination" section, we have not extended Cadovimex's separate-rate status to "Cadovimex-Vietnam" in these preliminary results.

[22] For the same reasons discussed in *Vietnam Shrimp AR2 Final*, we have not extended Cataco's separate rate status to Cantho Import-Export Seafood Joint Stock Company, also known as Caseamex. *See Vietnam Shrimp AR2* at Comment 7.

[23] As indicated above in the ''Separate Rates Determination'' section, we have not extended Thuan Phuoc's separate-rate, pertaining to its status prior to any name or corporate changes, to the new entity in these preliminary results.

[24] For the same reasons discussed in *Vietnam Shrimp AR2 Final*, we have not extended Minh Hai Jostoco's separate-rate status to: Kien Cuong Seafood Processing Import Export Joint-Stock Company (''Kien Cuong'') and Viet Cuong Seafood Processing Import Export Joint-Stock Company (''Viet Cuong''). *See Vietnam Shrimp AR2* at Comment 7. We further note that, to date, Minh Hai Jostoco has not filed a changed circumstance review with respect to Kien Cuong and Viet Cuong.

[25] As indicated above in the ''Separate Rates Determination'' section, we have not extended Stapimex's separate-rate status to Soc Trang Seafood Joint Stock Company in these preliminary results.

[26] As indicated above in the ''Separate Rates Determination'' section, we have not extended UTXI's separate-rate status to UTXI Aquatic Products Processing Corporation in these preliminary results.

[27] The Vietnam-wide entity rate preliminarily includes Kim Anh and CP Vietnam.

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 37 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(d).

Any interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Requests should contain the following information: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If we receive a request for a hearing, we plan to hold the hearing seven days after the deadline for submission of the rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by these reviews. We will instruct CBP to liquidate entries containing merchandise from the Vietnam–wide entity at the Vietnam–wide rate we determine in the final results of review. We intend to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. In accordance with 19 CFR 351.212(b)(1), for Camimex, MPG, and Phuong Nam, we calculated an exporter/importer (or customer)-specific assessment rate for the merchandise subject to this review. Where the respondent has reported reliable entered values, we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis*, we will apply the assessment rate to the entered value of the importer's/customer's entries during the review period. *See* 19 CFR 351.212(b)(1).

Where we do not have entered values for all U.S. sales, we calculated a per–unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* ratios based on the estimated entered value. Where an importer (or customer)-specific *ad valorem* rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For the companies receiving a separate rate that were not selected for individual review, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review pursuant to section 735(c)(5)(B) of the Act. Where the weighted–average *ad valorem* rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For Vinh Hoan and Quoc Viet, companies for which this review is preliminarily rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of the administrative review for all shipments of warmwater shrimp from Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) for the exporters listed above, the cash–deposit rate will be that established in the final results of review (except, if the rate is zero or *de minimis*, no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above that have separate rates, the cash–deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all other Vietnamese exporters of subject merchandise, which have not been found to be entitled to a separate rate, the cash–deposit rate will be the Vietnam–wide rate of 25.76 percent; and (4) for all non–Vietnamese exporters of subject merchandise which have not received their own rate, the cash–deposit rate will be the rate applicable to the Vietnamese exporter that supplied that exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary 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.

This administrative review and this notice are in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4911 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–846]

Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Japan: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain hot-rolled flat-rolled carbon quality steel products (hot-rolled steel) from Japan. The United States Steel Corporation (Petitioner) requested administrative reviews of JFE Steel Corporation (JFE), Nippon Steel Corporation (Nippon), and Kobe Steel, Ltd. (Kobe). This review covers exports of subject merchandise to the United States during the period June 1, 2007 through May 31, 2008.

We preliminarily determine that, in accordance with sections 776(a) and (b) of the Tariff Act of 1930, as amended (the Act), adverse facts available (AFA) should be applied to JFE, Nippon, and Kobe for not cooperating with the Department in this administrative review. The antidumping margins assigned to these companies are listed in the *Preliminary Results of Review* section of this notice. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Martha Douthit, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5050.

Background

On June 29, 1999, the Department published the antidumping duty order on hot-rolled steel from Japan in the **Federal Register**. *See Antidumping Duty Order: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan,* 64 FR 34778 (June 29, 1999).

On June 9, 2008, the Department published a notice of opportunity to request an administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review,* 73 FR 32557 (June 9, 2008). The Department received a timely request for a review from Petitioner, covering JFE, Nippon, and Kobe. On July 30, 2008, the Department published its initiation notice for the administrative review of these companies under the antidumping order on hot-rolled steel from Japan. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, and Request for Revocation in Part, and Deferral of Administrative Review,* 73 FR 44220 (July 30, 2008).

The Department issued Sections A through E of its original questionnaire to JFE, Nippon, and Kobe.[1] The deadlines to submit responses to the Department's questionnaire were September 1, 2008 for Section A, and September 17, 2008 for Sections B through E, for JFE and Nippon, and October 14, 2008 for Section A, and October 30, 2008 for Sections B through E for Kobe.

On August 12, 2008, JFE Corporation submitted a letter stating that, effective April 1, 2003, Kawasaki Steel Corporation had changed its name to JFE as part of a merger with NKK Corporation.[2] On August 19, 2008, Nippon submitted a letter stating that it would not be submitting a response to the Department's questionnaire. Neither JFE, Nippon, nor Kobe submitted any response to the Department's questionnaire.

Scope of the Order

The merchandise covered by this order consists of certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this order.

Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum. Steel products to be included in the scope of this investigation, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: (1) Iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
1.50 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.012 percent of boron, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.41 percent of titanium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this order:

- Alloy hot-rolled steel products in which at least one of the chemical

[1] Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy (NME) cases). Section C requests a complete listing of U.S. sales. Section D requests information on the cost of production (COP) of the foreign like product and the constructed value (CV) of the merchandise under investigation. Section E requests information on further manufacturing.

[2] The Department has not previously determined whether JFE is a successor to Kawasaki Steel Corporation or NKK Corporation nor has it been requested to do so in this review.

elements exceeds those listed above (including *e.g.*, ASTM specifications A543, A387, A514, A517, and A506).

- SAE/AISI grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 percent.
- ASTM specifications A710 and A736.
- USS abrasion-resistant steels (USS AR 400, USS AR 500).
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni
0.10–0.14%	0.90% Max	0.025% Max	0.005% Max	0.30–0.50%	0.50–0.70%	0.20–0.40%	0.20% Max.

Width = 44.80 inches maximum; Thickness = 0.063–0.198 inches; Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000–88,000 psi.

Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	Mo
0.10–0.16%	0.70–0.90%	0.025% Max	0.006% Max	0.30–0.50%	0.50–0.70%	0.25% Max	0.20% Max	0.21% Max.

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	V (wt.)	Cb
0.10–0.14%	1.30–1.80%	0.025% Max	0.005% Max	0.30–0.50%	0.50–0.70%	0.20–0.40%	0.20% Max ..	0.10% Max ..	0.08% Max

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum; Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	Nb	Ca	Al
0.15% Max	1.40% Max	0.025% Max	0.010% Max	0.50% Max	1.00% Max	0.50% Max	0.20% Max	0.005% Min	Treated	0.01–0.07%

Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses 0.148 inches and 65,000 psi minimum for thicknesses > 0.148 inches; Tensile Strength = 80,000 psi minimum.

Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, contains 0.9 percent up to and including 1.5 percent silicon by weight, further characterized by either (i) tensile strength between 540 N/mm2 and 640 N/mm2 and an elongation percentage 26 percent for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm2 and 690 N/mm2 and an elongation percentage 25 percent for thicknesses of 2mm and above.

Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012 percent maximum phosphorus, 0.015 percent maximum sulfur, and 0.20 percent maximum residuals including 0.15 percent maximum chromium. Grade ASTM A570–50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.

The merchandise subject to this order is classified in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, 7211.19.75.90, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Certain hot-rolled flat-rolled carbon-quality steel covered by this order, including: vacuum degassed, fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the merchandise is dispositive.

Analysis

Application of Facts Available

Sections 776(a)(1) and (2) of the Act provide that, if necessary information is not available on the record, or if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such

information in a timely matter or in the form or manner requested subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

JFE, Nippon, and Kobe did not respond to the Department's questionnaire. Thus, the information necessary for the Department to conduct its analysis is not available in the record. *See* Section 776(a)(1) of the Act. Also, JFE's, Nippon's, and Kobe's failure to respond to the Department's questionnaire constitutes a refusal to provide the Department with information necessary to conduct its antidumping analysis. *See* Sections 776(a), (2)(A), and (B) of the Act. As JFE, Nippon, and Kobe have withheld necessary information that has been requested by the Department, the Department shall, pursuant to sections 776(a)(1), (2)(A), and (2)(B) of the Act, use facts otherwise available to reach the applicable determination. JFE, Nippon, and Kobe have not submitted any requested information regarding this review; therefore sections 782(d) and (e) of the Act are not applicable. *See e.g., Carbazole Violet Pigment 23 from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 52007 (September 8, 2008) (*CVP–23*) (unchanged in the final results).

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to comply by not acting to the best of its ability to comply with a request of information, the Department may use an adverse inference in selecting from among the facts otherwise available. Because JFE, Nippon, and Kobe did not respond to the Department's questionnaire, the Department finds that these companies have failed to cooperate by not acting to the best of their ability to comply with the Department's request for information. JFE, Nippon, and Kobe did not request additional time to respond to the questionnaire. Further, Nippon affirmatively stated on the record that it would not submit a response. By withholding the requested information, JFE, Nippon, and Kobe prevented the Department from conducting any company-specific analysis or calculating dumping margins for the POR. Therefore, pursuant to section 776(b) of the Act, the Department may preliminarily determine that an inference that is adverse to the interests of JFE, Nippon, and Kobe is warranted. Section 776(b) of the Act also provides that an adverse inference may include reliance on information derived from the petition, the final determination in the investigation segment of the proceeding, a previous review under section 751 of the Act or a determination under section 753 of the Act, or any other information placed on the record.

The Department's practice, when selecting an adverse facts available rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse ''as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See e.g., Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998). Additionally, the Department's practice has been to assign the highest margin determined for any party in the less-than-fair-value (LTFV) investigation, or in any administrative review of a specific order, to respondents who have failed to cooperate with the Department. *See e.g., CVP–23*.

The Department is assigning JFE, Nippon, and Kobe an AFA rate of 40.26 percent *ad valorem*, the margin calculated in the section 129 redetermination of the original LTFV investigation using information provided by Kawasaki Steel Corporation (Kawasaki), and the highest rate determined for any party in any segment of this case. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 FR 71936, 71939 (December 3, 2002) (*HR from Japan129*).

Section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate ''secondary information'' used for facts available by reviewing independent sources reasonably at its disposal. Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise. Information from a prior segment of the proceeding, such as that used here, constitutes secondary information. *See e.g., CVP–23*. To ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value. *See id.* To the extent practicable, the Department will examine the reliability and relevance of the information to be used. Unlike other types of information, such as input costs or selling expenses, there are no independent sources from which the Department can derive calculated dumping margins. The only source for dumping margins is administrative determinations. In an administrative review, if the Department chooses as AFA a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that period. *Id.*

In making a determination as to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin as ''best information available'' (the predecessor to ''facts available'') since the margin was based on another company's uncharacteristic business expense that resulted in an unusually high dumping margin. Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co.* v. *United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated). None of these unusual circumstances is present here, and there is no evidence indicating that the margin used as facts available in this review is not appropriate.

Absent any other information, we find the calculated rate from the investigation, as modified by *HR from Japan129*, to be appropriate in this case and the requirements of section 776(c) of the Act are satisfied.

Preliminary Results of Review

We preliminarily determine that the following dumping margins exist:

Manufacturer/exporter	Margin (percent)
JFE Steel Corporation	40.26
Nippon Steel Corporation	40.26
Kobe Steel, Ltd.	40.26

Duty Assessment

Upon publication of the final results of this review, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. For the period June 1, 2007 through May 31, 2008, we preliminarily determine the antidumping duty margin to be 40.26 percent for JFE, Nippon, and Kobe. If these preliminary results are adopted in our final results of this review, the Department will instruct CBP to assess antidumping duties on all appropriate entries. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of the final results of this review.

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) (*Assessment Policy Notice*). This clarification applies to entries of subject merchandise during the POR produced by any company included in the final results of review for which the reviewed company did not know that the merchandise it sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, the Department will instruct CBP to liquidate un-reviewed entries at the all-others rate if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit rates will be effective with respect to all shipments of hot-rolled steel from Japan entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided for by section 751(a)(1) of the Act: (1) For JFE, Nippon, and Kobe, the cash deposit rate will be the rate established in the final results of this administrative review; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will be the company-specific rate established for the most recent period; (3) if the exporter is not a firm covered in this review, a prior 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 subject merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered by this review, a prior review, or the LTFV investigation, the cash deposit rate shall be the all-others rate established in the section 129 redetermination of the LTFV investigation, which is 22.92 percent. *See HR from Japan 129*. These deposit rates, when imposed, shall remain in effect until further notice.

Public Comment

Pursuant to section 351.309 of the Department's regulations, interested parties may submit written comments in response to these preliminary results. Unless the deadline is extended by the Department, case briefs are to be submitted within 30 days after the date of publication of this notice, and rebuttal briefs, limited to arguments raised in case briefs, are to be submitted no later than five days after the time limit for filing case briefs. Parties who submit arguments in this proceeding are requested to submit with the argument: (1) A statement of the issues, and (2) a brief summary of the argument. Case and rebuttal briefs must be served on interested parties in accordance with section 351.303(f) of the Department's regulations.

Also, pursuant to section 351.310(c) of the Department's regulations, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Department specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs. Parties will be notified of the time and location.

The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief, no later than 120 days after publication of these preliminary results, unless extended. *See* section 351.213(h) of the Department's regulations.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under section 351.402(f) of the Department's regulations 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.

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4908 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

A–351–825

Stainless Steel Bar From Brazil: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain stainless steel bar from Brazil. This review covers one producer/exporter of the subject merchandise, Villares Metals S.A. (VMSA). The period of review (POR) is February 1, 2007, through January 31, 2008.

The Department has preliminarily determined that VMSA made U.S. sales at prices less than normal value. If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on these preliminary results of review. We intend to issue the final results of review no later than 120 days from the publication date of this notice.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine Cartsos or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–5287 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 21, 1995, the Department published in the **Federal Register** an antidumping duty order on certain stainless steel bar from Brazil. See *Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan*, 60 FR 9661 (February 21, 1995). On February 4, 2008, the Department published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the order. See *Antidumping or Countervailing*

Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 73 FR 6477 (February 4, 2008).

In accordance with 19 CFR 351.213(b)(2), on February 29, 2008, VMSA requested that the Department conduct an administrative review of its sales and entries of subject merchandise into the United States during the POR; the Department initiated a review on March 31, 2008. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 16837 (March 31, 2008). On October 27, 2008, we extended the time period for issuing the preliminary results of the review by 90 days until January 29, 2009. See *Stainless Steel Bar From Brazil: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 63695 (October 27, 2008). On February 2, 2009, we extended the time period for issuing the preliminary results of the review by 30 additional days until February 28, 2009. See Stainless Steel Bar From Brazil: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review, 74 FR 5817 (February 2, 2009).

The Department is conducting this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The scope of the order covers stainless steel bar (SSB). The term SSB with respect to the order means articles of stainless steel in straight lengths that have been either hot–rolled, forged, turned, cold–drawn, cold–rolled or otherwise cold–finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons or other convex polygons. SSB includes cold–finished SSBs that are turned or ground in straight lengths, whether produced from hot–rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process. Except as specified above, the term does not include stainless steel semi–finished products, cut–length flat–rolled products (*i.e.*, cut–length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.*, cold–formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat–rolled products), and angles, shapes and sections. The SSB subject to the order is currently classifiable under subheadings 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075, and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Verification

As provided in section 782(i) of the Act, we have verified sales information provided by VMSA using standard verification procedures, including on–site inspection of the manufacturer's facility, the examination of relevant sales and financial records, and the selection of original documentation containing relevant information. Our verification results are outlined in the public version of the verification report, dated January 29, 2009, which is on file in the Central Records Unit, room 1117 of the main Commerce building.

Fair–Value Comparison

To determine whether VMSA's sales of the subject merchandise from Brazil to the United States were at prices below normal value, we compared the export price (EP) or constructed export price (CEP) to the normal value as described in the ''Export Price,'' ''Constructed Export Price,'' and ''Normal Value'' sections of this notice. Therefore, pursuant to section 777A(d)(2) of the Act, we compared the EP or CEP of individual U.S. transactions to the monthly weighted–average normal value of the foreign like product where there were sales made in the ordinary course of trade as discussed in the ''Cost–of-Production Analysis'' section of this notice.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products covered by the ''Scope of the Order'' section, above, produced and sold by VMSA in the comparison market during the POR to be foreign like product for the purposes of determining appropriate products to use in comparison to U.S. sales of subject merchandise. Specifically, in making our comparisons, we used the following methodology. If an identical comparison–market model was reported, we made comparisons to weighted–average comparison–market prices that were based on all sales which passed the cost–of-production (COP) test of the identical product during the relevant or contemporary month. We calculated the weighted–average comparison–market prices on a level of trade–specific basis. If there were no contemporaneous sales of an identical model, we identified the most similar comparison–market model. To determine the most similar model, we matched the foreign like product based on the physical characteristics reported by the respondent in the following order of importance: general type of finish, grade, remelting process, type of final finishing operation, shape, size.

Export Price

The Department based the price of certain U.S. sales of subject merchandise by VMSA on EP as defined in section 772(a) of the Act because merchandise was sold before importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States. We calculated EP based on the packed F.O.B., C.I.F., or delivered price to unaffiliated purchasers in, or for exportation to, the United States. See section 772(c) of the Act. We made adjustments to price for billing adjustments and discounts, where applicable. We also made deductions for any movement expenses in accordance with section 772(c)(2)(A) of the Act.

Constructed Export Price

In addition to EP sales, the Department based the price of certain U.S. sales of subject merchandise by VMSA on CEP as defined in section 772(b) of the Act because the merchandise was sold, before importation, by a U.S.-based seller affiliated with the producer to unaffiliated purchasers in the United States. We calculated the CEP based on the packed F.O.B., C.I.F., or delivered price to unaffiliated purchasers in the United States. In accordance with section 772(d)(1) of the Act, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which includes direct selling expenses. In accordance with section 772(d)(1) of the Act, we also deducted those indirect selling expenses associated with economic activities occurring in the United States and the profit allocated to expenses deducted under section 772(d)(1) in accordance with sections 772(d)(3) and 772(f) of the Act. In accordance with section 772(f) of the Act, we computed profit based on the total revenues realized on sales in both the U.S. and comparison markets, less

all expenses associated with those sales. We then allocated profit to expenses incurred with respect to U.S. economic activity based on the ratio of total U.S. expenses to total expenses for both the U.S. and comparison markets.

Duty Drawback

Section 772(c)(1)(B) of the Act provides that EP or CEP shall be increased by, among other things, ''the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.'' The Department determines that an adjustment to U.S. price for claimed duty drawback is appropriate when a company can demonstrate that the ''import duty and rebate are directly linked to, and dependent upon, one another'' and ''the company claiming the adjustment can show that there were sufficient imports of the imported raw materials to account for the drawback received on the exported product.'' See *Rajinder Pipes, Ltd. v. United States*, 70 F. Supp. 2d 1350, 1358 (CIT 1999).

VMSA claimed an adjustment to the U.S. price for duty drawback but at verification it was not able to support its claim. See Preliminary Results Analysis Memorandum for Villares Metals S.A., dated March 2, 2009 (VMSA Preliminary Results Analysis Memorandum). The Department finds that VMSA has not provided substantial evidence on the record to establish the necessary link between the import duty and the claimed duty drawback. The Department also finds that VMSA has not demonstrated that that there were sufficient imports of the imported raw materials to account for the drawback it received on the exported product. Therefore, because VMSA has not met the Department's requirements, the Department has denied VMSA's request for a duty–drawback adjustment to U.S. price for the preliminary results. See VMSA Preliminary Results Analysis Memorandum.

Normal Value

A. Home–Market Viability

In accordance with section 773(a)(1)(C) of the Act, in order to determine whether there was a sufficient volume of sales of SSB in the home market to serve as a viable basis for calculating the normal value, we compared the volume of the respondent's home–market sales of the foreign like product to its volume of the U.S. sales of the subject merchandise. VMSA's quantity of sales in the home market was greater than five percent of its sales to the U.S. market. Based on this comparison of the aggregate quantities sold in Brazil and to the United States and absent any information that a particular market situation in the exporting country did not permit a proper comparison, we preliminarily determine that the quantity of the foreign like product sold by the respondent in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a)(1) of the Act. Thus, we determine that VMSA's home market was viable during the POR. *Id.* Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based normal value for the respondent on the prices at which the foreign like product was first sold for consumption in the exporting country in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the U.S. sales.

B. Cost–of-Production Analysis

On November 3, 2008, the petitioners[1] filed a timely below–cost allegation based on the revised home–market database VMSA submitted with its October 27, 2008, response to our supplemental questionnaire. The petitioners based their cost allegation on VMSA's own cost information, *i.e.*, inventory value and packing cost, which we found to be a reasonable methodology. On December 2, 2008, we initiated a cost investigation because we had reasonable grounds to believe or suspect that VMSA's sales of the foreign like product under consideration for the determination of normal value may have been made at prices below COP as provided by section 773(b)(2)(A)(ii) of the Act. Pursuant to section 773(b)(1) of the Act, we have conducted a COP investigation of VMSA's sales in the home market.

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of the costs of materials and labor employed in producing the foreign like product, the selling, general, and administrative expenses, and all costs and expenses incidental to packing the merchandise. In our COP analysis, we used the home–market sales and COP information provided by VMSA in its questionnaire response.

After calculating the COP, in accordance with section 773(b)(1) of the Act we tested whether home–market sales of the foreign like product were made at prices below the COP within an extended period of time in substantial quantities and whether such prices permitted the recovery of all costs within a reasonable period of time. See section 773(b)(2) of the Act. We compared model–specific COPs to the reported home–market prices less any applicable movement charges, discounts, and rebates.

Pursuant to section 773(b)(2)(C) of the Act, when less than 20 percent of VMSA's sales of a given product were at prices less than the COP, we did not disregard any below–cost sales of that product because the below–cost sales were not made in substantial quantities within an extended period of time. When 20 percent or more of VMSA's sales of a given product during the POR were at prices less than the COP, we disregarded the below–cost sales because they were made in substantial quantities within an extended period of time pursuant to sections 773(b)(2)(B) and (C) of the Act and because, based on comparisons of prices to weighted–average COPs for the POR, we determined that these sales were at prices which would not permit recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act.

C. Price–to-Price Comparisons

We based normal value for VMSA on home–market sales to unaffiliated purchasers. VMSA's home–market prices were based on the packed, ex–factory, or delivered prices. When applicable, we made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Act. We also made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411 and for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. For comparisons to EP sales, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from and adding U.S. direct selling expenses to normal value. We also made adjustments, if applicable, for home–market indirect selling expenses to offset U.S. commissions in EP calculations. For comparisons to CEP sales, we made circumstance–of-sale adjustments by deducting home–market direct selling expenses from normal value.

[1] The petitioners are Carpenter Technology Corporation, Valbruna Slater, Inc., Electralloy Corporation, a Division of G.O. Carlson, Inc., and Universal Stainless.

Level of Trade

To the extent practicable, we determine normal value for sales at the same level of trade as EP or CEP sales. See section 773(a)(1)(B)(i) of the Act and 19 CFR 351.412. When there are no sales at the same level of trade, we compare EP and CEP sales to comparison–market sales at a different level of trade. The normal–value level of trade is that of the starting–price sales in the comparison market.

To determine whether home–market sales were at a different level of trade than VMSA's U.S. sales in this review, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. Based on our analysis, we have preliminarily determined that there is one level of trade in the United States and two levels of trade in the home market; we also find that the single U.S. level of trade is at the same level as one of the levels of trade in the home market and at a less advanced stage than the second home–market level of trade. Therefore, we have compared U.S. sales to home–market sales at the same level of trade and, where there was no home–market sale at the same level of trade, at a different level of trade.

Because there are two levels of trade in the home market, we were able to calculate a level–of-trade adjustment based on VMSA's home–market sales of the foreign like product. For a detailed description of our level–of-trade analysis for VMSA for these preliminary results, see VMSA Preliminary Results Analysis Memorandum.

Currency Conversion

Pursuant to section 773(a) of the Act and 19 CFR 351.415, we converted amounts expressed in foreign currencies into U.S. dollar amounts based on the exchange rates in effect on the dates of the relevant U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the weighted–average dumping margin for Villares Metals S.A. is 4.97 percent for the period February 1, 2007, through January 31, 2008.

Disclosure and Public Comment

We will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. See 19 CFR 351.310. If a hearing is requested, the Department will notify interested parties of the hearing schedule.

Interested parties are invited to comment on the preliminary results of this review. The Department will consider case briefs filed by interested parties within 30 days after the date of publication of this notice in the **Federal Register**. See 19 CFR 351.309(c). Interested parties may file rebuttal briefs, limited to issues raised in the case briefs. See 19 CFR 351.309(d). The Department will consider rebuttal briefs filed not later than five days after the time limit for filing case briefs. Parties who submit arguments are requested to submit with each argument a statement of the issue, a brief summary of the argument, and a table of authorities cited. Further, we request that parties submitting written comments provide the Department with a diskette containing an electronic copy of the public version of such comments.

We intend to issue the final results of this administrative review, including the results of our analysis of issues raised in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**.

Assessment Rates

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer/customer–specific assessment rates for these preliminary results of review. We divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each reported importer or customer. We will instruct CBP to assess the importer/customer–specific rate uniformly, as appropriate, on all entries of subject merchandise made by the relevant importer or customer during the POR. See 19 CFR 351.212(b). The Department intends to issue instructions to CBP 15 days after the publication of the final results of review.

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) (*Assessment of Antidumping Duties*). This clarification will apply to entries of subject merchandise during the POR produced by VMSA for which VMSA did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries of VMSA–produced merchandise at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Assessment of Antidumping Duties*.

Cash–Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of SSB from Brazil entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) the cash–deposit rate for VMSA will be the rate established in the final results of this review; (2) for previously reviewed or investigated companies not listed above, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less–than-fair–value 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; (4) if neither the exporter nor the manufacturer has its own rate, the cash–deposit rate will be the all–others rate for this proceeding, 19.43 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) 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 Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4907 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

A–570–893

Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp (''shrimp'') from the People's Republic of China (''PRC''), covering the period of review (''POR'') of February 1, 2007, through January 31, 2008. As discussed below, we preliminarily determine that certain respondents in this review made sales in the United States at prices below normal value (''NV''). If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on entries of subject merchandise during the POR for which importer–specific assessment rates are above de minimis.

EFFECTIVE DATE: March 9, 2009.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–0413.

SUPPLEMENTARY INFORMATION:

Background

The Department received timely requests from both Petitioners[1] and certain PRC companies, in accordance with 19 CFR 351.213(b), during the anniversary month of February, for administrative reviews of the antidumping duty order on shrimp from the PRC. On April 7, 2008, the Department initiated an administrative review of 482 producers/exporters of subject merchandise from the PRC.[2] *See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 73 FR 18739 (April 7, 2008) (''*Initiation*'').

Respondent Selection

On June 16, 2008, in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (''Act''), the Department selected Hilltop International (''Hilltop'') and Zhanjiang Go–Harvest Aquatic Products Co., Ltd. (''Go–Harvest'') for individual examination in this review, since they were the two largest exporters by volume during the POR, based on CBP data of U.S. imports. *See* Memorandum to James Doyle, Director, Office IX, from Susan Pulongbarit, International Trade Analyst, ''2007–2008 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Selection of Respondents for Individual Review,'' dated June 16, 2008. On July 1, 2008, the Department issued antidumping duty questionnaires to Hilltop and Go–Harvest.

On July 3, 2008, Hilltop withdrew its request for review, and on July 7, 2008, Petitioners withdrew their request for review of Yelin Enterprise Co., Ltd. Hong Kong (the predecessor in interest to Hilltop International); Yangjiang City Yelin Hoitat Quick Frozen Seafood Co., Ltd.; Fuqing Yihua Aquatic Food Co., Ltd.; and Fuqing Minhua Trade Co., Ltd. (collectively referred to hereafter as ''Hilltop/Yelin''). Since both withdrawal requests were timely, and no other party requested a review of Hilltop/Yelin, in accordance with section 351.213(d)(1) of the Department's regulations, the Department is rescinding the administrative review with respect to Hilltop/Yelin. *See* the ''Partial Recission of Review'' section below. Consequently, on August 25, 2008, in accordance with section 777A(c)(2) of the Act, the Department selected Zhanjiang Regal Integrated Marine Resources Co., Ltd. (''Regal'') for individual examination in this review, because Regal was the next largest exporter by volume during the POR, based on CBP data of U.S. imports. See Memorandum to James Doyle, Director, Office IX, from Erin Begnal, Senior International Trade Analyst, ''2007–2008 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Selection of Additional Mandatory Respondent,'' dated August 25, 2008. On August 29, 2008, the Department issued the antidumping duty questionnaire to Regal.

Regal

Between October 3, 2008, and January 21, 2009, Regal responded to the Department's original and supplemental questionnaires. Pursuant to 19 CFR 351.307(b)(iv), from January 19–23, 2009, the Department conducted verification of Regal's questionnaire responses. *See* Memorandum to the File through Scot Fullerton, Program Manager, Office IX, from Paul Walker, Senior Case Analyst, ''Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Verification of Zhanjiang Regal Integrated Marine Resources Co., Ltd.,'' dated concurrently with this notice (''Regal Verification Report'').

Go–Harvest

In response to the Department's July 1, 2008, questionnaire, on August 8, 2008, Go–Harvest submitted a certification to the Department stating that it had no shipments of subject merchandise during the POR. However, as noted above in the ''Respondent Selection'' section, the Department placed information on the record obtained from CBP which showed that shipments of subject merchandise had been made by Go–Harvest during the POR. On October 22, 2008, the Department issued a second antidumping duty questionnaire to Go–Harvest. On November 5, 2008, Go–Harvest submitted a second no shipment certification. On November 12, 2008, the Department issued Go–Harvest a third questionnaire to resolve the discrepancies between the CBP data and Go–Harvest's no shipment certifications of August 8, 2008, and November 5, 2008. On November 17, 2008, Go–Harvest submitted a letter stating that it would not respond to the Department's questionnaire of November 12, 2008. On November 19, 2008, the Department provided Go–Harvest an additional opportunity to respond to the Department's November 12, 2008, questionnaire. Go–Harvest made no response to this additional opportunity.

Separate Rates

On May 30, 2008, we received a separate rate application from Shantou Longsheng Aquatic Product Foodstuff Co., Ltd. (''Shantou Longsheng''). Go–Harvest did not demonstrate eligibility for a separate rate during the course of this proceeding. Thus, Go–Harvest will be considered part of the PRC–wide entity for purposes of this review.

Rescission of Reviews

As noted above, on July 7, 2008, the Petitioners made a timely withdrawal of review request on Hilltop/Yelin. Between April 17, 2008, and April 30, 2008, the following companies submitted no shipment certifications:

[1] The petitioners are the members of the Ad Hoc Shrimp Trade Action Committee (hereinafter referred to as ''Petitioners'').

[2] *See Initiation* for a listing of these companies.

Allied Pacific Group (comprised of Allied Pacific Food (Dalian) Co., Ltd.; Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd.;[3] Zhanjiang Allied Pacific Aquaculture Co., Ltd.; Allied Pacific (H.K.) Co., Ltd.; and King Royal Investments Ltd.); Gallant Ocean (Nanhai), Ltd.; Luk Ka Paper Industrial Ltd.; Shantou Yelin Frozen Seafood Co., Ltd.; and Shantou Yuexing Enterprise Company.

Surrogate Country and Surrogate Values

On October 21, 2008, the Department sent interested parties a letter requesting comments on the surrogate country and information pertaining to valuing factors of production (''FOPs''). On January 16, 2009, Petitioners submitted surrogate value comments regarding various Thai sources. No other interested party submitted comments on the surrogate country or information pertaining to valuing FOPs.

Case Schedule

On October 8, 2008, in accordance with section 751(a)(3)(A) of the Act, we extended the time period for issuing the preliminary results by 120 days, until March 2, 2008. *See Certain Frozen Warmwater Shrimp from Ecuador, India, the People's Republic of China, and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Third Administrative Reviews*, 73 FR 58931 (October 8, 2008).

Partial Rescission of Review

Final Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within ninety days of the date of publication of notice of initiation of the requested review. Because the Petitioner's and Hilltop's withdrawals of requests for review were timely and no other party requested a review of the following companies, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with respect to Hilltop/Yelin.

[3] The Department in its initiation notice included ''Allied Pacific Aquatic Products (Zhangjiang) Co., Ltd.'' due to the Petitioners' misspelling of the company's name in its review request. See Letter from Dewey & LeBouef to the Secretary of Commerce, ''Request for Administrative Reviews,'' (Feb. 29, 2008). In its April 17, 2008, letter, Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd. clarified the correct spelling of its name. See Letter from Trade Pacific to the Secretary of Commerce, ''Frozen Warmwater Shrimp from the People's Republic of China.'' The Department notes that the review is preliminarily rescinded for both the proper name and the misspelled name of this company.

Preliminary Partial Rescission

As discussed in the ''Supplementary Information'' section above, several companies indicated they did not export PRC origin shrimp to the United States during the POR. In order to corroborate these submissions, we reviewed PRC shrimp shipment data obtained from CBP, and found no discrepancies with the statements made by these firms.

Therefore, for the reasons mentioned above, we are preliminarily rescinding the administrative review with respect to: Allied Pacific Group (comprised of Allied Pacific Food (Dalian) Co., Ltd.; Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd.; Zhanjiang Allied Pacific Aquaculture Co., Ltd.; Allied Pacific (H.K.) Co., Ltd.; and King Royal Investments Ltd.); Gallant Ocean (Nanhai), Ltd.; Luk Ka Paper Industrial Ltd.; Shantou Yelin Frozen Seafood Co., Ltd.; and Shantou Yuexing Enterprise Company because each reported having made no shipments of subject merchandise during the POR, and the Department found no information to indicate otherwise. *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 72 FR 53527, 53530 (September 19, 2007), unchanged in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission*, 73 FR 15479, 15480 (March 24, 2008) (''*Third Fish Fillets Review*'').

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, white–leg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (Penaeus chinensis), giant river prawn (Macrobrachium rosenbergii), giant tiger prawn (Penaeus monodon), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this investigation.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS subheading 1605.20.1020); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell–on or peeled (HTS subheadings 0306.23.0020 and 0306.23.0040); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.0510); (5) dried shrimp and prawns; (6) Lee Kum Kee's shrimp sauce; (7) canned warmwater shrimp and prawns (HTS subheading 1605.20.1040); (8) certain dusted shrimp; and (9) certain battered shrimp. Dusted shrimp is a shrimp–based product: (1) That is produced from fresh (or thawed–from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this investigation are currently classified under the following HTS subheadings:

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

0306.13.0003, 0306.13.0006, 0306.13.0009, 0306.13.0012, 0306.13.0015, 0306.13.0018, 0306.13.0021, 0306.13.0024, 0306.13.0027, 0306.13.0040, 1605.20.1010 and 1605.20.1030. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Facts Available

Sections 776(a)(1) and 776(a)(2) of the Act, provide that, if necessary information is not available or on the record, or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party ''promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information,'' the Department may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed ''deficient'' under section 782(d) if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department; and (5) the information can be used without undue difficulties.

Furthermore, section 776(b) of the Act states that if the Department ''finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.'' *See also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 at 870 (1994) (''SAA''). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *Id.* An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act.

Regal's Water Consumption

For these preliminary results, in accordance with sections 776(a)(1) and 776(a)(2)(B) of the Act, we have determined that the use of facts available is appropriate for Regal's consumption of water. As noted above, consistent with section 782(c)(1) of the Act, if an interested party promptly notifies the Department that it is unable to submit the information in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the Department will take into consideration the ability of the party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

Consistent with section 773(c)(1)(B) of the Act, the Department values FOPs that a respondent uses to produce the subject merchandise. *See, e.g., Third Fish Fillets Review* at Comment 8E. In past cases the Department has specifically stated that water which is pumped from a well, regardless of whether the respondent incurs a cost for that water, will be treated as a FOP and valued accordingly. *See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews*, 72 FR 34438 (June 22, 2007) at Comment 8. In its questionnaire responses, Regal stated that it used water during the farming and processing of shrimp. Regal also stated that it did not track the amount of water used because it incurred no cost for pumping the water from either wells (at the processing factory) or the ocean (at the farms). At verification the Department found no evidence that Regal tracks the amount of water it consumes in its normal course of business. *See* Regal Verification Report at 2. However, at verification Regal was able to provide estimates of the water it consumed. *Id.* Because information regarding the actual amount of water consumed is not available and Regal was unable to provide the data regarding actual water consumption, and in the form and manner required, we are applying facts available to Regal's water consumption in accordance with sections 776(a)(1), 776(a)(2)(B) and 782(c)(1) of the Act.

As noted above, Regal consumes water at its shrimp farms. As facts available, we are applying the average amount of water consumed at the farms, as estimated by Regal's farming production manager, to the NV. *See* Regal Verification Report at 2. In addition, Regal uses water at its processing factory to make ice, to clean the shrimp during the production process, and to pack the shrimp. Also, as facts available, to account for the ice consumed by Regal at its processing plant, we are applying the average amount of ice reported by Regal[5] in transporting the shrimp form the farm to the factory. *See* Regal's October 23, 2008 submission. In addition, as facts available, to calculate the water used to pack the shrimp we are deducting from the gross weight of the sale, the weight of the shrimp and packing. Moreover, we are using an average of these water weights to estimate the amount of water Regal used to wash the shrimp during the production process. Because these usage rates are proprietary, *see* Memorandum to the File, through Scot Fullerton, Program Manager, Office IX, from Paul Walker, Senior Analyst, ''Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Zhanjiang Regal

[5] Regal purchases ice to keep the shrimp fresh as they are transported from the farm to the factory. Regal reported an FOP usage rate for this purchased ice.

Integrated Marine Resources Co., Ltd.,'' dated concurrently with this notice (''Regal Analysis Memo'') for further details.

Moreover, we note that for future reviews of this order, Regal must comply with all requests for information by the Department and should, therefore, maintain the appropriate records to comply with these requests. If Regal, or any other Respondents, are unable to comply with such requests, the Department may resort to the use of adverse facts available (''AFA'') absent the information on the record that is required by the Department to conduct its proceedings in accordance with section 776(b) of the Act.

Regal's Unreported FOP and Movement Expense

For these preliminary results, in accordance with section 776(a)(2)(A) of the Act, we have determined that the use of facts available is appropriate for Regal's unreported consumption of diesel oil and movement expenses it paid for filing U.S. Food and Drug Administration (''USFDA'') paperwork in the United States for certain sales.

Regal did not report diesel oil consumption or certain movement expenses in its submissions of FOP and sales data dated October 3, 2008, December 16, 2008, and January 21, 2009. At verification, Regal attempted to submit data regarding its diesel oil consumption and other movement expenses as minor corrections. However, the Department did not accept this new information as minor corrections. *See* Regal Verification Report at 2. Unlike water, the usage of which is not currently recorded in Regal's books and records, we note diesel oil consumption and this particular movement expense are recorded in Regal's books and records and were readily available to Regal. Because Regal did not report this data in a timely manner, and failed to report its diesel oil consumption and the movement expense to the Department, despite multiple opportunities to provide complete FOP and sales data, we are applying facts available to Regal's unreported diesel oil consumption and movement expense pursuant to section 776(a)(2)(A) of the Act.

As noted above, section 776(b) of the Act states that if the Department ''finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.'' *See also* SAA accompanying the URAA at 870. An adverse inference may include reliance on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act.

In this instance, Regal failed to act to the best of its ability to comply with the Department's repeated requests for information regarding all of its FOPs and sales expenses, *i.e.*, diesel oil and the movement expenses it paid for filing USFDA paperwork. *See, e.g.*, the Department's letter dated August 29, 2008, at c–25 and d–8, where we asked Regal to report all U.S. movement expenses and all energy inputs, respectively. Only at verification did it become clear that these two previously unreported costs existed. As noted above, these factors are reported in Regal's books and records and were readily available to Regal. Regal did not indicate that it was unable to submit complete FOP and sales information in the requested form and manner. Therefore, we find that Regal failed to cooperate to the best of its ability and we are applying AFA to this FOP and movement expense incurred by Regal in these preliminary results, pursuant to section 776(b) of the Act. As partial AFA for Regal's diesel oil FOP, we are using the highest single monthly usage rate for diesel oil and applying this monthly usage rate to all months during the POR. In addition, as partial AFA for Regal's movement expense, we are using the highest single fee incurred by Regal and applying this fee to all sales invoices for which this fee was incurred.

Go–Harvest/PRC–wide Entity

As noted above in the ''Supplementary Information'' section, the Department selected Go–Harvest for individual examination in this review, based on CBP data of U.S. imports which showed that Go–Harvest was one of the largest exporters by volume during the POR. Although Go–Harvest submitted certifications that it had no shipments, it refused to answer our questions regarding the discrepancies between its no shipments claims and the CBP data. Accordingly, based on the CBP data, and Go–Harvest's failure to refute that data, we find that Go–Harvest made shipments of subject merchandise during the POR, and consequently, as a selected respondent, was required to answer the full questionnaire. By not responding to the Department's questionnaire, Go–Harvest failed to demonstrate that it qualifies for separate rate status. Accordingly, we consider Go–Harvest to be a part of the PRC–wide entity.

We find that the PRC–wide entity, including Go–Harvest, withheld requested information, failed to provide information in a timely manner and in the form requested, and significantly impeded this proceeding. Moreover, by refusing to answer the Department's questionnaire, the PRC–wide entity, including Go–Harvest, failed to cooperate to the best of its ability. Therefore, the Department must rely on adverse facts otherwise available in order to determine a margin for the PRC–wide entity, pursuant to section 776(a)(2)(A), (B), (C) and 776(b) of the Act. *See e.g., Non–Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 69546 (December 1, 2006) and accompanying Issues and Decision Memorandum at Comment 1. *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review*, 72 FR 10689, 10692 (March 9, 2007) (decision to apply total AFA to the NME–wide entity unchanged in *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 FR 52052 (September 12, 2007) (''*First Vietnamese Shrimp Review*''). By doing so, we ensure that the companies that are part of the PRC–wide entity will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In reviews, the Department normally selects, as AFA, the highest rate on the record of any segment of the proceeding. *See, e.g., Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008). The Court of International Trade (''CIT'') and the Federal Circuit have consistently upheld the Department's practice in this regard. *See Rhone*

Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Circ. 1990) (*''Rhone Poulenc''); NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a LTFV investigation); *see also Kompass Food Trading Int'l v. United States*, 24 CIT 678, 689 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd. v. United States*, 360 F. Supp 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse ''as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See Static Random Access Memory Semiconductors from Taiwan; Final Determination of Sales at Less than Fair Value*, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See SAA at 870; see also Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910, 76912 (December 23, 2004); *D&L Supply Co. v. United States*, 113 F. 3d 1220, 1223 (Fed. Cir. 1997). In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin ''reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.'' *Rhone Poulenc*, 899 F.2d at 1190. Consistent with the statute, court precedent, and its normal practice, the Department has assigned the rate of 112.81 percent, the highest rate on the record of any segment of the proceeding, to the PRC–wide entity, which includes Go–Harvest, as AFA. *See, e.g., Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007). As discussed further below, this rate has been corroborated.

Corroboration of Facts Available

Section 776(c) of the Act requires that the Department corroborate, to the extent practicable, secondary information on which it relies as facts available. To be considered corroborated, information must be found to be both reliable and relevant. We are applying as AFA the highest rate from any segment of this administrative proceeding, which is the rate currently applicable to all exporters subject to the PRC–wide rate. The AFA rate in the current review (*i.e.*, the PRC–wide rate of 112.81 percent) represents the highest rate from the petition in the LTFV investigation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 FR 5149 (February 1, 2005).

For purposes of corroboration, the Department will consider whether that margin is both reliable and relevant. The AFA rate we are applying for the current review was corroborated in the LTFV investigation. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 FR 70997 (December 8, 2004). No information has been presented in the current review that calls into question the reliability of this information.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico; Final Results of Antidumping Administrative Review*, 61 FR 6812, 6814 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. The information used in calculating this margin was based on sales and production data submitted by the petitioner in the LTFV investigation, together with the most appropriate surrogate value information available to the Department chosen from submissions by the parties in the LTFV investigation, as well as information gathered by the Department itself. Furthermore, the calculation of this margin was subject to comment from interested parties in the proceeding. As there is no information on the record of this review that demonstrates that this rate is not appropriately used as AFA, we determine that this rate has relevance.

As the 112.81 percent rate is both reliable and relevant, we determine that it has probative value. Accordingly, we determine that the calculated rate of 112.81 percent, which is the current PRC–wide rate, is in accord with the requirement of section 776(c) that secondary information be corroborated to the extent practicable (*i.e.*, that it have probative value). We have assigned this AFA rate to exports of the subject merchandise by the PRC–wide entity.

NME Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding has contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rate Determination

A designation as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Act. Accordingly, there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate. *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006).

In the *Initiation*, the Department notified parties of the application

process by which exporters and producers may obtain separate rate status in NME investigations. *See Initiation*. It is the Department's policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in *Notice of Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*'').

Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

In this administrative review, only Regal and Shantou Longsheng have placed sufficient evidence on the record that demonstrate an absence of *de jure* control. *See* Regal's submission of October 3, 2008; *see also* Shantou Longsheng's submission of May 30, 2008. The Department has analyzed such PRC laws as the ''Foreign Trade Law of the People's Republic of China'' and the ''Company Law of the People's Republic of China'' and has found that they establish an absence of *de jure* control. *See, e.g., Preliminary Results of New Shipper Review: Certain Preserved Mushrooms From the People's Republic of China*, 66 FR 30695, 30696 (June 7, 2001). We have no information in this proceeding that would cause us to reconsider this determination. Thus, we find that the evidence on the record supports a preliminary finding of an absence of de jure government control based on: (1) an absence of restrictive stipulations associated with the exporter's business license; (2) the legal authority on the record decentralizing control over the respondent, as demonstrated by the PRC laws placed on the record of this review; and (3) other formal measures by the government decentralizing control of companies.

Absence of De Facto Control

As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China*, 63 FR 72255 (December 31, 1998). Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates. The Department typically considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the exporter sets its own export prices independent of the government and without the approval of a government authority; (2) whether the respondent has the authority to negotiate and sign contracts, and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22587; Sparklers, 56 FR at 20589.

The Department conducted separate rate analyses for Regal and Shantou Longsheng, which have asserted the following: (1) there is no government participation in setting export prices; (2) sales managers and authorized employees have the authority to create binding sales contracts; (3) they do not have to notify any government authorities of management selections; (4) there are no restrictions on the use of export revenue; and (5) they are is responsible for financing their own losses. The questionnaire responses of Regal and Shantou Longsheng do not indicate that pricing is coordinated among exporters. During our analysis of the information on the record, we found no information indicating the existence of government control of export activities. *See* Regal's submission of October 3, 2008; *see also* Shantou Longsheng's submission of May 30, 2008. Consequently, we preliminarily determine that Regal and Shantou Longsheng have met the criteria for the application of a separate rate.

In the *Initiation*, we requested that all companies listed therein wishing to qualify for separate rate status in this administrative review submit, as appropriate, either a separate rate status application or certification. *See Initiation*. As discussed above, the Department initiated this administrative review with respect to 482 companies, and is rescinding the review on five[6] of those 482 companies. In addition, we are preliminarily rescinding the review with respect to eleven[7] other companies due to the lack of shipments during the POR. Thus, including Regal and Shantou Longsheng, 466 companies remain subject to this review. Only Regal and Shantou Longsheng provided, as appropriate, either a separate rate application or certification. No other company listed in the *Initiation*, including Go–Harvest discussed above, has demonstrated its eligibility for separate rate status in this administrative review. Therefore, the Department preliminarily determines that there were exports of merchandise under review from PRC exporters that did not demonstrate their eligibility for separate rate status. As a result, the Department is treating these PRC exporters as part of the PRC–wide entity, subject to the PRC–wide rate.

Surrogate Country

When the Department investigates imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs, valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are at a level of economic development comparable to that of the NME country and significant producers of comparable merchandise. The sources of the surrogate factor values are discussed under the ''Normal Value'' section below and in the Memorandum to the File through Scot Fullerton, Program Manager, Office IX, from Paul

[6] These include Yelin Enterprise Co., Ltd. Hong Kong (the predecessor in interest to Hilltop International); Yangjiang City Yelin Hoitat Quick Frozen Seafood Co., Ltd.; Fuqing Yihua Aquatic Food Co., Ltd.; and Fuqing Minhua Trade Co., Ltd.

[7] These include Allied Pacific Group (comprised of Allied Pacific Food (Dalian) Co., Ltd.; Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd.; Zhanjiang Allied Pacific Aquaculture Co., Ltd.; Allied Pacific (H.K.) Co., Ltd.; and King Royal Investments Ltd.); Gallant Ocean (Nanhai), Ltd.; Luk Ka Paper Industrial Ltd.; Shantou Yelin Frozen Seafood Co., Ltd.; and Shantou Yuexing Enterprise Company.

Walker, Senior Case Analyst, ''Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Surrogate Factor Valuations for the Preliminary Results,'' dated concurrently with this notice (''Surrogate Values Memo'').

As discussed in the ''NME Country Status'' section, the Department considers the PRC to be an NME country. The Department determined that India, Indonesia, the Philippines, Colombia, and Thailand are countries comparable to the PRC in terms of economic development. See the Department's letter to all interested parties, dated October 21, 2008. Moreover, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from these countries. *See Department Policy Bulletin No. 04.1: Non–Market Economy Surrogate Country Selection Process*, dated March 1, 2004. The Department finds India to be a reliable source for surrogate values because India is at a comparable level of economic development pursuant to 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has publicly available and reliable data. Furthermore, the Department notes that India has been the primary surrogate country in past segments. As noted above, the Petitioner submitted surrogate value data for certain, but not all, FOPs for Thailand on January 16, 2009. However, we note that we are placing Indian surrogate value information for all FOPs on the record of this review concurrently with this notice, and that the FOPs which are valued using Indian import statistics are of a greater HTS specificity than the Thai import statistics. See Surrogate Values Memo. Given the above facts, the Department has selected India as the primary surrogate country for this review.

U.S. Price

In accordance with section 772(a) of the Act, we calculated the export price (''EP'') for sales to the United States for Regal. We calculated EP based on the price to unaffiliated purchasers in the United States. In accordance with section 772(c) of the Act, as appropriate, we deducted from the starting price to unaffiliated purchasers foreign inland freight, foreign brokerage and handling, customs duties, domestic brokerage and handling and other movement expenses incurred. For the services provided by an NME vendor or paid for using an NME currency we based the deduction of these movement charges on surrogate values. See Surrogate Values Memo for details regarding the surrogate values for movement expenses. For expenses provided by a market economy vendor and paid in U.S. dollars, we used the actual cost per kilogram of the freight. *See* Regal Analysis Memo.

Normal Value

Methodology

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOP because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOP data reported by Regal for the POR. To calculate NV, we multiplied the reported per–unit factor–consumption rates by publicly available surrogate values (except as discussed below).

In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. We added to each Indian import surrogate value, a surrogate freight cost calculated from the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory, where appropriate. *See Sigma Corp. v. United States*, 117 F. 3d 1401, 1407–1408 (Fed. Cir. 1997).

For these preliminary results, in accordance with the Department's practice, we used data from the *Indian Import Statistics* in order to calculate surrogate values for most of Regal's material inputs. In selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act, the Department's practice is to select, to the extent practicable, surrogate values which are non–export average values, most contemporaneous with the POR, product–specific, and tax–exclusive. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004). The record shows that the Indian import statistics represent import data that are contemporaneous with the POR, product–specific, and tax–exclusive. Where we could not obtain publicly available information contemporaneous to the POR with which to value FOPs, we adjusted the surrogate values, where appropriate, using the Indian Wholesale Price Index (''WPI'') as published in *OECD Stat* by the Organization for Economic Development and Cooperation.

To value shrimp larvae for Regal, which has an integrated production process, the Department valued shrimp larvae using an average of the price derived from the Nekkanti Sea Foods Ltd. financial statement for 04/2002 - 03/2003, and the price quoted in *Fishing Chimes*, which is an Indian seafood industry publication. However, because the shrimp larvae prices are dated before the POR, we inflated the price to be contemporaneous with the POR using WPI.

We valued electricity using price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India in its publication titled *Electricity Tariff & Duty and Average Rates of Electricity Supply in India*, dated July 2006. These electricity rates represent actual country–wide, publicly–available information on tax–exclusive electricity rates charged to industries in India. Since the rates are dated before the POR, we inflated the values to be contemporaneous with the POR using WPI. *See* Surrogate Values Memo.

Consistent with 19 CFR 351.408(c)(3), we valued direct, indirect, and packing labor, using the most recently calculated regression–based wage rate, which relies on 2005 data. This wage rate can currently be found on the Department's website on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in May 2008, ia.ita.doc.gov/wages/05wages/05wages–051608.html. The source of these wage–rate data on the Import Administration's web site is the *Yearbook of Labour Statistics 2002*, ILO (Geneva: 2002), Chapter 5B: Wages in Manufacturing. Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by Regal.

To value water, the Department used data from the Maharashtra Industrial Development Corporation (www.midindia.orgwww.midcindia.org) since it includes a wide range of industrial water tariffs. This source provides 386 industrial water rates within the Maharashtra province from June 2003: 193 of the water rates were for the ''inside industrial areas'' usage category and 193 of the water rates were for the ''outside industrial areas'' usage category. Because the value was not contemporaneous with the POR, we adjusted the rate for inflation.

We valued truck freight expenses using a per–unit average rate calculated from data on the Info Banc web site: www.infobanc.com/logistics/logtruck.htm. The logistics section of this website contains inland freight truck rates between many large Indian cities. Since this value is dated after the POR, we deflated the values to be contemporaneous with the POR using WPI. *See* Surrogate Values Memo.

We valued brokerage and handling using a simple average of the brokerage and handling costs that were reported in public submissions that were filed in three antidumping duty cases. See Surrogate Values Memo. Specifically, we averaged the public brokerage and handling expenses reported by (a) Agro Dutch Industries Ltd. in the antidumping duty administrative review of certain preserved mushrooms from India, (b) Kejirwal Paper Ltd. in the LTFV investigation of certain lined paper products from India, and (c) Essar Steel in the antidumping duty administrative review of hot–rolled carbon steel flat products from India.[8] *See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 71 FR 10646 (March 2, 2006); *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Certain Lined Paper Products From India*, 71 FR 19706 (April 17, 2006) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India*, 71 FR 45012 (August 8, 2006)), and *Certain Hot–Rolled Carbon Steel Flat Products From India: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 2018, 2021 (January 12, 2006) (unchanged in *Certain Hot–Rolled Carbon Steel Flat Products From India: Final Results of Antidumping Administrative Review*, 71 FR 40694 (July 18, 2006)). The Department derived the average per–unit amount from each source and adjusted each average rate for inflation. Finally, the Department averaged the average per–unit amounts to derive an overall average rate for the POR.

To value factory overhead, sales, general and administrative expenses, and profit, we relied upon publicly available information in the 2007–2008 annual report of Falcon Marine Exports Ltd., an integrated Indian producer of subject merchandise. *See* Surrogate Values Memo.

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Preliminary Results of the Review

The Department has determined that the following preliminary dumping margins exist for the period February 1, 2007, through January 31, 2008:

HONEY FROM THE PRC

Manufacturer/Exporter	Margin
Regal	26.30%
Shantou Longsheng	26.30%
PRC–wide Entity[9]	112.81%

[9] The PRC-wide entity includes the 464 companies currently under review that have not established their entitlement to a separate rate, including Zhanjiang Go-Harvest Aquatic Products Co., Ltd.

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, in accordance with 19 CFR 351.301(c)(1), for the final results of this administrative review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent–from-the–record alternative surrogate value information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than five days after the deadline for filing case briefs. See 19 CFR 351.309(d). The Department urges interested parties to provide an executive summary of each argument contained within the case briefs and rebuttal briefs.

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by these reviews. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. In accordance with 19 CFR 351.212(b)(1), for Regal we calculated an exporter/importer (or customer)-specific assessment rate for the merchandise subject to this review. Where the respondent has reported reliable entered values, we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis*, we will apply the assessment rate to the entered value of the importer's/customer's entries during the POR. *See* 19 CFR 351.212(b)(1).

[8] These data have been placed on the record of this case and can be found in attachments to the Factors Memo.

Where we do not have entered values for all U.S. sales, we calculated a per–unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific ad valorem ratios based on the estimated entered value. Where an importer (or customer)-specific *ad valorem* rate is zero or *de minimis*, we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For the companies receiving a separate rate that were not selected for individual review, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review pursuant to section 735(c)(5)(B) of the Act.

For those companies for which this review has been preliminarily rescinded,[10] the Department intends to assess antidumping duties at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2), if the review is rescinded for these companies.

For Yelin/Hilltop, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2). The Department will issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Cash Deposit Requirements

The following cash–deposit requirements will be effective upon publication of these final results for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise exported by Regal and Shantou Longsheng the cash deposit rate will be 26.30 percent; (2) for all other PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, and thus, are a part of the PRC–wide entity, the cash–deposit rate will be the PRC–wide rate of 112.81 percent; and (3) for all non–PRC exporters of subject merchandise, the cash–deposit rate will be the rate applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until further notice.

Notification of Interested Parties

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. 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.

This administrative review, and this notice are in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–4900 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–DS–S

[10] These include Allied Pacific Group (comprised of Allied Pacific Food (Dalian) Co., Ltd.; Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd.; Zhanjiang Allied Pacific Aquaculture Co., Ltd.; Allied Pacific (H.K.) Co., Ltd.; and King Royal Investments Ltd.); Gallant Ocean (Nanhai), Ltd.; Luk Ka Paper Industrial Ltd.; Shantou Yelin Frozen Seafood Co., Ltd.; and Shantou Yuexing Enterprise Company.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XN21

Endangered Species; File No. 14272

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Lawrence Wood, Marinelife Center of Juno Beach, 14200 U.S. Hwy. #1, Juno Beach, Florida, 33408, has applied in due form for a permit to take hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before April 8, 2009.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 14272 from the list of available applications. These documents are also 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

Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application should be mailed 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 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. 14272.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Malcolm Mohead, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit 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 proposed research would continue to describe the abundance and movements of an aggregation of hawksbill sea turtles found on the barrier reefs of Palm Beach County, Florida. Up to 75 animals would be annually captured, measured, flipper and passive integrated transponder tagged, marked, photographed, tissue and blood sampled, and released. Up to 10 of these animals would also have satellite transmitters attached to their carapace. The permit would be issued for five years.

Dated: March 3, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–4910 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XN81

Marine Mammals; File No. 14341

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Karen Terio, DVM, PhD, Zoological Pathology Program, College of Veterinary Medicine, University of Illinois, LUMC Room 0745, Building 101, 2160 South First Street, Maywood, IL 60153, has applied in due form for a permit to import marine mammal specimens for scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before April 8, 2009.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 14341 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978)281–9300; fax (978)281–9333.

Written comments or requests for a public hearing on this application should be mailed 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 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. 14341.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Kate Swails, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The applicant is requesting authorization to import unlimited biological samples from up to 200 individuals per year of the orders Cetacea (all species) and Pinnipedia (with the exception of walruses) from yet to be determined locations outside the U.S. All samples are being imported for diagnostic testing to determine the causes of outbreaks or unusual natural mortalities, investigations into the ecology of diseases in free-ranging animals, or unexpected mortalities in captive populations. All biological specimens would originate from animals found deceased in nature, collected opportunistically during the animals' capture by other researchers possessing permits for such activities, or from specimens legally held in captivity outside the U.S.A. No live animals would be taken from the wild for research. The permit is requested for a period of five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: March 3, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–4901 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XN25

Whaling Provisions; Aboriginal Subsistence Whaling Quotas

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

ACTION: Notification of quota for bowhead whales.

SUMMARY: NMFS provides notification of the aboriginal subsistence whaling quota for bowhead whales has been assigned to the Alaska Eskimo Whaling Commission (AEWC), and other limitations deriving from regulations adopted at the 59th Annual Meeting of the International Whaling Commission (IWC). For 2009, the quota is 75 bowhead whales struck. This quota and other limitations govern the harvest of bowhead whales by members of the AEWC.

DATES: Effective March 9, 2009 through December 31, 2009.

ADDRESSES: Office of International Affairs, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Ryan Wulff, (301) 713–9090.

SUPPLEMENTARY INFORMATION: Aboriginal subsistence whaling in the United States is governed by the Whaling Convention Act (16 U.S.C. 916 et seq.). Regulations that implement the Act, found at 50 CFR 230.6, require the Secretary of Commerce (Secretary) to publish, at least annually, aboriginal subsistence whaling quotas and any other limitations on aboriginal subsistence whaling deriving from regulations of the IWC.

At the 59th Annual Meeting of the IWC, the Commission set catch limits for aboriginal subsistence use of bowhead whales from the Bering-Chukchi-Beaufort Seas stock. The bowhead catch limits were based on a joint request by the United States and the Russian Federation, accompanied by documentation concerning the needs of two Native groups: Alaska Eskimos and

Chukotka Natives in the Russian Far East.

This action by the IWC thus authorized aboriginal subsistence whaling by the AEWC for bowhead whales. This aboriginal subsistence harvest is conducted in accordance with a cooperative agreement between NOAA and the AEWC.

The IWC set a 5-year block quota of 280 bowhead whales landed. For each of the years 2008 through 2012, the number of bowhead whales struck may not exceed 67, except that any unused portion of a strike quota from any year, including 15 unused strikes from the 2003 through 2007 quota, may be carried forward. No more than 15 strikes may be added to the strike quota for any one year. At the end of the 2008 harvest, there were 15 unused strikes available for carry-forward, so the combined strike quota for 2009 is 82 (67 + 15).

This arrangement ensures that the total quota of bowhead whales landed and struck in 2009 will not exceed the catch limits set by the IWC. Under an arrangement between the United States and the Russian Federation, the Russian natives may use no more than seven strikes, and the Alaska Eskimos may use no more than 75 strikes.

Through its cooperative agreement with the AEWC, NOAA has assigned 75 strikes to the Alaska Eskimos. The AEWC will allocate these strikes among the 11 villages whose cultural and subsistence needs have been documented, and will ensure that its hunters use no more than 75 strikes.

Other Limitations

The IWC regulations, as well as the NOAA regulation at 50 CFR 230.4(c), forbid the taking of calves or any whale accompanied by a calf.

NOAA regulations (at 50 CFR 230.4) contain a number of other prohibitions relating to aboriginal subsistence whaling, some of which are summarized here. Only licensed whaling captains or crew under the control of those captains may engage in whaling. They must follow the provisions of the relevant cooperative agreement between NOAA and a Native American whaling organization. The aboriginal hunters must have adequate crew, supplies, and equipment. They may not receive money for participating in the hunt. No person may sell or offer for sale whale products from whales taken in the hunt, except for authentic articles of Native handicrafts. Captains may not continue to whale after the relevant quota is taken, after the season has been closed, or if their licenses have been suspended. They may not engage in whaling in a wasteful manner.

Dated: March 4, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E9–4904 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2008–0063]

Extension of Time for Comments on Deferred Examination for Patent Applications

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Request for comments; extension of comment period.

SUMMARY: The United States Patent and Trademark Office (USPTO) conducted a roundtable to obtain public input on deferral of examination for patent applications, and invited the public to submit written comments on issues raised at the roundtable or on any issue pertaining to deferral of examination.

Comment Deadline Date: The deadline for receipt of written comments is May 29, 2009.

ADDRESSES: Written comments should be sent by electronic mail message over the Internet addressed to *AC6comments@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Robert W. Bahr. Although comments may be submitted by mail, the USPTO prefers to receive comments via the Internet.

The written comments and list of the roundtable participants and their associations will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the USPTO Internet Web site (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Robert W. Bahr, Senior Patent Counsel, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272–8800, by electronic mail message at *robert.bahr@uspto.gov,* or by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Robert W. Bahr.

SUPPLEMENTARY INFORMATION: The USPTO conducted a roundtable to determine whether or not there is support in the patent community and/or the public sector for the adoption of some type of deferral of examination. *See Request for Comments and Notice of Roundtable on Deferred Examination for Patent Applications,* 74 FR 4946 (Jan. 28, 2009), 1339 *Off. Gaz. Pat. Office* 153 (Feb. 24, 2009) (notice). The USPTO also invited written comments by any member of the public on the issues raised at the roundtable, or on any issue pertaining to deferral of examination. *See Request for Comments and Notice of Roundtable on Deferred Examination for Patent Applications,* 74 FR at 4947, 1339 *Off. Gaz. Pat.* Office at 154. The USPTO Webcast the roundtable and a video recording of the roundtable is available on the USPTO's Internet Web site. The USPTO is extending the comment period to provide interested members of the public with an additional opportunity to view the Webcast before submitting comments to the USPTO.

Dated: March 3, 2009.

John J. Doll,

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

[FR Doc. E9–4897 Filed 3–6–09; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of intent to renew an existing collection.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments.

DATES: Comments must be submitted on or April 8, 2009.

For Further Information or a Copy Contact: David Van Wagner, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st

Street, NW., Washington, DC 20581, (202) 418–5481; FAX: (202) 418–5527; e-mail: *dvanwagner@cftc.gov* and refer to OMB Control No. 3038–0048.

SUPPLEMENTARY INFORMATION: *Title:* Off-Exchange Agricultural Trade Options (OMB Control No. 3038–0048). This is a request for extension of a currently approved information collection.

Abstract: Off-Exchange Agricultural Trade Options, OMB Control No. 3038–0048–Extension.

In April 1998, the Commodity Futures Trading Commission (Commission or CFTC) removed the prohibition on off-exchange trade options on the enumerated agricultural commodities subject to a number of regulatory conditions. 63 FR 18821 (April 16, 1998). Thereafter, the Commission streamlined the regulatory or paperwork burdens in order to increase the utility of agricultural trade options while maintaining basic customer protections. 64 FR 68011 (Dec. 6, 1999).

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 the CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on December 29, 2008 (73 FR 79452).

Burden Statement: The respondent burden for this collection is estimated to average 5.59 hours per response.

Respondents/Affected Entities: 36.

Estimated Number of Responses: 41.

Estimated Total Annual Burden on Respondents: 230 hours.

Frequency of Collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0048 in any correspondence.

David Van Wagner, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581 and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: March 3, 2009.

David Stawick,

Secretary of the Commission.

[FR Doc. E9–4859 Filed 3–6–09; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of intent to renew an existing collection.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before April 8, 2009.

FOR FURTHER INFORMATION OR A COPY CONTACT: Mark H. Bretscher, Division of Clearing and Intermediary Oversight, CFTC, (312) 596–0529; Fax: (312) 596–0714; e-mail: *Mbretscher@cftc.gov* and refer to OMB Control No. 3038–0024.

SUPPLEMENTARY INFORMATION:

Title: Regulations and Forms Pertaining to the Financial Integrity of the Marketplace (OMB Control No. 3038–0024). This is a request for extension of a currently approved information collection.

Abstract: The commodity futures markets play a vital role in the furthering of global commerce by providing commercial users and speculators with a price discovery mechanism for the commodities traded on such markets and by providing commercial users of the markets with a mechanism for hedging their goods and services against price risks. The Commodity Futures Trading Commission is the independent Federal regulatory agency charged with providing various forms of customer protection so that users of the markets can be assured of the financial integrity of the markets and the intermediaries that they employ in their trading activities. Among the financial safeguards the Commission has imposed on commodity brokerages, technically futures commission merchants (FCMs) and introducing brokers (IBs), are minimum capital standards and, for FCMs, a requirement that they segregate and separately account for the funds they receive from their commodity customers. In order to monitor compliance with such financial standards, the Commission has required FCMs and IBs to file financial reports with the Commission and with the self-regulatory organizations SROs) of which they are members. (*See* Commission Rule 1.10, 17 CFR 1.10.)

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 the CFTC's regulations were published on December 30, 1981. *See* 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with the 60-day comment period soliciting comments on this collection was published on December 29, 2008 (73 FR 79452).

Burden Statement: The respondent burden for this collection is estimated to average .50 hours per response. These estimates include 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; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Futures Commission Merchants, Introducing Brokers.

Estimated Number of Respondents: 2,078.

Estimated Total Annual Burden or Respondents: 21,138.50 hours.

Frequency of Collection: On occasion, monthly, annually, semi-annually.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0024 in any correspondence.

Mark H. Bretscher, Division of Clearing and Intermediary Oversight, U.S. Commodity Futures Trading Commission, 525 W. Monroe Street, Suite 1100, Chicago, Illinois 60661 and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: March 3, 2009.

David Stawick,

Secretary of the Commission.

[FR Doc. E9–4860 Filed 3–6–09; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Federal Register Notice Requesting Nominations for the Subcommittee on Convergence in Agricultural Commodity Markets Under the Agricultural Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice requesting nominations for the Subcommittee on Convergence in Agricultural Commodity Markets under the Agricultural Advisory Committee.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is calling for nominations to the Subcommittee on Convergence in Agricultural Commodity Markets (Subcommittee on Convergence or Subcommittee) under the auspices of the Agricultural Advisory Committee. The Subcommittee on Convergence was established to identify the causes of poor cash-futures convergence in select agricultural commodity markets and advise the Commission on actions to remedy the situation. Nominations are sought for highly qualified representatives from government agencies, industry, exchanges, and groups representing interests or organizations involved with or affected by the convergence issues. Individuals seeking to be nominated to the Subcommittee on Convergence should possess demonstrable expertise in a related field or represent a stakeholder of interest in the issue. Prospective nominees should be open to participating in an open public-private forum.

DATES: The final deadline for nominations is 14 days from the publication date of this notice.

ADDRESSES: Nominations should be sent to Andrei Kirilenko, Office of the Chief Economist, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: Andrei Kirilenko, (202) 418–5587; fax: (202) 418–5660; e-mail: *akirilenko@cftc.gov*.

SUPPLEMENTARY INFORMATION: The Subcommittee on Convergence will conduct at least three sessions: On the causes, potential remedies, and suggested actions to remedy poor convergence. The sessions will be held during the first half of 2009 either in person or via telephone and will be open to the public. The Subcommittee will present a report with its findings and recommendations to the members of the Agricultural Advisory Committee and the Commission, at which time the Commission and Chair of the Agricultural Advisory Committee will determine what further actions warrant consideration. Subcommittee participants will not be compensated or reimbursed for travel and per diem expenses.

Each nomination submission should include the proposed member's name and organizational affiliation; a brief description of the nominee's qualifications and interest in serving on the Subcommittee on Convergence; the organization, group, or government agency the nominee would represent on the subcommittee; and the curriculum vitae or resume of the nominee. Self-nominations are acceptable. The following contact information should accompany each submission: The nominee's name, address, phone number, fax number, and e-mail address if available.

There are no capital costs and no operating or maintenance costs associated with this notice.

Dated: March 3, 2009.

David Stawick,

Secretary of the Commission.

[FR Doc. E9–4952 Filed 3–6–09; 8:45 am]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Notice of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108; Correction

AGENCY: Consumer Product Safety Commission.

ACTION: Notice; correction.

SUMMARY: The Consumer Product Safety Commission published a document in the **Federal Register** of February 23, 2009, concerning a request for comments on a Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108. The document omitted a Web site link.

FOR FURTHER INFORMATION CONTACT: Todd Stevenson, 301–504–6836.

Correction

In the **Federal Register** of February 23, 2009, in FR Doc. E9–3808, on page 8060, in the third column, at the end of the sentence at paragraph O., correct the Web site link to read: Web site (*http://www.cpsc.gov/about/cpsia/phthalatesop.pdf*)

Dated: March 3, 2009.

Todd Stevenson,

Director, Office of the Secretary.

[FR Doc. E9–4947 Filed 3–6–09; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft and Final Second Supplemental Environmental Impact Statement for Reach 1A on the Herbert Hoover Dike Major Rehabilitation Project, Martin and Palm Beach Counties

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The purpose of the project is to reconstruct and rehabilitate Reach 1A of the Herbert Hoover Dike to prevent catastrophic failure of the system to retain the waters of Lake Okeechobee. On July 8 2005, the Jacksonville District, U.S. Army Corps of Engineers (Corps) issued a Final Supplemental Environmental Impact Statement (FSEIS) for the Major Rehabilitation actions proposed for Herbert Hoover Dike (HHD), Reach One. Herbert Hoover Dike is the levee that completely surrounds Lake Okeechobee. On September 23, 2005, a Record of Decision was signed adopting the preferred alternative as the Selected Plan for Reach One.

As plans and specifications were developed for Reach 1, it became apparent that the cut-off wall with seepage berm alternative would not work for all of Reach 1. The alternative for Reach 1A will be a combination of one or more of the following features dependent on the geology and adjacent land factors with the cut-off wall: Seepage Berm, Relief Trench, Soil Replacement Wedge, Relief Wells, Drainage Feature and Sand Columns. Reach 1A of the HHD extends for approximately 4.6 miles within Martin and Palm Beach Counties, from the St. Lucie Canal at Port Mayaca, south to the 10A culvert. The final full design of the cutoff wall and landside rehabilitation feature will include lands outside of the existing ROW. Therefore it is necessary to update the July 2005 SEIS for Reach 1A to include these new landside rehabilitation features and any impacts to lands outside of the existing ROW. Two separate draft and final SEIS's will be developed for the four Subreaches: An SEIS for Subreach 1A will be completed first and a second SEIS for

Subreaches 1B, 1C, and 1D will be completed when designs (anticipated late 2009) are available. This study is a cooperative effort between the Corps and the South Florida Water Management District (SFWMD).

ADDRESSES: U.S. Army Corps of Engineers, Planning Division, Environmental Branch, P.O. Box 4970, Jacksonville, FL 32232–0019.

FOR FURTHER INFORMATION CONTACT: Mr. William Porter at (904) 232–3206 or e-mail at *William.L.Porter2@usace.army.mil.*

SUPPLEMENTARY INFORMATION: a. The proposed action will be the selected plan described in the July 2005 Supplemental Environmental Impact Statement (SEIS) with the additional action of implementing the landside rehabilitation features as needed based on geology and adjacent land factors. The proposed action will not affect the Regulation Schedule for Lake Okeechobee. Land may have to be acquired outside of the existing right-of-way (ROW) and this SEIS will account for any impacts that result due to acquisition of additional real estate.

b. Alternatives to be considered separately for each subdivision of Reach 1 are dependent upon the geology and adjacent land factors with the cut-off wall. Reach 1 is divided into Subreaches A, B, C and D. The alternatives to be implemented include one or more of the following features: Seepage Berm, Relief Trench, Soil Replacement Wedge, Relief Wells, Sand Column and Drainage Feature.

c. A scoping letter will be used to invite comments on alternatives and issues from Federal, State, and local agencies, affected Indian tribes, and other interested private organizations and individuals. A scoping letter was sent in October 2007 in anticipation of writing a single EIS for Reach 1. An additional scoping letter will be sent out in March 2009 to address the change in the process of completing the Reach 1 Environmental Impact Statements. A scoping meeting is not anticipated.

d. A public meeting will be held after release of each of the Draft Second Supplemental EIS's. The public meeting is anticipated to be held in late 2009 for Reach 1A in Clewiston, FL. The exact location, date, and times will be announced in a public notice and local newspapers.

e. A Major Rehabilitation Evaluation Report (MRR) was approved by Congress in the Water Resources Development Act (WRDA) 2000 that addressed the need to repair the aging dike.

Dated: February 23, 2009.

Eric P. Summa,

Chief, Environmental Branch.

[FR Doc. E9–4931 Filed 3–6–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education; Overview Information; William F. Goodling Even Start Family Literacy Programs—Grants for Federally Recognized Indian Tribes and Tribal Organizations

Notice inviting applications for new awards for fiscal year (FY) 2009.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.258A.

DATES: Applications Available: March 9, 2009.

Deadline for Transmittal of Applications: May 4, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The William F. Goodling Even Start Family Literacy Programs (Even Start), including the grants for Indian tribes and Tribal organizations, are intended to help break the cycle of poverty and illiteracy by improving the educational opportunities of low-income families by integrating early childhood education, adult literacy or adult basic education, and parenting education into a unified family literacy program. These programs are implemented through cooperative activities that: Build on high-quality existing community resources to create a new range of educational services; promote the academic achievement of children and adults; assist children and adults from low-income families in achieving challenging State content and student achievement standards; and use instructional programs based on scientifically based reading research and addressing the prevention of reading difficulties for children and adults, to the extent such research is available. A description of the required 15 program elements for which funds must be used is included in the application package.

Priorities: Under this competition we are particularly interested in applications that address the following priorities.

Invitational Priorities: For FY 2009 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1—Intensity

Applications that propose to operate full-time programs of high intensity that offer a minimum of the following hours in each of the following four core instructional components:

- Adult Education—60 hours per month.
- Early Childhood Education (birth through 3 years of age)—60 hours per month.
- Early Childhood Education (3 to 4 years of age)—65 hours per month.
- Parenting Education and Interactive Literacy Activities between Parents and Children—20 hours per month.

Scientifically based research on increasing the effectiveness of early childhood education programs serving children from low-income families tells us that children who participate more intensively in early childhood education score higher on standardized literacy measures. For example, the Third National Even Start Evaluation: Program Impacts and Implications for Improvement showed that ''children who participated more intensively in early childhood education scored higher on standardized literacy skills. Further, parents who participate more intensively in parenting education have children who score higher on standardized literacy measures.'' \1\ In other words, children who spend more time in high-quality early childhood education programs learn more than children who spend less time in those programs. The purpose of this invitational priority is to encourage family literacy programs supported with Even Start funds to provide services that are of a sufficient intensity to maximize language and early literacy gains for children enrolled in those programs.[1]

Invitational Priority 2—Early Childhood Education Services in a Group Setting

Applications that propose to offer center-based early childhood education services.

The research in early childhood education, such as the Third National Even Start Evaluation, shows that educational services for young children that are provided in a center are more likely to be intensive and, therefore, more likely to result in significant

[1] Ricciuti, A.E., St. Pierre, R.G., Lee, W., Parsad, A. & Rimdzius, T. *Third National Even Start Evaluation: Follow-Up Findings From the Experimental Design Study.* U.S. Department of Education, Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance. Washington, DC: 2004. p. 8–9.

learning outcomes than non-center-based services. A center is defined, for the purpose of this invitational priority, as a place where early childhood educational services can be provided to a group of children from multiple households. All center-based programs still must comply with the required program elements, including providing integrated home-based instructional programs.

Program Authority: 20 U.S.C. 6381a(a)(1)(C).

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $831,470 of FY 2008 funds are available for new awards in FY 2009.

Contingent upon the availability of funds and the quality of applications, we may make additional awards later in FY 2009 or in FY 2010 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $150,000—$250,000 per year.

Estimated Average Size of Awards: $200,000 per year.

Estimated Number of Awards: 3–5.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* Federally recognized Indian tribes and Tribal organizations. Definitions of the terms ''Indian tribe'' and ''Tribal organization'' are in section 4 of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b.

2. *Cost Sharing or Matching:* Cost sharing requirements for these grants are detailed in section 1234(b) of the Elementary and Secondary Education Act of 1965 (ESEA).

3. *Other:* (a) In general, a family is eligible to participate in an Even Start project for Indian tribes and Tribal organizations if—(1) the participating parent (a) is eligible to participate in adult education and literacy activities under the Adult Education and Family Literacy Act, or (b) is within the State's compulsory school attendance age range (in which case a local educational agency must provide or ensure the availability of the basic education component), or is attending secondary school; and (2) the participating child is younger than eight years of age. More specific information on family eligibility is contained in section 1236 of the ESEA.

(b) *Participation by Private School Children and Teachers.* An entity that receives a grant under the Even Start Family Literacy Program for Indian tribes and Tribal organizations is required to provide for the equitable participation of otherwise eligible private elementary school children and secondary school students and their teachers or other educational personnel. In order to ensure that grant program activities address the needs of private school children, the applicant must engage in timely and meaningful consultation with appropriate elementary and secondary private school officials during the design and development of the program. This consultation must take place before the applicant makes any decision that affects the opportunities of eligible private school children and students, teachers, and other educational personnel to participate. Administrative direction and control over grant funds must remain with the grantee. (*See* section 9501, Participation by Private School Children and Teachers, of the ESEA.)

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www.Grants.gov.* To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. Fax: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.258A.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the program contact person listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of the application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 25 typed pages. You, the applicant, also provide a budget narrative that reviewers use to evaluate your application. You must limit the budget narrative to the equivalent of no more than 5 typed pages, and the project abstract to the equivalent of no more than 2 typed pages. For all page limits, use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application and budget narratives, including titles, headings, footnotes, quotations, references, and captions. Text in tables, charts, graphs, and the limited Appendices may be single spaced.
- Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch). You may use other point fonts for any tables, charts, graphs, and the limited Appendices, but those tables, charts, graphs, and limited Appendices should be in a font size that is easily readable by the reviewers of your application.
- Use one of the following fonts for the application and budget narratives: Times New Roman, Courier, Courier New, or Arial. An application with an application or budget narrative submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.
- Other application materials are limited to the specific materials indicated in the application package, and may not include any video or other non-print materials.

The page limits do not apply to: The cover sheet; the budget forms; and the assurances and certifications.

Any tables, charts, or graphs are included in the overall application narrative and budget narrative page limits. The limited Appendices are not part of these page limits. Appendices are limited to the following: The curriculum vitae or position descriptions of no more than 5 people (including key contract personnel and consultants).

Our reviewers will not read any pages of your application that exceed the page

limit; or exceed the equivalent of the page limit if you apply other standards.

In addition, our reviewers will not read or view any Appendices or enclosures (including non-print materials such as videotapes or CDs) other than those described in this notice and the application package.

3. *Submission Dates and Times:*

Applications Available: March 9, 2009.

Deadline for Transmittal of Applications: May 4, 2009.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (*http://Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* Recipients of an Even Start Indian tribe and Tribal organization grant may not use funds awarded under this competition for the indirect costs of a project, or claim indirect costs as part of the local project share. (Section 1234(b)(3) of the ESEA.) Grant recipients may request that the Secretary waive this requirement under appropriate circumstances. To obtain a waiver, a recipient must demonstrate to the Secretary's satisfaction that the recipient otherwise would not be able to participate in the Even Start program. (Section 1234(b)(3) of the ESEA.) Information about requesting a waiver is in the application package. We reference regulations outlining additional funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:*

Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the William F. Goodling Even Start Family Literacy Programs—Grants for Federally Recognized Indian Tribes and Tribal Organizations, CFDA Number 84.258A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for William F. Goodling Even Start Family Literacy Programs—Grants for Federally Recognized Indian Tribes and Tribal Organizations at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.*, search for 84.258, not 84.258A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (*see http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (*see http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal

Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Amber Sheker, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E252, Washington, DC 20202–6200. Telephone: (202) 205–0653. Fax: (202) 260–8969.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.258A), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.258A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the

application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from sections 34 CFR 75.209 and 75.210 and are listed in the following paragraphs. The maximum score for each criterion is indicated after the title of the criterion. The maximum score for all of the selection criteria is 100 points.

(1) *Quality of the Project Design* (50 points). The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(a) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (34 CFR 75.210(c)(2)(i))

(b) The extent to which the proposed project represents an exceptional approach for meeting statutory purposes and requirements. (34 CFR 75.210(c)(2)(xiv))

Note: Under section 1235 of the ESEA, projects funded under this program must meet the following requirements:

(1) Include the identification and recruitment of families most in need of services provided under this program, as indicated by a low level of income, a low level of adult literacy or English language proficiency of the eligible parent or parents, and other need-related indicators;

(2) Include screening and preparation of parents, including teenage parents, and children to enable those parents and children to participate fully in the activities and services provided under this program, including testing, referral to necessary counseling, other developmental and support services, and related services;

(3) Be designed to accommodate the participants' work schedule and other responsibilities, including the provision of support services, when those services are unavailable from other sources, necessary for participation in the activities assisted under this program, such as—

(a) Scheduling and locating of services to allow joint participation by parents and children;

(b) Child care for the period that parents are involved in the program provided under this program; and

(c) Transportation for the purpose of enabling parents and their children to participate in activities authorized by this program;

(4) Include high-quality, intensive instructional programs that promote adult literacy and empower parents to support the educational growth of their children, developmentally appropriate early childhood educational services, and preparation of children for success in regular school programs;

(5) With respect to the qualifications of staff the cost of whose salaries are paid, in whole or in part, with Federal funds provided under the grant, ensure that—

(a)(i) A majority of the individuals providing academic instruction—

(I) Have obtained an associate's, bachelor's, or graduate degree in a field related to early childhood education, elementary school or secondary school education, or adult education; and

(II) If applicable, meet qualifications established by the State for early childhood education, elementary school or secondary school education, or adult education provided as part of an Even Start program or another family literacy program;

(ii) The individual responsible for administration of family literacy services carried out through the grant has received training in the operation of a family literacy program; and

(iii) Paraprofessionals who provide support for academic instruction have a secondary school diploma or its recognized equivalent; and

(b) All new personnel hired to provide academic instruction—

(i) Have obtained an associate's, bachelor's, or graduate degree in a field related to early childhood education, elementary school or secondary school education, or adult education; and

(ii) If applicable, meet qualifications established by the State for early childhood education, elementary school or secondary school education, or adult education provided as part of an Even Start program or another family literacy program;

(6) Include special training of staff, including child-care staff, to develop the skills necessary to work with parents and young children in the full range of instructional services offered through this program;

(7) Provide and monitor integrated instructional services to participating parents and children through home-based programs;

(8) Operate on a year-round basis, including the provision of some program services, including instructional and enrichment services, during the summer months;

(9) Be coordinated with—

(a) Other programs assisted under the ESEA;

(b) Any relevant programs under the Adult Education and Family Literacy Act, the Individuals with Disabilities Education Act, and title I of the Workforce Investment Act of 1998; and

(c) The Head Start program, volunteer literacy programs, and other relevant programs;

(10) Use instructional programs based on scientifically based reading research for children and adults, to the extent that research is available;

(11) Encourage participating families to attend regularly and to remain in the program a sufficient time to meet their program goals;

(12) Include reading-readiness activities for preschool children based on scientifically based reading research, to the extent available, to ensure that children enter school ready to learn to read;

(13) If applicable, promote the continuity of family literacy to ensure that individuals retain and improve their educational outcomes;

(14) Ensure that the programs will serve those families most in need of the activities and services provided by this program; and

(15) Provide for an independent evaluation of the program, to be used for program improvement.

(2) *Quality of Project Services* (20 points). The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. (34 CFR 75.210(d)(2)) In addition, the Secretary considers the following factor: The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards. (34 CFR 75.210(d)(3)(vii))

(3) *Adequacy of Resources* (15 points). The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(a) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization. (34 CFR 75.210(f)(2)(i))

Note: Please note that section 1234(b)(1) of the ESEA requires grantees to provide an increasing local project share over the grant period (at least the following amounts: 10 percent in the first year, 20 percent in the second year. 30 percent in the third year, 40 percent in the fourth year, 50 percent in the fifth through eighth years, and 65 percent thereafter). The law also does not permit indirect costs to be included in the budget, either as a part of the Federal funding or for the local project's share or match, unless a project requests and qualifies for a waiver of that requirement under section 1234(b)(3) of the ESEA.

(b) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project. (34 CFR 75.210(f)(2)(iv))

(4) *Quality of the Management Plan* (15 points). The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(a) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (34 CFR 75.210(g)(2)(i))

(b) The extent to which the time commitments of the project director and principal investigator and other key personnel are appropriate and adequate to meet the objectives of the proposed project. (34 CFR 75.210(g)(2)(iv))

Note: Grantees will be required to report annually on any project-specific performance measures that are included in the grantees' approved grant application, including the performance measures established for the Tribal Even Start Program under the Government Performance and Results Act (GPRA) and identified in section VI of this notice under the heading *Performance Measures*

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Department has established the following Government Performance and Results Act of 1993 (GPRA) performance measures for the William F. Goodling Even Start Family Literacy Programs, including the Indian tribes and Tribal organizations grants:

(1) The percentage of Tribal Even Start adults who do not have limited English proficiency who achieve significant learning gains in reading;

(2) The percentage of Tribal Even Start adults with limited English proficiency who achieve significant learning gains in reading/English Language acquisition;

(3) The percentage of Tribal Even Start adults with a high school completion goal who earn a high school diploma;

(4) The percentage of Tribal Even Start adults with the goal of General Equivalency Diploma (GED) attainment who earn a GED;

(5) The percentage of preschool-aged children participating in Tribal Even Start programs who achieve significant gains in oral language skills;

(6) The average number of letters Tribal Even Start preschool-aged children are able to identify; and

(7) The percentage of preschool-aged children participating in Tribal Even Start programs who demonstrate age-appropriate oral language skills.

These measures constitute the Department's indicators of success for this program. Consequently, we advise an applicant for a grant under this program to give careful consideration to these measures in conceptualizing the approach and evaluation for its proposed project. Each grantee will be required to provide, in its annual performance and final reports, data about its progress in meeting these measures. The Department will provide further information on selecting valid, reliable, and program-appropriate assessment instruments on the Tribal Even Start Web site at *http://www.ed.gov/programs/evenstartindian/applicant.html.*

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Amber Sheker, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E252, Washington, DC 20202–6200. Telephone: (202) 205–0653 or by e-mail: *Amber.Sheker@ed.gov.*

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Delegation of Authority: The Secretary of Education has delegated authority to Joseph C. Conaty, Director, Academic Improvement and Teacher Quality Programs for the Office of Elementary and Secondary Education to perform the functions of the Assistant Secretary for Elementary and Secondary Education.

Dated: March 4, 2009.

Joseph C. Conaty,

Director, Academic Improvement and Teacher Quality Programs.

[FR Doc. E9–4932 Filed 3–6–09; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0431; FRL–8779–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Wet-Formed Fiberglass Mat Production (Renewal), EPA ICR Number 1964.04, OMB Control Number 2060–0496

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 April 8, 2009.

ADDRESSES: Submit your comments, referencing Docket ID number EPA–HQ–OECA–2008–0431, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2282T, 1200 Pennsylvania Avenue, 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: John Schaefer, Office of Air Quality Planning and Standards, Sector Policies and Programs Division (D243–05), Measurement Policy Group, Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0296; fax number: (919) 541–3207; e-mail address: *schaefer.john@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID number EPA–HQ–OECA–2008–0431, which is available for public viewing online at *http://www.regulations.gov* or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA/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 Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NESHAP for Wet-Formed Fiberglass Mat Production (Renewal).

ICR Numbers: EPA ICR Number 1964.04, OMB Control Number 2060–0496.

ICR Status: This ICR is scheduled to expire on March 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9 and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Wet-Formed Fiberglass Mat Production were proposed on May 26, 2000 (65 FR 34251), and promulgated on April 11, 2002 (67 FR 17823). These standards apply to new and existing component processes at industrial facilities that manufacture wet-formed fiberglass mat including preparation of glass fibers, formation of fibers into a fiberglass mat, saturation with urea-formaldehyde binder solution, curing and drying the binder-coated fiberglass mat, cooling the mat, and trimming, cutting, and packaging.

The monitoring, recordkeeping, and reporting requirements outlined in these rules are similar to those required for other NESHAP regulations. Consistent with the NESHAP General Provisions (40 CFR part 63, subpart A), respondents are required to submit initial notifications, conduct performance tests, and submit semiannual reports. They are also required to maintain records of applicability determinations; performance test results; exceedances; periods of startup, shutdown, or malfunction; monitoring records; and all other information needed to determined compliance with the applicable standard.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 61 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: Wet-formed fiberglass mat production facilities.

Estimated Number of Respondents: 14.

Frequency of Response: Initially, occasionally, semiannually, and annually.

Estimated Total Annual Hour Burden: 1,966.

Estimated Total Annual Cost: $158,672 in annual labor costs and $0 annualized capital or O&M costs.

Changes in the Estimates: There is no change in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

Dated: March 3, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–4886 Filed 3–6–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8776–7; Docket ID No. EPA–HQ–ORD–2009–0040]

Draft Toxicological Review of Halogenated Platinum Salts and Platinum Compounds: In Support of the Summary Information in the Integrated Risk Information System (IRIS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of listening session.

SUMMARY: EPA is announcing a listening session to be held on March 25, 2009, during the public comment period for the external review draft document entitled, ''Toxicological Review of Halogenated Platinum Salts and Platinum Compounds: In Support of Summary Information on the Integrated Risk Information System (IRIS)''. This listening session is a new step in EPA's revised IRIS process, announced on April 10, 2008, for development of human health assessments for inclusion on IRIS. The purpose of the listening session is to allow all interested parties to present scientific and technical comments on draft IRIS health assessments to EPA and other interested parties during the public comment period and prior to the external peer review meeting. EPA welcomes the scientific and technical comments that will be provided to the Agency by the listening session participants. The comments will be considered by the Agency as it revises the draft assessment in response to the independent external peer review and public comments. All presentations will become part of the official and public record.

The EPA's draft assessment and peer review charge are available via the Internet on the National Center for Environmental Assessment's (NCEA) home page under the Recent Additions and the Data and Publications menus at *http://www.epa.gov/ncea.*

DATES: The listening session on the draft IRIS health assessment for Halogenated Platinum (Pt) Salts and Pt Compounds will be held on March 25, 2009, beginning at 9 a.m. and ending at 4 p.m., Eastern Daylight Time. If you wish to make a presentation at the listening session, you should register by March 18, 2009, and indicate that you wish to make oral comments at the session, and indicate the length of your presentation. At the time of your registration, please indicate if you require audio-visual aid (*e.g.*, lap top and slide projector). In general, each presentation should be no more than 30 minutes. If, however, there are more requests for presentations than the allotted time will allow, then the time limit for each presentation will be adjusted accordingly. A copy of the agenda for the listening session will be available at the meeting. If no speakers have registered by March 18, 2009, the listening session will be cancelled. EPA will notify those registered to attend of the cancellation.

The public comment period for review of this draft assessment was announced previously in the **Federal Register** (FR) (74 FR 6154) on February 05, 2009. As stated in that FR notice, the public comment period began on February 5, 2009, and ends April 6, 2009. Any technical comments submitted during the public comment period should be in writing and must be received by EPA by April 6, 2009, according to the procedures outlined below. Only those public comments submitted using the procedures identified in the February 5, 2009, FR notice by the April 6, 2009, deadline will be provided to the independent peer-review panel prior to the peer-review meeting. The date and logistics for the peer-review meeting will be announced later in a separate FR notice.

Listening session participants who wish to have their comments available to the external peer reviewers should also submit written comments during the public comment period using the detailed and established procedures included in the aforementioned FR notice (February 5, 2009). Comments submitted to the docket prior to the end of the public comment period will be submitted to the external peer reviewers and considered by EPA in the disposition of public comments. Comments received in the docket after the public comment period closes must still be submitted to the docket but will not be submitted to the external peer reviewers.

ADDRESSES: The listening session on the draft Halogenated Platinum Salts and Platinum Compounds assessment will be held at the EPA offices at Two Potomac Yard (North Building), 7th Floor, Room 7100, 2733 South Crystal Drive, Arlington, Virginia, 22202. To attend the listening session, register by March 18, 2009, via the Internet at *https://www2.ergweb.com/projects/conferences/peerreview/register-platinum.htm.* You may also register via e-mail at e-mail: *meetings@erg.com* (subject line: Halogenated Platinum Salts and Platinum Compounds Listening Session), by phone: 781–674–7374 or toll free at 800–803–2833, or by faxing a registration request to 781–674–2906 (please reference the ''Halogenated Platinum Salts and Platinum Compounds Listening Session'' and include your name, title, affiliation, full address and contact information). Please note that to gain entrance to this EPA building to attend the meeting, attendees must have photo identification with them and must register at the guard's desk in the lobby. The guard will retain your photo identification and will provide you with a visitor's badge. At the guard's desk, attendees should give the name Christine Ross and the telephone number, 703–347–8592, to the guard on duty. The guard will contact Ms. Ross who will meet you in the reception area to escort you to the meeting room. Upon your exit from the building please return your visitor's badge and you will receive the photo identification that you provided.

A teleconference line will also be available for registered attendees/speakers. The teleconference number is 866–299–3188 and the access code is 7033478503, followed by the pound sign (#). The teleconference line will be activated at 8:45 a.m., and you will be asked to identify yourself and your affiliation at the beginning of the call.

Information on Services for Individuals with Disabilities: EPA welcomes the attendance of the public at the ''Halogenated Platinum Salts and Compounds Listening Session'' and will make every effort to accommodate persons with disabilities. For information on access or services for individuals with disabilities, please contact Christine Ross at 703–347–8592 or *ross.christine@epa.gov.* To request accommodation of a disability, please contact Ms. Ross, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

FOR FURTHER INFORMATION CONTACT: For information on the public listening sessions, please contact Christine Ross, IRIS Staff, National Center for Environmental Assessment (NCEA), (8601P), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 703–347–8592; facsimile:

703–347–8689; or e-mail: *ross.christine@epa.gov.* If you have questions about the draft Halogenated Platinum Salts and Platinum Compounds assessment, contact Andrew A. Rooney, IRIS Staff, National Center for Environmental Assessment, U.S. EPA, 109 T.W. Alexander Drive, B243–01, Durham, NC 27711; telephone: 919–541–1492; facsimile: 919–541–0245; or e-mail: *rooney.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION: This listening session is a new step in EPA's revised IRIS process, announced on April 10, 2008, for development of human health assessments for inclusion on IRIS. The new process is posted on the NCEA home page under the Recent Additions menu at *http://www.epa.gov/ncea.* Two listening sessions are scheduled under the new IRIS process. The first is during the public review of the draft assessment that includes only qualitative discussion. The second session is during the public review of the externally peer-reviewed draft assessment; if feasible, the completed draft of IRIS assessments will include both qualitative and quantitation elements. All IRIS assessments that are at the document development stage will follow the revised IRIS process, which includes the two listening sessions. However, when EPA initiated the new IRIS process, the draft assessment for Halogenated Platinum Salts and Platinum Compounds had already completed document development and been through several rounds of internal review. Therefore, EPA will only hold one listening session during the public review and comment period of the externally peer-reviewed draft.

Dated: February 17, 2009.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. E9–4885 Filed 3–6–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8779–3]

Gulf of Mexico Program Citizens Advisory Committee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act (Pub. L. 92–463), EPA gives notice of a meeting of the Gulf of Mexico Program (GMP) Citizens Advisory Committee (CAC).

For information on access or services for individuals with disabilities, please contact Gloria Car, EPA, at (228) 688–2421 or *car.gloria@epa.gov.* To request accommodation of a disability, please contact Gloria Car, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

DATES: The meeting will be held on Wednesday, April 1, 2009, from 10 a.m. to 3:30 p.m. and Thursday, April 2, 2009, from 9 a.m. to 2:30 p.m.

ADDRESSES: The meeting will be held at Building 1100, Gainesville Room, Stennis Space Center, MS 39529.

FOR FURTHER INFORMATION CONTACT: Gloria D. Car, Designated Federal Officer, Gulf of Mexico Program Office, Mail Code EPA/GMPO, Stennis Space Center, MS 39529 (228) 688–2421.

SUPPLEMENTARY INFORMATION: The proposed agenda includes the following topics: Gulf of Mexico Program's 2009 Priorities; Gulf of Mexico Alliance Governors' Action Plan II Overview; Gulf of Mexico Program 2008 Accomplishments Report; and Citizens Advisory Committee Report.

Dated: March 2, 2009.

Gloria D. Car,

Designated Federal Officer.

[FR Doc. E9–4887 Filed 3–6–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8778–9]

National Advisory Council for Environmental Policy and Technology

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, Public Law 92463, EPA gives notice of a meeting of the National Advisory Council for Environmental Policy and Technology (NACEPT). NACEPT provides advice to the EPA Administrator on a broad range of environmental policy, technology, and management issues. NACEPT is a committee of individuals who represent diverse interests from academia, industry, non-governmental organizations, and local, state, and tribal governments. To mark NACEPT's 20th anniversary and its achievements over the last two decades, a project was initiated to: (1) Identify the issues and challenges that EPA will face and should focus on over the next 10 years; (2) Review NACEPT's operations and accomplishments; and (3) Develop a strategic framework for how NACEPT can best serve EPA based on the prospective and retrospective findings. The purpose of the meeting is to discuss the prospective and retrospective reports, and to develop a strategic framework for the Council. A copy of the agenda for the meeting will be posted at *http://www.epa.gov/ocem/nacept/cal-nacept.htm.*

DATES: NACEPT will hold a two-day meeting on Wednesday, March 25, 2009, from 9 a.m. to 5 p.m. and Thursday, March 26, 2009, from 9 a.m. to 2 p.m.

ADDRESSES: The meeting will be held at the Gaylord National Resort and Convention Center, 201 Waterfront Street, National Harbor, MD 20745. The meeting is open to the public, with limited seating on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Sonia Altieri, Designated Federal Officer, *altieri.sonia@epa.gov,* (202) 564–0243, U.S. EPA, Office of Cooperative Environmental Management (1601M), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Requests to make oral comments or to provide written comments to the Council should be sent to Sonia Altieri, Designated Federal Officer, at the contact information above. All requests must be submitted no later than March 18, 2009.

Meeting Access: For information on access or services for individuals with disabilities, please contact Sonia Altieri at 202–564–0243 or *altieri.sonia@epa.gov.* To request accommodation of a disability, please contact Sonia Altieri, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: March 2, 2009.

Sonia Altieri,

Designated Federal Officer.

[FR Doc. E9–4884 Filed 3–6–09; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Advisory Committee was established by Public Law 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in

the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Wednesday, March 18, 2009 beginning at 9:30 a.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include a briefing on the status of the 2008 Advisory Committee's recommendations and a discussion of the challenges for 2009.

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented at the guard's desk as part of the clearance process into the building, and you may contact Susan Houser to be placed on an attendee list. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to March 10, 2009, Susan Houser, Room 1273, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3232 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: For further information, contact Susan Houser, Room 1273, 811 Vermont Ave., NW., Washington, DC 20571, (202) 565–3232.

Kamil P. Cook,

General Counsel (Acting).

[FR Doc. E9–4825 Filed 3–6–09; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, Comments Requested

February 27, 2009.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before April 8, 2009. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your comments to Nicholas A. Fraser, Office of Management and Budget (e-mail address: *nfraser@omb.eop.gov*), and to the Federal Communications Commission's PRA mailbox (e-mail address: *PRA@fcc.gov*). Include in the e-mails the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below or, if there is no OMB control number, the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information contact Leslie F. Smith via e-mail at *PRA@fcc.gov* or at (202) 418–0217. To view or obtain a copy of an information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR you want to view (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0835.

Title: Ship Inspections, FCC Forms 806, 824, 827, and 829.

Form Numbers: FCC 806, 824, 827, and 829.

Type of Review: Extension without change of a currently approved collection.

Respondents: Businesses or other for-profit; Not-for-profit institutions.

Number of Respondents and Responses: 1,210 respondents; 3,630 responses.

Estimated Time per response: 5 minutes to 4 hours.

Frequency of Response: Recordkeeping; Annual and 5 year reporting requirements; Third Party Disclosure.

Obligation to Respond: Mandatory. *See* 47 U.S.C. 361 and 362.

Total Annual Burden: 5,245 hours.

Total Annual Cost: $0.00.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Communications Act requires the Commission to inspect the radio installation of large cargo ships and certain passenger ships at least once a year to ensure that the radio installation is in compliance with the requirements of the Communications Act. Additionally, the Communications Act requires the inspection of small passenger ships at least once every five years. The Safety Convention (to which the United States is a signatory) also requires an annual inspection. However, the Safety Convention permits an Administrator to entrust the inspections to either surveyors nominated for the purpose or to organizations recognized by it. Therefore, the United States can have other parties conduct the radio inspection of vessels for compliance with the Safety Convention. The Commission allows FCC-licensed technicians to conduct these inspections. FCC-licensed technicians certify that the ship passed an inspection and issue a safety certificate. These safety certificates (FCC Forms 806, 824, 827 and 829) indicate that the vessel complies with the Communications Act and the Safety Convention. These technicians are required to provide a summary of the results of the inspection in the ship's log. In addition, the vessel's owner, operator, or ship's master must certify in the ship's log that the inspection was

satisfactory. Inspection certificates issued in accordance with the Safety Convention must be posted in a prominent and accessible place on the ship. The purpose of the information is to ensure that the inspection was successful so that passengers and crewmembers of certain United States ships have access to distress communications in an emergency.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–4902 Filed 3–6–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, March 10, 2009, and Wednesday March 11, 2009 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. E9–4821 Filed 3–6–09; 8:45 am]

BILLING CODE 6715–01–M

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation (FTR); Relocation Allowances—Relocation Income Tax Allowance (RITA) Tables; Notice of FTR Bulletin 09–04

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of a bulletin.

SUMMARY: This notice announces Federal Travel Regulation (FMR) Bulletin 09–04 which provides the 2008 Federal State, and Puerto Rico tax tables needed for calculating the relocation income tax (RIT) allowance. FTR Bulletin 09–04 and all other FTR Bulletins may be found at *http://www.gsa.gov/ftrbulletins.* The tax tables may also be found at *http://www.gsa.gov/relo.*

DATES: The bulletin announced in this notice became effective February 25, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Ed Davis, Office of Governmentwide Policy (M), Office of Travel, Transportation, and Asset Management (MT), General Services Administration at (202) 208–7638 or via e-mail at *ed.davis@gsa.gov.* Please cite FTR Bulletin 09–04.

SUPPLEMENTARY INFORMATION:

A. Background

On June 25, 2008 the General Services Administration (GSA) published FTR Amendment 2008–04 in the **Federal Register** (73 FR 35952) specifying that the General Services Administration (GSA) would no longer publish the RITA tables found in 41 CFR part 301–17 Appendices A through D in the **Federal Register**.

B. Procedures

Bulletins regarding relocation policy are located on the Internet at *http://www.gsa.gov/ftrbulletins* as Federal Travel Regulation (FTR) bulletins.

Dated: February 27, 2009.

Henry Maury,

Director, Relocation Policy.

[FR Doc. E9–4840 Filed 3–6–09; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on HIV/AIDS

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (DHHS) is hereby giving notice that the Presidential Advisory Council on HIV/AIDS (PACHA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will be held on Tuesday, March 24, 2009 and Wednesday, March 25, 2009. The meeting will be held from 9 a.m. to approximately 5 p.m. on both days.

ADDRESSES: Department of Health and Human Services, Hubert H. Humphrey Building; 200 Independence Avenue, SW., Room 800, Washington, DC 20201

FOR FURTHER INFORMATION CONTACT: Mr. Melvin Joppy, Committee Manager, PACHA, Department of Health and Human Services, 200 Independence Avenue, SW., Room 736E, Washington, DC 20201; (202) 205–0216. More detailed information about PACHA can be obtained by accessing the Council's Web site at *http://www.pacha.gov.*

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995, as amended by Executive Order 13009, dated June 14, 1996. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to (a) promote effective prevention of HIV disease, (b) advance research on HIV and AIDS, and (c) promote quality services to persons living with HIV disease and AIDS. PACHA was established to serve solely as an advisory body to the Secretary of Health and Human Services. The Council is composed of not more than 21 members. Council membership is selected by the Secretary from individuals who are considered authorities with particular expertise in, or knowledge of, matters concerning HIV and AIDS.

The agenda for this Council meeting is being developed. The meeting agenda will be posted on the Council's Web site when it is drafted.

Public attendance at the meeting is limited to space available. Individuals must provide a photo ID for entry into the meeting. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person. Pre-registration for public attendance is advisable and can be accomplished online by accessing the PACHA Web site, *http://www.pacha.gov.*

Members of the public will have the opportunity to provide comments at the meeting. Pre-registration is required for public comment. Any individual who wishes to participate in the public comment session must register online at *http://www.pacha.gov;* registration for public comment will not be accepted by telephone. Public comment will be limited to three minutes per speaker.

Any members of the public who wish to have printed material distributed to PACHA members for discussion at the meeting should submit, at a minimum, one copy of the materials to the Committee Manager, PACHA no later than close of business on March 17, 2009. Contact information for the

PACHA Committee Manager is listed above.

Dated: March 3, 2009.

Christopher H. Bates,

Interim Executive Director, Presidential Advisory Council on HIV/AIDS.

[FR Doc. E9–4854 Filed 3–6–09; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee to the Director, Centers for Disease Control and Prevention, (ACD, CDC)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the CDC announces the following meeting of the aforementioned committee:

TIME AND DATE: 6 p.m.–7 p.m., March 4, 2009.

PLACE: The teleconference call will originate at the CDC. Details on accessing the teleconference are located in the supplementary information.

STATUS: Open to the public, teleconference access limited only by availability of telephone ports.

PURPOSE: The committee will provide advice to the Director, CDC on strategic and other broad issues facing CDC.

MATTERS TO BE DISCUSSED: During this conference call, the National Biosurveillance Advisory Subcommittee (NBAS) will provide recommendations to the ACD, CDC for transmittal to the administration. Since the NBAS was created in May, 2008, the subcommittee has been on a very aggressive timeline in order to provide the administration with key recommendations for improving the nation's biosurveillance capability. In order for these recommendations to go through the proper clearance steps and still be timely and relevant for the administration, the ACD, CDC must review and approve these recommendations as soon as possible. The NBAS was originally scheduled to present these recommendations to the ACD, CDC at the meeting scheduled for February 24, 2009.

Agenda items are subject to change as priorities dictate.

SUPPLEMENTARY INFORMATION: This conference call is scheduled to begin at 6 p.m. Eastern Standard Time. To participate in the teleconference, please dial 1–888–323–9787 and enter conference code 4735949.

CONTACT PERSON FOR MORE INFORMATION: Brad Perkins, M.D., M.B.A., Designated Federal Officer, ACD, CDC, 1600 Clifton Road, NE., M/S D–14, Atlanta, Georgia 30333. Telephone: 404–639–7000.

The ACD, CDC was scheduled to meet by conference call on February 24, 2009. The meeting was postponed on short notice because of quorum guidelines. The meeting is re-scheduled for March 4, 2009, at 6 p.m., as this is the only available time to gather a quorum of the ACD members.

This notice is being published less than 15 days prior to the meeting due to the scheduling difficulties encountered when planning the meeting, and due to the urgent nature of transmitting the recommendations to the administration.

The Director, Management Analysis and Services office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the CDC and the Agency for Toxic Substances and Disease Registry.

Andre Tyler,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. E9–4940 Filed 3–4–09; 4:15 pm]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–245]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicare and Medicaid Programs OASIS Collection Requirements as Part of the CoPs for HHAs and Supporting Regulations in 42 CFR, Sections 484.55, 484.205, 484.245, 484.250; *Use:* The Centers for Medicare & Medicaid Services is requesting OMB approval to modify the Outcome and Assessment Information Set (OASIS) data set that home health agencies (HHAs) are required to collect in order to participate in the Medicare program. Proposed revisions to the OASIS data set include: (1) Issues raised by stakeholders, including removing items that are not currently used by CMS for payment or quality, adding items to address clinical domains not currently covered, and modifying item wording or response categories for selected items; and (2) the addition of process items that support measurement of evidence-based practices. Proposed revisions to OASIS items address issues raised by stakeholders, including removing items that are not currently used by CMS for payment or quality, adding items to address clinical domains not currently covered, and modifying item wording or response categories for selected items. These changes and item deletions are considered to be high priority by CMS and have implications for outcome measurement, risk adjustment of outcome reports, case mix adjustment for prospective payment, data submission procedures and specifications, reporting systems, and provider paperwork burden.

In addition, adopting measures of efficient and high-quality care is central to the direction that CMS would like to take in its Quality Initiative. In accordance with long-standing Federal objectives, CMS ultimately plans to create a standard patient assessment instrument that can be used across all post-acute care settings. The revision of the OASIS instrument is an opportunity to consider various components of quality care and how patients might be better served as they (and information about them and their care) move among health care settings. For this reason, the OASIS C includes process items that support measurement of evidence-based practices across the post-acute care spectrum that have been shown to prevent exacerbation of serious conditions, can improve care received by individual patients, and can provide

guidance to agencies on how to improve care and avoid adverse events. *Form Number:* CMS–R–245 (OMB# 0938–0760); *Frequency:* Occasionally; *Affected Public:* Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 10,170; *Total Annual Responses:* 14,960,070; *Total Annual Hours:* 15,590,610.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *April 8, 2009.*

OMB, Office of Information and Regulatory Affairs

Attention: CMS Desk Officer.
Fax Number: (202) 395–6974.
E-mail: *OIRA_submission@omb.eop.gov*.

Dated: March 3, 2009.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E9–4883 Filed 3–6–09; 8:45 am]

BILLING CODE 4120–01–U–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Developmental Disabilities Program Independent Evaluation Project.

OMB No.: New collection.

Description: The Developmental Disabilities Program Independent Evaluation (DDPIE) Project is an independent (non-biased) evaluation to examine through rigorous and comprehensive performance-based research procedures the targeted impact on the lives of people with developmental disabilities and their families of three programs funded under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act): (1) State Councils on Developmental Disabilities (SCDDs); (2) State Protection and Advocacy Systems for Individuals with developmental disabilities (P & As); and (3) University Centers for Excellence in Developmental Disabilities (UCEDDs). The intent of this evaluation is to understand and report on the accomplishments of these programs, including collaborative efforts among the DD Network programs. The results of this evaluation will provide a report to the Administration on Developmental Disabilities (ADD) (the agency that administers these programs) with information on the effectiveness of its programs and policies and serve as a way for ADD to promote accountability to the public.

The independent evaluation is a response to accountability requirements for ADD as identified in the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), the Government Performance and Results Act (GPRA) of 1993, and the Program Assessment Rating Tool (PART), administered by the Office of Management and Budget (OMB). This project meets the requirements of PART by providing a non-biased method of evaluating the effectiveness and impact of DD Network programs on the lives of people with developmental disabilities and their families.

ADD is seeking OMB approval for the evaluation tools (*e.g.*, data collection instruments). The evaluation tools are designed to collect data for two purposes: (1) To measure the programs according to indicators (structural, process, output, and outcome) in key function areas; and (2) to establish performance standards for measuring the impact of each of the programs. The evaluation tools are primarily protocols for conducting interviews with various staff of the three programs and stakeholders associated with the programs. The interview protocols were tested during a pilot study in 2008. There is also a self-administered form for each of the programs to be completed by Executive Directors or his/her designee. The self-administered form was developed as a result of the pilot study and, therefore, has not been tested for reliability and validity. It is intended that the clearance process will be a mechanism for determining the reliability, validity, and feasibility of using this instrument.

Respondents: Staff of State Councils on Developmental Disabilities, State Protection and Advocacy Systems for Indiviiduals with developmental disabilities, and University Centers for Excellence in Developmental Disabilities, Education, Research, and Service; individuals with developmental disabilities; parents of individuals with developmental disabilities; siblings of individuals with developmental disabilities; guardians; advocates; policymakers; service providers; university faculty; and others (*e.g.*, DDC chairs, members of Protection and Advocacy boards of directors or commissioners; Consumer Advisory Committee members).

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
DD Council: Executive Director Interview	20	1	4	80
DD Council: Interview with Council Chair/Council Members	60	1	0.75	45
DD Council: Group Interview with Policymakers, Collaborators, and Grantees	160	1	2	320
DD Council: Group Interview with Recipients of Self-Advocacy and Leadership Education and Training	100	1	0.75	75
DD Council: Group Interview with Recipients of Education and Training to Improve Community Capacity	100	1	0.75	75
DD Council: Self-administered Form	20	1	8	160
P&A: Executive Director Interview	20	1	4	80
P&A: Staff Interview	60	1	0.75	45

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
P&A: Board of Directors (Commissioners)—Chair and Members	60	1	0.75	45
P&A: Group Interview with Policymakers and Collaborators	160	1	2	320
P&A: Interview with Recipient of Community Education	100	1	0.75	75
P&A: Interview with Clients	100	1	0.75	75
P&A: Self-administered Form	20	1	8	160
UCEDD: Interview with Director	20	1	4	80
UCEDD: Telephone Interview with Current and Graduated Students	100	1	0.75	75
UCEDD: Interview with the Consumer Advisory Committee	60	1	0.75	45
UCEDD: Interview with Peer Researchers and Colleagues	100	1	0.75	75
UCEDD: Interview with Recipients of Community Services or Members of Organizations/Agencies that are Trained to Provide Community Services	100	1	0.75	75
UCEDD: Self-administered Form	20	1	8	160

Estimated Total Annual Burden Hours: 2,065.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: March 4, 2009.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E9–4857 Filed 3–6–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[CFDA#: 93.604]

Office of Refugee Resettlement

AGENCY: Office of Refugee Resettlement, ACF, DHHS.

ACTION: Notice of a Noncompetitive Successor Award to Utah Health and Human Rights Service for Grant Number 90ZT0059.

Legislative Authority: ''Torture Victims Relief Act (TVRA) of 1998,'' Public Law 105–320 (22 U.S.C. 2152 note), reauthorized by Public Law 109–165 in January 2006. Section 5(a) of the law provides: Assistance for Treatment of Torture Victims—The Secretary of Health and Human Services may provide grants to programs in the United States to cover the cost of the following services: (1) Services for the rehabilitation of victims of torture, including treatment of the physical and psychological effects of torture. (2) Social and legal services for victims of torture. (3) Research and training for health care providers outside of treatment centers, or programs for the purpose of enabling such providers to provide the services described in paragraph (1).

Amount of Award: Remainder of current budget period February 1, 2009 through September 29, 2009. Award $152,405. Final budget period of the originally approved three-year project period September 30, 2008 through September 29, 2009.

Project Period: February 1, 2009–September 29, 2009.

Summary: In FY 2006, ORR awarded a competitive Services for Survivors of Torture grant to the Tides Center/Utah Health and Human Rights Project in Salt Lake City, Utah. The original project period was from September 30, 2006 through September 29, 2009. The Tides Center served as fiscal sponsor and legal entity of the approved project. The Tides Center provides essential financial, human resources, and administrative services to philanthropic projects such as the Utah Health and Human Rights Project (UHHRP) while enabling them to become independent agencies. UHHRP has now completed the process of becoming an independent agency and is formally separating from the Tides Center on January 31, 2009. The Tides Center has requested permission for UHHRP to assume the grant. UHHRP has agreed to this request and will continue to function with the scope and operations of the grant remaining unchanged.

Contact for Further Information: Ronald Munia, Director, Division of Community Resettlement, Office of Refugee Resettlement, 370 L'Enfant Promenade, SW., Washington, DC 20447. Telephone: 202–401–4559. E-mail: *Ronald.Munia@acf.hhs.gov.*

Dated: March 3, 2009.

Ronald Munia,

Director, Division of Community Resettlement, Office of Refugee Resettlement.

[FR Doc. E9–4922 Filed 3–6–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0607]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Reclassification Petitions for Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by April 8, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0138. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Reclassification Petitions for Medical Devices—21 CFR Section 860.123 (OMB Control Number 0910–0138)—Extension

FDA has responsibility under sections 513(e) and (f), 514(b), 515(b), and 520(l) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(e), and (f), 360d(b), 360e(b), and 360j(l)) and part 860 (21 CFR part 860), subpart C, to collect data and information contained in reclassification petitions. The reclassification provisions of the act allow any person to petition for reclassification of a device from any one of the three classes i.e, I, II, and III, to another class. The reclassification procedure regulation requires the submission of specific data when a manufacturer is petitioning for reclassification. This includes a ''Supplemental Data Sheet,'' Form FDA 3427, and a ''Classification Questionnaire,'' Form FDA 3429. Both forms are a series of questions concerning the safety and effectiveness of the device type. Further, the reclassification content regulation (§ 860.123) requires the submission of sufficient, valid scientific evidence demonstrating that the proposed reclassification will provide a reasonable assurance of safety and effectiveness of the device type for its indications for use. Thus, the reclassification provisions of the act serve primarily as a vehicle for manufacturers to seek reclassification from a higher to a lower class, thereby reducing the regulatory requirements applicable to a particular device type, or to seek reclassification from a lower to a higher class, thereby increasing the regulatory requirements. The reclassification petitions requesting classification from class III to class II or class I, if approved, provides an alternative route to the market in lieu of premarket approval for class III devices or from class I or II, to one or the other class, which may increase requirements.

In the **Federal Register** of December 4, 2008 (73 FR 73938), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
860.123	6	1	6	500	3,000

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on the last 3 years, and actual reclassification petitions received, FDA anticipates that six petitions will be submitted each year. The time required to prepare and submit a reclassification petition, including the time needed to assemble supporting data, averages 500 hours per petition. This average is based upon estimates by FDA administrative and technical staff that: (1) Are familiar with the requirements for submission of a reclassification petition, (2) have consulted and advised manufacturers on these requirements, and (3) have reviewed the documentation submitted.

Dated: March 2, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–4829 Filed 3–6–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0098]

Agency Information Collection Activities; Proposed Collection; Comment Request; Evaluation of Potential Data Sources for the Sentinel Initiative

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the proposed information collection through a survey designed to identify potential data sources and/or data environments that could participate in the Sentinel Initiative to create a national, electronic distributed system, strengthening FDA's ability to monitor the postmarket performance of a medical product.

DATES: Submit written or electronic comments on the collection of information by May 8, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information

Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794. To obtain a copy of the draft survey instrument contact Tomeka Arnett on 301–827–1512.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Evaluation of Potential Data Sources for the Sentinel Initiative

In September 2005, the Secretary of Health and Human Services (the Secretary) asked FDA to expand its current system for monitoring medical product performance. The Secretary asked FDA to explore the possibility of working in collaboration with multiple healthcare data systems to augment FDA's capability of identifying and evaluating product safety information beyond its existing voluntary reporting systems. Such a step would strengthen FDA's ability, ultimately, to monitor the performance of a product after marketing approval. The Secretary recommended that FDA explore creating a public-private collaboration as a framework for such an effort leveraging increasingly available large, electronic healthcare databases and taking advantage of emerging technologies and building on existing systems and efforts, rather than creating new systems.

In 2006, the Institute of Medicine (IOM) issued a report entitled ''The Future of Drug Safety—Promoting and Protecting the Health of the Public.''[1] Among other suggestions, this IOM report recommended FDA identify ways to access other health-related databases and create a public-private partnership to support safety and efficacy studies.

In 2007, Congress enacted the Food and Drug Administration Amendments Act of 2007[2] (FDAAA). Section 905 of FDAAA calls for the Secretary to develop methods to obtain access to disparate data sources and to establish an active postmarket risk identification and analysis system that links and analyzes healthcare data from multiple sources. The law sets a goal of access to data from 25 million patients by July 1, 2010, and 100 million patients by July 1, 2012. The law also requires FDA to work closely with partners from public, academic, and private entities. FDA views the Sentinel Initiative as a mechanism through which this mandate can be carried out.

Consistent with FDA's mission to protect and promote the public health, FDA is embarking on the Sentinel Initiative to create a national, electronic distributed system, strengthening FDA's ability to monitor the post-market performance of a product. As currently envisioned, the Sentinel Initiative will enable FDA to capitalize on the capabilities of multiple, existing data systems (e.g. electronic health record systems and medical claims databases) to augment the agency's current surveillance capabilities. The proposed system will enable queries of distributed data sources quickly and securely for relevant product safety information. Data will continue to be managed by its owners, and only data of organizations who agree to participate in this system will be included. Operations will adhere to strict privacy and security safeguards.

The success of this Initiative will depend largely on the content, quality, searchability, and responsiveness of participating data sources and/or data environments. It is essential that FDA understand the strengths and limitations of potential data sources that might be included in the Sentinel Initiative. This survey will be used to collect information from potentially participating data sources and/or environments. The data we are seeking will describe the characteristics of the data available, not personally identifiable information. The findings will help FDA plan for this proposed system and for future work related to the Sentinel Initiative.

This survey will collect information on the scope, content, structure, quality, and timeliness of data; patient population(s), duration of follow up, and capture of care across all settings; availability, experience, and interest of investigators with knowledge of the data in using it for post-market product safety surveillance as well as plans for further data source enhancements; availability, experience, and interest of investigators with knowledge of the data in participating in a distributed data system; and barriers that exist to including each data source in the Sentinel Initiative.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Activity	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Data Source and/or Environment Survey	250	1	250	24.5	6,125

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

[1] Institute of Medicine, ''The Future of Drug Safety—Promoting and Protecting the Health of the Public,'' September 22, 2006, *http://www.iom.edu/*. (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.)

[2] Food and Drug Administration Amendments Act of 2007, Public Law 110–85, was signed into law in September 2007. See Title IX, Section 905.

FDA estimates that approximately 250 respondents will participate in this voluntary survey. These respondents will consist mostly of other Federal agencies, health plan data sources, health information exchanges, large multi-specialty medical groups and academic medical centers, large hospital systems, pharmacies, medical societies, consumer-oriented Web sites, commercial data sets, research networks, lab data, and registries.

Each respondent will extend approximately 24.5 hours to complete 1 survey for a total of 6,125 hours (250 x 1 x 24.5 = 6,125).

Dated: February 27, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–4830 Filed 3–6–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–E–0164]

Determination of Regulatory Review Period for Purposes of Patent Extension; ALTABAX OINTMENT

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for ALTABAX OINTMENT and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Submit written comments and petitions to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the human drug product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product ALTABAX OINTMENT (retapamulin). ALTABAX OINTMENT is indicated for the topical treatment of impetigo due to *Staphylococcus aureus* (methicillin-susceptible isolates only) or *Streptococcus pyogenes* in patients aged 9 months or older. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for ALTABAX OINTMENT (U.S. Patent No. RE39,128E) from SmithKline Beecham P.L.C., and SmithKline Beecham Corp., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated April 28, 2008, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of ALTABAX OINTMENT represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for ALTABAX OINTMENT is 1,602 days. Of this time, 1,297 days occurred during the testing phase of the regulatory review period, while 305 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(i)) became effective*: November 24, 2002. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on November 24, 2002.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the act*: June 12, 2006. FDA has verified the applicant's claim that the new drug application (NDA) for ALTABAX OINTMENT (NDA 22–055) was initially submitted on June 12, 2006.

3. *The date the application was approved*: April 12, 2007. FDA has verified the applicant's claim that NDA 22–055 was approved on April 12, 2007.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 833 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments and ask for a redetermination by May 8, 2009. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by September 8, 2009. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 17, 2009.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. E9–4914 Filed 3–6–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council on Blood Stem Cell Transplantation; Request for Nominations for Voting Members

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is requesting nominations to fill expected vacancies on the Advisory Council on Blood Stem Cell Transplantation.

The Advisory Council on Blood Stem Cell Transplantation was established pursuant to Public Law 109–129, 42 U.S.C. 274k (section 379 of the Public Health Service Act, as amended). In accordance with Public Law 92–463, the Council was chartered on December 19, 2006.

DATES: The agency must receive nominations on or before April 8, 2009.

ADDRESSES: All nominations should be submitted to the Executive Secretary, Advisory Council on Blood Stem Cell Transplantation, Healthcare Systems Bureau, HRSA, Parklawn Building, Room 12–105, 5600 Fishers Lane, Rockville, Maryland 20857. Federal Express, Airborne, or UPS, mail delivery should be addressed to Executive Secretary, Advisory Council on Blood Stem Cell Transplantation, Healthcare Systems Bureau, HRSA, at the above address.

FOR FURTHER INFORMATION CONTACT: Remy Aronoff, Executive Secretary, Advisory Council on Blood Stem Cell Transplantation, at (301) 443–3264 or e-mail *Remy.Aronoff@hrsa.hhs.gov* or Robert Baitty, Director, Blood Stem Cell Transplantation Program, Division of Transplantation, at (301) 443–2612 or e-mail *Robert.Baitty@hrsa.hhs.gov*.

SUPPLEMENTARY INFORMATION: The Council was established to implement a statutory requirement of the Stem Cell Therapeutic and Research Act of 2005 (Pub. L. 109–129). The Council is governed by the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

The Advisory Council advises the Secretary and the Administrator, HRSA, on matters related to the activities of the C.W. Bill Young Cell Transplantation Program and the National Cord Blood Inventory Program.

The Council shall, as requested by the Secretary, discuss and make recommendations regarding the C.W. Bill Young Cell Transplantation Program (Program). It shall provide a consolidated, comprehensive source of expert, unbiased analysis and recommendations to the Secretary on the latest advances in the science of blood stem cell transplantation. The Council shall advise, assist, consult and make recommendations, at the request of the Secretary, on broad Program policy in areas such as the necessary size and composition of the adult donor pool available through the Program and the composition of the National Cord Blood Inventory, requirements regarding informed consent for cord blood donation, accreditation requirements for cord blood banks, the scientific factors that define a cord blood unit as high quality, public and professional education to encourage the ethical recruitment of genetically diverse donors and ethical donation practices, criteria for selecting the appropriate blood stem source for transplantation, Program priorities, research priorities, and the scope and design of the Stem Cell Therapeutic Outcomes Database. It also shall, at the request of the Secretary, review and advise on issues relating more broadly to the field of blood stem cell transplantation, such as regulatory policy including compatibility of international regulations, and actions that may be taken by the State and Federal Governments and public and private insurers to increase donation and access to transplantation. The Advisory Council also shall make recommendations regarding research on emerging therapies using cells from bone marrow and cord blood.

The Council consists of up to 25 members, including the Chair. Members of the Advisory Council shall be chosen to ensure objectivity and balance, and reduce the potential for conflicts of interest. The Secretary shall establish bylaws and procedures to prohibit any member of the Advisory Council who has an employment, governance, or financial affiliation with a donor center, recruitment organization, transplant center, or cord blood bank from participating in any decision that materially affects the center, recruitment organization, transplant center, or cord blood bank; and to limit the number of members of the Advisory Council with any such affiliation.

The members and Chair shall be selected by the Secretary from outstanding authorities and representatives of marrow donor centers and marrow transplant centers; representatives of cord blood banks and participating birthing hospitals; recipients of a bone marrow transplant; recipients of a cord blood transplant; persons who require such transplants; family members of such a recipient or family members of a patient who has requested the assistance of the Program in searching for an unrelated donor of bone marrow or cord blood; persons with expertise in bone marrow and cord blood transplantation; persons with expertise in typing, matching, and transplant outcome data analysis; persons with expertise in the social sciences; basic scientists with expertise in the biology of adult stem cells; ethicists, hematology and transfusion medicine researchers with expertise in adult blood stem cells; persons with expertise in cord blood processing; and members of the general public.

In addition, representatives from the Division of Transplantation of the Health Resources and Services Administration, the Department of Defense Marrow Recruitment and Research Program operated by the Department of the Navy, the Food and Drug Administration, the National Institutes of Health, the Centers for Medicare & Medicaid Services, and the Centers for Disease Control and Prevention serve as non-voting *ex officio* members.

Specifically, HRSA is requesting nominations for voting members of the Advisory Council on Blood Stem Cell Transplantation in these categories: Marrow donor centers and transplant centers representatives; cord blood banks and participating hospitals representatives; family members of bone marrow transplant and cord blood transplant recipients or family members of a patient who has requested assistance by the Program in searching for an unrelated donor; persons with expertise in bone marrow or cord blood transplantation; persons with expertise in typing, matching, and transplant outcome data analysis; basic scientists with expertise in the biology of adult stem cells; researchers in hematology and transfusion medicine with expertise in adult blood stem cells; persons with expertise in cord blood processing; and members of the general public. Nominees will be invited to serve a 2- to 6-year term beginning after January 1, 2010.

HHS will consider nominations of all qualified individuals to ensure that the Advisory Council includes the areas of subject matter expertise noted above. Individuals may nominate themselves or other individuals, and professional associations and organizations may nominate one or more qualified persons for membership on the Advisory Council. Nominations shall state that the nominee is willing to serve as a member of the Council. Potential candidates will be asked to provide detailed information concerning financial interests, consultancies, research grants, and/or contracts that might be affected by recommendations of the Council to permit evaluation of possible sources of conflicts of interest. In addition, nominees will be asked to provide detailed information concerning any employment, governance, or financial affiliation with any donor centers, recruitment organizations, transplant centers, and/or cord blood banks.

A nomination package should be sent in hard copy accompanied by an electronic version of the documents on compact disc. A nomination package should include the following information for each nominee: (1) A letter of nomination stating the name, affiliation, and contact information for the nominee, the basis for the nomination (*i.e.*, what specific attributes recommend him/her for service in this capacity), and the nominee's field(s) of expertise; (2) a biographical sketch of the nominee and a copy of his/her curriculum vitae; and (3) the name, return address, e-mail address, and daytime telephone number at which the nominator can be contacted.

The Department of Health and Human Services has special interest in assuring that women, minority groups, and the physically disabled are adequately represented on advisory committees; and therefore, extends particular encouragement to nominations for appropriately qualified female, minority, or disabled candidates.

Dated: February 27, 2009.

Elizabeth M. Duke,

Administrator.

[FR Doc. E9–4927 Filed 3–6–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; REDS–II Donor Iron Status Evaluation (RISE) Study

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health (NIH), will publish periodic summaries of proposed projects to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection

Title: REDS–II Donor Iron Status Evaluation (RISE) Study. *Type of Information Collection Request:* Revision of a currently approved collection. OMB control # 0925–0581. *Expiration Date:* 05/31/2009. *Need and Use of Information Collection:* Although the overall health significance of iron depletion in blood donors is uncertain, iron depletion leading to iron deficient erythropoiesis and lowered hemoglobin levels results in donor deferral and, occasionally, in mild iron deficiency anemia. Hemoglobin deferrals represent more than half of all donor deferral, deferring 16% of women. The RISE Study is a longitudinal study of iron status in two cohorts of blood donors: a first time/reactivated donor cohort in which baseline iron and hemoglobin status can be assessed without the influence of previous donations, and a frequent donor cohort, where the cumulative effect of additional frequent blood donations can be assessed. Each cohort's donors will donate blood and provide evaluation samples during the study period.

The primary goal of the study is to evaluate the effects of blood donation intensity on iron and hemoglobin status and assess how these are modified as a function of baseline iron/hemoglobin measures, demographic factors, and reproductive and behavioral factors. Hemoglobin levels, a panel of iron protein, red cell and reticulocyte indices will be measured at baseline and at a final follow-up visit 15–24 months after the baseline visit. A DNA sample will be obtained once at the baseline visit to assess three key iron protein polymorphisms. Donors will also complete a self-administered survey assessing past blood donation, smoking history, use of vitamin/mineral supplements, iron supplements, aspirin, frequency of heme rich food intake, and, for females, menstrual status and pregnancy history at these two time points. This study aims to identify the optimal laboratory measures that would predict the development of iron depletion, hemoglobin deferral, and/or iron deficient hemoglobin deferral in active whole blood and double red cell donors at subsequent blood donations. The data collected will help evaluate hemoglobin distributions in the blood donor population (eligible and deferred donors) and compare them with NHANES data. Other secondary objectives include elucidating key genetic influences on hemoglobin levels and iron status in a donor population as a function of donation history; and establishing a serum and DNA archive to evaluate the potential utility of future iron studies and genetic polymorphisms.

This study will develop better predictive models for iron depletion and hemoglobin deferral (with or without iron deficiency) in blood donors; allow for the development of improved donor screening strategies and open the possibility for customized donation frequency guidelines for individuals or classes of donors; provide important baseline information for the design of targeted iron supplementation strategies in blood donors, and improved counseling messages to blood donors regarding diet or supplements; and by elucidating the effect of genetic iron protein polymorphisms on the development of iron depletion, enhance the understanding of the role of these proteins in states of iron stress, using frequent blood donation as a model.

This request for modification is to add eleven questions to the RISE study final visit questionnaire that will include questions about Restless Leg Syndrome (RLS) and pica, two disorders associated with iron deficiency. RLS is a neurologic movement disorder in which patients complain of crawling, aching or indescribable feelings in their legs or just have the need to move. Pica is an eating disorder defined as compulsive ingestion of non-food substances. Blood donation results in the removal of 200–250 mg of iron from the donor. It is well established that repeated blood donation can produce iron deficiency, yet the prevalence of RLS and pica among blood donors is unknown. The REDS–II RISE study subjects are an ideal study population for the investigation of RLS and pica in blood donors. About 2,400 subjects with variable donation intensity (*e.g.* frequency with which a person donates blood) are currently enrolled in the RISE

Study. The iron status of all of these subjects is well characterized, including measurement of plasma ferritin and soluble transferrin receptor along with hemoglobin/hematocrit. These laboratory values allow each subject to be defined as (1) iron replete, (2) iron deficient without anemia or (3) iron deficiency anemia. The responses to these questions will be correlated with the laboratory test values to determine the relationship between blood donation and the development of RLS and pica and will establish its prevalence in these populations.

Frequency of Response: Twice. *Affected Public:* Individuals. *Type of Respondents:* Adult blood donors. The annual reporting burden is a follows: *Estimated Number of Respondents:* Baseline visit: 2,340. Follow up Visit: 1,530; *Estimated Number of Responses per Respondent:* 1. *Average Burden of Hours per Response:* Baseline Visit: 0.37. Follow up Visit: 0.25; and *Estimated Total Annual Burden Hours Requested:* Baseline visit: 866. Follow up Visit: 383. The annualized cost to respondents is estimated at: Baseline Visit: $15,588, Follow up Visit: $6,894 (based on $18 per hour). There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Blood donors at Baseline Visit	2,340	1	0.37	866
Blood donors at Follow-up Visit	1,530	1	0.25	383
Total				1,249

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. George Nemo, Project Officer, NHLBI, Two Rockledge Center, Suite 10042, 6701 Rockledge Drive, Bethesda, MD 20892–7950, or call 301–435–0075, or e-mail your request to *nemog@nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: February 27, 2009.

George Nemo,

NHLBI Project Officer, NHLBI, National Institutes of Health.

[FR Doc. E9–4836 Filed 3–6–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel. Minority Biomedical Research Score Applications.

Date: March 25–26, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: John J. Laffan, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892, 301–594–2773, *laffanjo@mail.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel. Minority Biomedical Research Support Score Applications.

Date: March 26–27, 2009.

Time: 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3AN18, 45 Center Drive, Bethesda, MD 20892. (Virtual Meeting).

Contact Person: Rebecca H. Johnson, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18C, Bethesda, MD 20892, 301–594–2771, *johnsonrh@nigms.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel. Molecular Biology of Hemorrhagic Shock.

Date: March 30, 2009.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3AN18, 45 Center Drive, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Brian R. Pike, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 27, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–4845 Filed 3–6–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Subcommittee for Planning the Annual Strategic Plan Updating Process of the Interagency Autism Coordinating Committee (IACC).

The purpose of the Subcommittee for Planning the Annual Strategic Plan Updating Process is to discuss a strategy for annually updating the IACC Strategic Plan for Autism Spectrum Disorder Research. The meeting will be open to the public with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below at least 7 days in advance of the meeting.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of Meeting: Subcommittee for Planning the Annual Strategic Plan Updating Process.

Date: March 17, 2009.

Time: 12 p.m. to 3 p.m. Eastern Time.

Agenda: To discuss a strategy for annually updating the Strategic Plan for Autism Spectrum Disorder Research.

Place:

In Person: The National Institutes of Health, 31 Center Drive, Building 31, C Wing, 6th Floor, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Webinar: https://www1.gotomeeting.com/register/609274163. To Access the Conference Call: Dial: 888–455–2920, Access Code: 3857872.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, Office of the Director, National Institute of Mental Health, NIH, 6001 Executive Boulevard, Room 8200, Bethesda, MD 20892–9669, 301–443–6040, *IACCPublicInquiries@mail.nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Please Note

The meeting will be open to the public through a conference call phone number and a Web presentation tool on the Internet. Individuals who participate using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request at least 7 days prior to the meeting.

Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. There may be an opportunity for members of the public to submit written comments during the meeting through the Web presentation tool. Submitted comments will be reviewed after the meeting. If you experience any technical problems with the Web presentation tool, please contact GoToWebinar at (800) 263–6317.

To access the Web presentation tool on the Internet the following computer capabilities are required: (A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later; (B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista; (C) Stable 56k, cable modem, ISDN, DSL or better Internet connection; (D) Minimum of Pentium 400 with 256 MB of RAM (Recommended); (E) Java Virtual Machine enabled (Recommended).

This notice is being published less than 15 days prior to the meeting due to the scheduling limitations of the members.

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov.*

Dated: February 27, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–4846 Filed 3–6–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, EUREKA Grant Applications.

Date: April 2–3, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3AN12, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lisa Dunbar, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, SCORE.

Date: April 3, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Arthur L. Zachary, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12, Bethesda, MD 20892, (301) 594–2886, *zacharya@nigms.nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, System Biology.

Date: April 3, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Mona R. Trempe, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–3998, *trempemo@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: February 27, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–4848 Filed 3–6–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Services Subcommittee of the Interagency Autism Coordinating Committee (IACC).

The purpose of the Services Subcommittee is to review the current state of services and supports for individuals with Autism Spectrum Disorder (ASD) and their families in order to improve these services. The meeting will be open to the public with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below at least 10 days in advance of the meeting.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Services Subcommittee.

Date: March 26, 2009.

Time: 1 p.m. to 5 p.m. Eastern Time.

Agenda: To discuss strategic planning for Autism Spectrum Disorder services and supports, and a presentation on TRICARE activities surrounding Autism Spectrum Disorder.

Place:

In Person: The Hubert H. Humphrey Building, Conference Room 335G2, 200 Independence Avenue, SW., Washington, DC 20201.

Webinar: https://www1.gotomeeting.com/register/563207085 To Access the Conference Call: Dial: 888–455–2920. Access code: 3857872.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, Office of the Director, National Institute of Mental Health, NIH, 6001 Executive Boulevard, Room 8200, Bethesda, MD 20892–9669, 301–443–6040, *IACCPublicInquiries@mail.nih.gov.*

In the interest of security, all guests are screened upon entry into the building. Please allow extra time for this process.

Please Note: The meeting will be open to the public through a conference call phone number and a web presentation tool on the Internet. Individuals who participate using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request at least 10 days prior to the meeting.

Members of the public who participate using the conference call phone number will be able to listen to the meeting but will not be heard. There may be an opportunity for members of the public to submit written comments during the meeting through the Web presentation tool. Submitted comments will be reviewed after the meeting. If you experience any technical problems with the web presentation tool, please contact GoToWebinar at (800) 263–6317.

To access the Web presentation tool on the Internet the following computer capabilities are required:

(A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later;

(B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista;

(C) Stable 56k, cable modem, ISDN, DSL or better Internet connection;

(D) Minimum of Pentium 400 with 256 MB of RAM (Recommended);

(E) Java Virtual Machine enabled (Recommended).

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov*

Dated: February 27, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–4850 Filed 3–6–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration (SAMHSA) National Advisory Council will meet on April 22, 2009 in the San Carlos Apache Reservation, San Carlos, Arizona.

The meeting is open to the public. It will include a report from the SAMHSA Acting Administrator, Update on SAMHSA's Budget, and discussions focusing on Understanding the Role of Behavioral Health in Overall Health and Creating and Sustaining Recovery-Oriented Systems of Care for American Indian/Alaska Native Communities.

Attendance by the public will be limited to space available. Public comments are welcome. The meeting can also be accessed via teleconference. To obtain the teleconference call-in numbers and access codes, to register, to submit written or brief oral comments, or to request special accommodations for persons with disabilities, please communicate with the SAMHSA National Advisory Council Designated Federal Official, Ms. Toian Vaughn (see contact information below).

Substantive program information, a summary of the meeting, and a roster of Council members may be obtained as soon as possible after the meeting, either by accessing the SAMHSA Committee Web site, *https://nac.samhsa.gov/NACcouncil/index.aspx* or by contacting Ms. Vaughn. The transcript for the meeting will also be available on the SAMHSA Committee Web site within three weeks after the meeting.

Committee Name: SAMHSA National Advisory Council.

Date/Time/Type: Wednesday, April 22, 2009, from 8:30 a.m. to 5:30 p.m.: Open.

Place: San Carlos Apache Tribal Reservation, Apache Gold Casino Resort Convention Center, Highway 70, San Carlos, Arizona 85550.

Contact: Toian Vaughn, M.S.W., Designated Federal Official, SAMHSA National Advisory Council and SAMHSA Committee Management Officer, 1 Choke Cherry Road, Room 8–1089, Rockville, Maryland 20857.

Telephone: (240) 276–2307; FAX: (240) 276–2220 and E-mail: *toian.vaughn@samhsa.hhs.gov.*

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. E9–4864 Filed 3–6–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2009–N0037; 40120–1112–0000–F5]

Receipt of Applications for Endangered Species Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with threatened and endangered species.

DATES: We must receive written data or comments on the applications at the address given below, by *April 8, 2009.*

ADDRESSES: Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: David Dell, HCP Coordinator).

FOR FURTHER INFORMATION CONTACT: David Dell, telephone 404/679–7313; facsimile 404/679–7081.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following applications for permits to

conduct certain activities with endangered and threatened species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). This notice is provided under section 10(c) of the Act. If you wish to comment, you may submit comments by any one of the following methods. You may mail comments to the Fish and Wildlife Service's Regional Office (see **ADDRESSES** section) or via electronic mail (e-mail) to *david_dell@fws.gov*. Please include your name and return address in your e-mail message. If you do not receive a confirmation from the Fish and Wildlife Service that we have received your e-mail message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section). Finally, you may hand deliver comments to the Fish and Wildlife Service office listed above (see **ADDRESSES** section).

Before including your address, telephone number, e-mail address, or other personal identifying information in your comments, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Applicant: David Nelson, University of South Alabama, Mobile, Alabama, TE091704.

The applicant requests renewal of existing authorization to survey, capture, and retain in captivity the Alabama red-bellied turtle (*Pseudemys alabamensis*) throughout Alabama.

Applicant: Moody Air Force Base, Georgia, TE206768.

The applicant requests authorization to harass wood storks (Mycteria americana) for operational safety purposes at Moody Air Force Base.

Applicant: Savannah River Ecology Laboratory, Aiken, South Carolina, TE801914.

The applicant requests renewal of existing authorization to capture, tag, and monitor wood storks for research and management purposes throughout Florida, Georgia, and South Carolina.

Applicant: Eco-Tech Consultants, Frankfort, Kentucky, TE810274.

The applicant requests amendment of existing authorization to add authority to capture, identify, and release Virginia big-eared bats (Plecotus townsendii virginianus), and Ozark big-eared bats (Plecotus townsendii ingenss) throughout the species ranges in the southeast and midwestern United States.

Applicant: Marine Science Center, Ponce Inlet, Florida, TE050044.

The applicant requests renewal of existing authorization to hold for veterinary treatment, to retain unreleasable specimens, or to euthanize specimens of Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*), loggerhead (*Caretta caretta*), and olive ridley (*Lepidochelys olivacea*) sea turtles. Treatment facilities are at Clearwater Marine Aquarium, but specimens may be accepted from authorized sources throughout Florida and other southeastern states.

Applicant: Georgia Sea Turtle Center, Jekyll Island, Georgia, TE206782.

The applicant requests authorization to hold for veterinary treatment, to retain unreleasable specimens, or to euthanize specimens of Kemp's ridley, hawksbill, leatherback, green, loggerhead, and olive ridley sea turtles. Treatment facilities are at Georgia Sea Turtle Center, but specimens may be accepted from authorized sources throughout Georgia and other southeastern states.

Applicant: Share the Beach, Gulf Shores, Alabama, TE100012.

The applicant requests renewal of existing authorization to survey, harass, capture, and translocate Kemp's ridley, green, and loggerhead sea turtles for recovery-related management purposes throughout coastal Alabama.

Applicant: Arnold Air Force Base, Tennessee, TE034379.

The applicant requests renewal of existing authorization to capture, identify, and release Indiana bats (*Myotis sodalis*), and gray bats (*Myotis grisescen*) for presence/absence surveys throughout Tennessee.

Applicant: Jason Jennings, Shelby, Tennessee, TE206776.

The applicant requests authorization to capture, identify, and release Indiana bats, and gray bats for presence/absence surveys throughout Tennessee.

Applicant: Ralph Costa, Mountain Rest, South Carolina, TE206777.

The applicant requests authorization to harass, capture, band, translocate, and conduct other management activities with the red-cockaded woodpecker (Picoides borealis) throughout the species range in Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Oklahoma.

Applicant: Florida Army National Guard, Starke, Florida, TE102418.

The applicant requests renewal of existing authorization to harass, capture, band, translocate, and conduct other management activities with the red-cockaded woodpecker on Camp Blanding, Florida.

Applicant: Sandhills Ecological Institute, Southern Pines, North Carolina, TE087191.

The applicant requests renewal of existing authorization to harass, capture, band, translocate, and conduct other management activities with the red-cockaded woodpecker in the sandhills region, Moore, Hoke, Cumberland, Richmond, and Scotland counties, North Carolina.

Applicant: Keith Walker, Montgomery, Alabama, TE069280.

The applicant requests renewal of existing authorization to collect little amphianthus (*Amphianthus pusillus*), Price's potato-bean (*Apios priceana*), American hart's-tongue fern (*Asplenium scolopendriun var. americanum*), Morefield's leather flower (*Clematis morefieldii*), Alabama leather flower (*Clematis socialis*), leafy prairie-clover (*Dalea foliosa*), Eggert's sunflower (*Helianthus eggertii*), lyrate bladderpod (*Lesquerella lyrata*), Mohr's barbara button (*Marshallia mohrii*), harperella (*Ptilimnium nodosum*), Kral's water-plantain (*Sagittaria secundifolia*), green pitcher-plant (*Sarracenia oreophila*), Alabama cane-break pitcher-plant (*Sarracenia rubra alabamensis*), American chaffseed (*Schwalbea americana*), gentian pinkroot (*Spigelia gentianoides*), Alabama streak-sorus fern (*Thelypteris pilosa var. alabamensis*), relict trillium (*Trillium reliquum*), and Tennessee yellow-eyed grass (*Xyris tenneseensis*), for survey purposes throughout Alabama, and requests amendment to expand authorized area of surveys throughout Georgia, Florida, Mississippi, and Tennessee.

Applicant: William Bailey, Searcy, Arkansas, TE206784.

The applicant requests authorization to capture, tag, translocate, and release the American burying beetle (*Nicrophorus americanus*) for population monitoring and management throughout Arkansas.

Applicant: Sean Beckmann, University of Miami, Florida, TE206774.

The applicant requests authorization to capture, tag, collect tissue samples, and release, Key Largo cotton mouse (*Peromyscus gossypinus allipaticola*) while conducting research activities throughout Key Largo, Florida.

Applicant: Wendell Neal, Brandon, Mississippi, TE797420.

The applicant requests renewal of existing authorization to capture, tag, and release, Perdido Key (*Peromyscus polionotus trissyllepsis*), Choctawhatchee (*P.p. polionotus*), Alabama (*P.p. ammobates*), Anastasia Island (*P.p. phasma*), and southeastern (*P.p. niveiventris*) beach mice while conducting presence/absence surveys throughout Alabama and Florida.

Applicant: Thomas Gunter, Tallahassee, Florida, TE206744.

The applicant requests authorization to capture, tag, and release, Perdido Key, Choctawhatchee, Alabama, Anastasia Island, southeastern, and St. Andrews (*P.p. peninsularis*) beach mice, Key Largo cotton mouse, and Mississippi gopher frog (*Rana capito sevosa*) while conducting presence/absence surveys throughout Georgia, Alabama, Florida, Mississippi, and Louisiana.

Applicant: James Moyers, Panama City Beach, Florida, TE087199.

The applicant requests renewal of existing authorization to capture, tag, and release, Perdido Key, Choctawhatchee, and St. Andrews beach mice while conducting presence/absence surveys throughout Florida.

Applicant: Joseph Perchmann, Western Carolina University, Cullowhee, North Carolina, TE056510.

The applicant requests authorization to capture, tag, and release adults, and collect and retain egg masses for propagation research, the Mississippi gopher frog while conducting recovery-related research throughout Mississippi.

Applicant: Monroe County Sheriff's Office, Key West, Florida, TE206785.

The applicant requests authorization to receive and maintain in captivity unreleasable key deer (*Odocoileus virginianus clavium*) for educational purposes in Key West, Florida.

Applicant: Thomas Dickinson, Hillsborough, North Carolina, TE102324.

The applicant requests renewal of existing authorization to capture, identify, release, and salvage remains of James spinymussel (*Pleurobema collina*), Tar spinymussel (*Elliptio steinstansana*), dwarf-wedge mussel (*Alasmidonta heterodon*), Carolina heelsplitter (*Lasmigona decorata*), Appalachian elktoe (*Alasmidonta raveneliana*), littlewing pearlymussel (*Pegias fabula*), oyster mussel (*Epioblasma capsaeformis*), and cumberland bean (*Villosa trabalis*) for presence/absence surveys throughout the species ranges in Georgia, North Carolina, and South Carolina.

Applicant: Michael Gangloff, Appalachian State University, Boone, North Carolina, TE079863.

The applicant requests renewal of existing authorization to capture, identify, release, and salvage remains of 55 species of listed freshwater snails and mussels, and to amend the authorization to add 20 species of listed freshwater snails and mussels for presence/absence surveys throughout the species ranges in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

Applicant: Mississippi Department of Environmental Quality, Pearl, Mississippi, TE065948.

The applicant requests renewal of existing authorization to capture, identify, and release Cumberland combshell (*Epioblasma brevidens*), southern combshell (*Epioblasma penita*), orange-nacre mucket (*Lampsilus perovalis*), black clubshell (*Pleuroblema curtum*), southern clubshell (*Pleuroblema decisum*), flat pigtoe (*Pleuroblema marshalli*), ovate clubshell (*Pleuroblema perovatum*), heavy pigtoe (*Pleuroblema taitianum*), inflated heelsplitter (*Potamlum extensa*), stirrupshell (*Quadrula stapes*), bayou darter (*Etheostoma rubbrum*), and Gulf sturgeon (*Acipenser oxyrinchus desotoi*) for presence/absence surveys throughout Mississippi.

Applicant: Alan Christian, Arkansas State University, State University, Arkansas, TE206740.

The applicant requests authorization to capture, identify, release for presence/absence surveys, to collect tissue samples, and to retain in captivity for propagation studies Ouachita rock pocketbook (*Arkansia wheeleri*), Curtis' pearlymussel (*Epioblasma florentina curtisi*), turgid blossom (*Epioblasma turgidula*), pink mucket (*Lampsilis abrupta*), Arkansas fatmucket (*Lampsilis powellii*), speckled pocketbook (*Lampsilis streckeri*), scaleshell (*Leptodea leptodon*), fat pocketbook (*Potamilus capax*), and winged mapleleaf (*Quadrula fragosa*). Specimens to be captured from throughout Arkansas and retained at Arkansas State University.

Applicant: Metro Water Services, Nashville, Tennessee, TE206741.

The applicant requests authorization to capture, identify, and release the Nashville crayfish (*Orconectes shoupi*) while conducting presence/absence surveys in Mill Creek Watershed, Davidson and Williamson Counties, Tennessee.

Dated: February 9, 2009.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E9–4826 Filed 3–6–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2009–N0044; 40120–1112–0000–F5]

Receipt of Applications for Endangered Species Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with threatened and endangered species.

DATES: We must receive written data or comments on the applications at the address given below, by *April 8, 2009.*

ADDRESSES: Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: David Dell, HCP Coordinator).

FOR FURTHER INFORMATION CONTACT: David Dell, telephone 404/679–7313; facsimile 404/679–7081.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following applications for permits to conduct certain activities with endangered and threatened species pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). This

notice is provided under section 10(c) of the Act. If you wish to comment, you may submit comments by any one of the following methods. You may mail comments to the Fish and Wildlife Service's Regional Office (see **ADDRESSES** section) or via electronic mail (e-mail) to *david_dell@fws.gov*. Please include your name and return address in your e-mail message. If you do not receive a confirmation from the Fish and Wildlife Service that we have received your e-mail message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section). Finally, you may hand deliver comments to the Fish and Wildlife Service office listed above (see **ADDRESSES** section).

Before including your address, telephone number, e-mail address, or other personal identifying information in your comments, 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 comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Applicant: Kentucky Division of Abandoned Mine Lands, Frankfort, Kentucky, TE206886

The applicant requests authorization to capture, identify, and release Indiana bats (*Myotis sodalis*), gray bats (*Myotis grisescen*), Virginia big-eared bats (*Plecotus townsendii virginianus*), Ozark big-eared bats (*Plecotus townsendii ingens*), blackside dace (*Phoxinus cumberlandensis*), palezone shiner (*Notropis albizonatus*), and relict darter (*Etheostoma chiense*) for presence surveys throughout Kentucky.

Applicant: Joy O'Keefe, Aiken, South Carolina, TE206872

The applicant requests authorization to capture, identify, and release Indiana bats, for presence surveys throughout Alabama, Georgia, Kentucky, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.

Applicant: Ronald Spears, Denver, Colorado, TE207139

The applicant requests authorization to capture, identify, and release Indiana and gray bats, for presence surveys throughout the species ranges in the midwestern and southeastern United States.

Applicant: T.H.E. Engineers, Lexington, Kentucky, TE206874

The applicant requests authorization to capture, identify, and release Indiana bats, gray bats, Virginia big-eared bats, blackside dace, and American burying beetle (*Nicrophorus americanus*) for presence surveys throughout Kentucky and Tennessee.

Applicant: Apogee Environmental Consultants, Inc., Whitesburg, Kentucky, TE070796

The applicant requests renewal of existing authorization to capture, identify, radio-tag, and release Indiana, gray, Virginia big-eared, and Ozark big-eared bats for presence surveys throughout the species ranges in the eastern United States.

Applicant: Copperhead Environmental Consulting, Inc., Paint Lick, Kentucky, TE070584

The applicant requests renewal of existing authorization to capture, identify, radio-tag, and release Indiana, gray, Virginia big-eared, and Ozark big-eared bats for presence surveys throughout the species ranges in the eastern United States.

Applicant: Biological Systems Consultants, Inc., Lexington, Kentucky, TE096554

The applicant requests renewal of existing authorization to capture, identify, and release blackside dace for presence surveys throughout Tennessee and to amend their authorization to include Kentucky.

Applicant: HMB Professional Engineers, Frankfort, Kentucky, TE129703

The applicant requests amendment of existing authorization to add authority to harass, collect, or capture, identify, and release Virginia big-eared bats, American burying beetle, clubshell (*Pleurobema clava*), Eskimo curlew (*Numenius borealis*), relict darter, scaleshell mussel (*Leptodea leptodon*), northern riffleshell (*Epioblasma torulosa rangiana*), palezone shiner, Kentucky cave shrimp (*Palaemonias ganteri*), Braun's rock-cress (*Arabis perstellata*), and Cumberland sandwort (*Arenaria cumberlandensis*) for presence surveys throughout Kentucky and Tennessee.

Applicant: Appalachian Technical Services, Inc., Wise, Virginia, TE009638

The applicant requests amendment of existing authorization to add authority to capture, handle, and release slender chub (*Erimystax cahni*), fanshell (*Cyprogenia stegaria*), dromedary pearlymussel (*Dromus dromas*), Cumberlandian combshell (*Epioblasma brevidens*), Appalachian monkeyface (*Quadrula sparsa*), Cumberland monkeyface (*Quadrula intermedia*), pink mucket (*Lampsilis abrupta*), and rough pigtoe (*Pleurobema plenum*) for presence surveys and scientific research aimed at recovery of the species throughout Georgia, North Carolina, Alabama, Mississippi, Kentucky, Tennessee, Ohio, Indiana, Pennsylvania, Virginia, and West Virginia.

Applicant: U.S.D.A. Forest Service, Chattahoochee-Oconee National Forests, Gainesville, Georgia, TE100242

The applicant requests renewal of existing authorization to capture, identify, and release spotfin chub (*Cyprinella monacha*), amber darter (*Percina antesella*), goldline darter (*Percina aurolineata*), Conasauga logperch (*Percina jenkinsi*), blue shiner (*Cyprinella caerulea*), Etowah darter (*Etheostoma etowahae*), and Cherokee darter (*Etheostoma scotti*) for presence surveys throughout Georgia.

Applicant: Fish and Wildlife Associates, Whittier, North Carolina, TE083941

The applicant requests renewal of existing authorization to capture, handle, and release snail darter (*Percina tanasi*), Conasauga logperch, blue shiner, amber darter (*Percina antesella*), goldline darter, Etowah darter, Cherokee darter, and painted snake coiled forest snail (*Anguispira picta*) for presence surveys throughout Georgia, Alabama, and Tennessee.

Applicant: Georgia Department of Transportation, Atlanta, Georgia, TE207108

The applicant requests authorization to capture, handle, and release Cherokee darter, shiny-rayed pocketbook (*Hamiota subangulata*), oval pigtoe (*Pleurobema pyriforme*), Gulf moccasinshell (*Medionidus penicillatus*), purple bankclimber (*Elliptoideus sloatianus*), and fat threeridge (*Amblema neislerii*) for presence surveys throughout Georgia.

Applicant: Tim Nehus, Lebanon, Tennesse, TE108584

The applicant requests renewal of existing authorization to capture, handle, and release the Nashville crayfish (*Orconectes shoupi*) and 53 species of fish and freshwater mussel for presence surveys throughout Tennessee.

Applicant: Copperhead Environmental Consulting, Inc., Paint Lick, Kentucky, TE171516

The applicant requests amendment of existing authorization to add authority to capture, handle, and release 31 species of freshwater mussel for presence surveys throughout the species ranges in the eastern United States.

Applicant: South Carolina Parks, Recreation and Tourism, Columbia, South Carolina TE207117

The applicant requests authorization to harass, inspect nest cavities, and conduct other management activities with the red-cockaded woodpecker (*Picoides borealis*) throughout South Carolina.

Applicant: Fort Benning Conservation Branch, Fort Benning, Georgia TE016270

The applicant requests renewal of existing authorization to harass, inspect nest cavities, capture, translocate, and conduct other management activities with the red-cockaded woodpecker throughout Georgia, Alabama, Florida, and Mississippi.

Applicant: Danny Gustafson, The Citadel, Charleston, South Carolina, TE117645

The applicant requests renewal of existing authorization to collect leaves of pondberry (*Lindera melissifolia*) from throughout South Carolina.

Applicant: North Carolina Botanical Garden, Chapel Hill, North Carolina, TE091705

The applicant requests renewal of existing authorization to collect seeds, spores, cuttings, and vegetative material of little amphianthus (*Amphianthus pusillus*), Alabama leather flower (*Clematis socialis*), harperella (*Ptilimnium nodosum*), Kral's water-plantain (*Sagittaria secundifolia*), green pitcher-plant (*Sarracenia oreophila*), seabeach amaranth (*Amaranthus pumilus*), shale-barren rockcress (*Arabis serotina*), golden sedge (*Carex lutea*), Alabama leather-flower (*Clematis socialis*), smooth-purple coneflower (*Echinacea laevigata*), Applachian avens (*Geum radiatum*), rock gnome lichen (*Gymnoderma lineare*), Schweinitz's sunflower (*Helianthus schweinitzii*), dwarf-flowered heartleaf (*Hexastylis naniflora*), mountain golden-heartleaf (*Hudsonia montana*), black-spore quillwort (*Isoetes melanospora*), Merlin's-grass (*Isoetes tegetiformans*), Heller's gayfeather (*Liatris helleri*), rough-leaved loosestrife (*Lysimachia asperulaefolia*), Canby's dropwort (*Oxypolis canbyi*), Ruth's golden aster (*Pityopsis ruthii*), Michaux's sumac (*Rhus michauxii*), bunched arrowhead (*Sagittaria fasciculata*), mountain sweet pitcher-plant (*Sarracenia jonesii*), largeflower skullcap (*Scutellaria montana*), blue ridge goldenrod (*Solidago spithamaea*), Virginia spirea (*Spiraea virginiana*), Cooley's meadowrue (*Thalictrum cooleyi*), and running buffalo clover (*Trifolium stoloniferum*) to develop and maintain germ plasm and propagated specimens of plants collected from throughout North Carolina, South Carolina, Alabama, Georgia, Florida, Tennessee, West Virginia, Virginia, and Maryland.

Applicant: International Carnivorous Plant Society, Pinole, California, TE061005

The applicant requests renewal of existing authorization to sell in interstate commerce cultivated seeds of green pitcher-plant (*Sarracenia oreophila*), Alabama canebreak pitcher-plant (*Sarracenia rubra* spp. *alabamensis*), mountain sweet pitcher-plant (*Sarracenia rubra* spp. *jonesii*), and godfrey's butterwort (*Pinguicula ionantha*). To be sold throughout the United States from specimens cultivated at University of California, Davis, California.

Applicant: Meadowview Biological Research Station, Woodford, Virginia, TE022690

The applicant requests renewal of existing authorization to sell in interstate commerce cultivated specimens of green pitcher-plant, Alabama canebreak pitcher-plant, and mountain sweet pitcher-plant. To be sold throughout the United States from specimens cultivated at Woodford, Virginia.

Dated: February 13, 2009.

Jacquelyn B. Parrish,

Acting Regional Director.

[FR Doc. E9–4827 Filed 3–6–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2008–N0058; 94300–1122–0000–Z2]

Wind Turbine Guidelines Advisory Committee; Announcement of Public Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of public meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), will host a Wind Turbine Guidelines Advisory Committee (Committee) meeting on March 24–26, 2009. The meeting is open to the public. The meeting agenda will include reports from the Subcommittees on Incentives, Legal, Science Tools & Procedures, and Synthesis, and discussion of the draft Recommendations to the Secretary.

DATES: The meeting is scheduled for March 24–26, 2009, from 11 a.m. to 5:30 p.m. on March 24, 8 a.m. to 5:30 p.m. on March 25, and 8 a.m. to 3:30 p.m. on March 26.

ADDRESSES: U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Rooms 200 A & B, Arlington, VA 22203. For more information, see ''Meeting Location Information.''

FOR FURTHER INFORMATION CONTACT: Rachel London, Division of Habitat and Resource Conservation, U.S. Fish and Wildlife Service, Department of the Interior, (703) 358–2161.

SUPPLEMENTARY INFORMATION:

Background

On March 13, 2007, the Department of the Interior published a notice of establishment of the Committee and call for nominations in the **Federal Register** (72 FR 11373). The Committee's purpose is to provide advice and recommendations to the Secretary of the Interior (Secretary) on developing effective measures to avoid or minimize impacts to wildlife and their habitats related to land-based wind energy facilities. The Committee is expected to exist for 2 years and meet approximately four times per year, and its continuation is subject to biennial renewal. All Committee members serve without compensation. In accordance with the Federal Advisory Committee Act (5 U.S.C. App.), a copy of the Committee's charter has been filed with the Committee Management Secretariat, General Services Administration; Committee on Environment and Public Works, U.S. Senate; Committee on Natural Resources, U.S. House of Representatives; and the Library of Congress. The Secretary appointed 22 individuals to the Committee on October 24, 2007, representing the varied interests associated with wind energy development and its potential impacts to wildlife species and their habitats. The Service held five Committee meetings in 2008, and has held one meeting in January of 2009. All Committee meetings are open to the public. The public has an opportunity to comment at all Committee meetings.

Meeting Location Information

Please note that the meeting location is accessible to wheelchair users. If you require additional accommodations,

please notify us at least two weeks in advance of the meeting you plan to attend.

All persons planning to attend the meeting will be required to present photo identification when entering the building. We require that persons planning to attend the workshop and/or meeting register at *http://www.fws.gov/habitatconservation/windpower/wind_turbine_advisory_committee.html*, by March 17, 2009. Seating is limited due to room capacity. We will give preference to registrants based on date and time of registration. Limited standing room will be available if all seats are filled.

Dated: March 3, 2009.

Rachel London,

Alternate Designated Federal Officer, Wind Turbine Guidelines Advisory Committee.

[FR Doc. E9–4858 Filed 3–6–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2009–N0017; 81420–1113–0000–F3]

Safe Harbor Agreement for East Bay Municipal Utility District Lands in San Joaquin, Amador, and Calaveras Counties, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of application and proposed safe harbor agreement.

SUMMARY: This notice advises the public that East Bay Municipal Utility District (applicant) has applied to the U.S. Fish and Wildlife Service (Service) for a Safe Harbor Agreement (Agreement) for three Federally threatened species: Valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*), California red-legged frog (*Rana aurora draytonii*), and California tiger salamander (*Ambystoma californiense*). The Agreement is available for public comment.

DATES: Written comments should be received on or before April 8, 2009.

ADDRESSES: Comments should be addressed to Mr. Rick Kuyper, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, CA 95825. Written comments may also be sent by facsimile to (916) 414–6713.

FOR FURTHER INFORMATION CONTACT: Mr. Rick Kuyper, Sacramento Fish and Wildlife Office (see **ADDRESSES**); telephone: (916) 414–6600.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of the documents for review by contacting the individual named above. You may also make an appointment to view the documents at the above address during normal business hours.

Background

Under a Safe Harbor Agreement, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the Act (16 U.S.C. 1531 *et seq*.). Safe Harbor Agreements, and the subsequent enhancement of survival permit that is issued pursuant to Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act), encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners that they will not be subjected to increased property use restrictions as a result of their efforts to attract listed species to their property, or to increase the numbers or distribution of listed species already on their property. Application requirements and issuance criteria for enhancement of survival permits through Safe Harbor Agreements are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22(c).

We have worked with the applicant to develop the proposed Agreement for the conservation of the valley elderberry longhorn beetle, the California red-legged frog, and the California tiger salamander on lands owned and managed by the applicant (Enrolled Property) in San Joaquin, Amador, and Calaveras Counties, California. The 28,000-acre Enrolled Property subject to this Agreement consists of about 19,115 acres of land and 9,034 acres of water surface. The Enrolled Property borders and includes Camanche and Pardee dams and reservoirs. It also includes the lands adjacent to the lower Mokelumne River for approximately ½ mile below Camanche Dam. Current and recent land use practices on the enrolled property include management for water supply, flood control, grazing, aquaculture, hydroelectric power, wastewater treatment, facility maintenance, residential use, and recreation. The applicant has proposed that the Agreement provide authorized incidental take of the three Federally listed species for the activities specified above, as well as for any future activities associated with raising the heights of any existing dams.

In order to benefit the valley elderberry longhorn beetle, the California red-legged frog, and the California tiger salamander for the duration of this Agreement, the applicant proposes to create, restore, manage, and maintain suitable breeding and dispersal habitat for the three Federally listed species on the Enrolled Property. We expect that the proposed activities will result in an increase in dispersal opportunities throughout the Enrolled Property, thus resulting in a net conservation benefit for the three Federally listed species. The Enrolled Property has known occurrences of the valley elderberry longhorn beetle and the California tiger salamander. Although California red-legged frogs have not been detected within the Enrolled Property, there is suitable breeding habitat throughout the Enrolled Property, and there is a known occurrence of this species on privately owned property adjacent to the enrolled property. The Agreement includes a monitoring component that will aid the applicant in developing management strategies that will ensure the successful creation, restoration, enhancement, and management of breeding and dispersal habitat for the three Federally listed species.

The proposed duration of the Agreement and the enhancement of survival permit is 30 years. When fully implemented, the Agreement and requested enhancement of survival permit will allow the applicant to return to baseline after the end of the 30-year term of the Agreement and prior to the expiration of the 30-year permit, if so desired by the applicant. The Agreement fully describes the management activities to be undertaken by the applicant, and the net conservation benefits expected to the three Federally listed species.

Upon approval of this Agreement, and consistent with the our Safe Harbor Policy published in the **Federal Register** on June 17, 1999 (64 FR 32717), we would issue a permit to the applicant authorizing take of the valley elderberry longhorn beetle, the California red-legged frog, and the California tiger salamander incidental to the implementation of the management activities specified in the Agreement, incidental to other lawful uses of the Enrolled Property including normal, routine land management activities, and to return to pre-Agreement conditions (baseline).

Public Review and Comments

We have made a preliminary determination that the proposed Agreement and permit application are eligible for categorical exclusion under the National Environmental Policy Act

of 1969 (NEPA). We explain the basis for this determination in an Environmental Action Statement that is also available for public review.

Individuals wishing copies of our Environmental Action Statement, and/or copies of the full text of the Agreement, including a map of the proposed permit area, should contact the office and personnel listed in the **ADDRESSES** section above.

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.

We will evaluate this permit application, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a) of the Act and NEPA regulations. If we determine that the requirements are met, we will sign the proposed Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the Act to the applicant for take of the valley elderberry longhorn beetle, the California red-legged frog, and the California tiger salamander incidental to otherwise lawful activities in accordance with the terms of the Agreement. We will not make our final decision until after the end of the 30-day comment period and will fully consider all comments received during the comment period.

We provide this notice pursuant to section 10(c) of the Act and pursuant to implementing regulations for NEPA (40 CFR 1506.6).

Dated: March 2, 2009.

Susan K. Moore,

Field Supervisor, Sacramento Fish and Wildlife Office, Sacramento, California.

[FR Doc. E9–4944 Filed 3–6–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

60–Day Notice of Intention to Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: Department of the Interior, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 and 5 CFR Part 1320, Reporting and Record Keeping Requirements, the National Park Service (NPS) invites public comments on a proposed extension of a currently approved collection of information (OMB #1024–0144).

DATES: Public comments on this Information Collection Request (ICR) will be accepted on or before May 8, 2009.

ADDRESSES: Send comments to: Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street NW, 8th floor, Washington, DC 20005; or via fax at 202/354–5179; or via e-mail at Sherry__Hutt@nps.gov. Also, you may send comments to Leonard E. Stowe, NPS Information Collection Clearance Officer, 1849 C St., NW., (2605), Washington, DC 20240; or via e-mail at Leonard__Stowe@nps.gov. All responses to this notice will be summarized and included in the request for the Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street NW, 8th floor, Washington, DC 20005; or via phone at 202/354–1479; or via fax at 202/354–5179; or via e-mail at Sherry__Hutt@nps.gov. You are entitled to a copy of the entire ICR package free of charge.

SUPPLEMENTARY INFORMATION:

Title: Native American Graves Protection and Repatriation Regulations, 43 CFR Part 10.

Bureau Form Number: None.

OMB Control Number: 1024–0144.

Current Expiration Date: August 31, 2009.

Type of Request: Extension of a currently approved collection of information that was reinstated in February 2009 based on an emergency submission to OMB.

Description of Need: The Native American Graves Protection and Repatriation Act (NAGPRA), requires museums to compile certain information (summaries, inventories, and notices) regarding Native American cultural items in their possession or control and provide that information to lineal descendants, culturally affiliated Indian tribes and Native Hawaiian organizations, and the National Park Service (acting on behalf of the Secretary of the Interior).

Description of respondents: Museums, defined in NAGPRA as any institution that receives Federal funds and has possession of or control over Native American cultural items.

Estimated average number of respondents: To date, 1,202 museums have completed summaries, inventories, or notices. NPS estimates about 50 new submissions or revision of previous submissions each year.

Estimated average burden hours per response: Public reporting burden for this collection of information is expected to average 100 hours for the exchange of summary/inventory information between a museum or Federal agency and an Indian tribe or Native Hawaiian organization and six hours per response for the notification to the Secretary, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information.

Frequency of Response: Information collection requirements are done on an as-needed basis, with summaries due within six months of either receipt of a new collection or acknowledgement of a new Indian tribe, and inventories due within two years of either receipt of a new collection or acknowledgement of a new Indian tribe. An institution receiving Federal funds for the first time must provide a summary within three years and an inventory within five years.

Estimated total annual reporting burden: 5,224 hours.

Comments are invited on: (1) the practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden hour to respondents, including use of automated information techniques or other forms of information technology.

Dated: March 3, 2009

Leonard E. Stowe,

NPS, Information Collection Clearance Officer.

[FR Doc. E9–4841 Filed 3–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: American Museum of Natural History, New York, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the American Museum of Natural History, New York, NY, that meet the definition of ''cultural items'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The 40 cultural items are 15 charms or ornaments, 8 caps, 3 bags containing stone, 1 fawn skin bag and contents, 1 quartz crystal, 10 arrows, 1 bow, and 1 quiver.

The first charm or ornament is a wristlet consisting of a piece of sinew strung with nine badger claws, separated by seven round white and blue glass beads, one cylindrical glass bead, and one small piece of shell. The second charm or ornament is an armlet consisting of a hide string onto which is attached five obsidian pieces (fragments of arrowheads), a fragment of limestone, and a fragment of glycimeris shell. The third charm or ornament is a neck ornament consisting of a piece of hide cord onto which 14 quartz crystals are attached with sinew.

The fourth charm or ornament is a neck ornament consisting of a cotton string that has five quartz crystals attached. The fifth charm or ornament consists of a perforated white shell, shaped into a pendant and hung on a cotton string. The sixth charm or ornament consists of more than 50 acorns threaded on a string, and separated by white and green glass beads with an attached quartz crystal.

The seventh charm or ornament consists of a string of alternating clear and green glass beads onto which is attached eight quartz crystals, two stone points, and one haliotis pendant. The eighth charm or ornament consists of a beaded buckskin bag that contains red powder. The top of the bag is embellished with two rows of glass black and white beads. The bag is tied with buckskin that extends into two flaps and is suspended by a string of blue, yellow, and white glass beads. The ninth charm or ornament consists of six strings of alternating large yellow and green glass beads that has two beaded pieces of buckskin and an obsidian point attached.

The tenth charm or ornament is a neck ornament consisting of a long strip of hide that has 25 quartz crystals, 1 stone arrow point, and 4 black nuts attached. The eleventh charm or ornament is a neck ornament consisting of a buckskin string with a miniature moccasin on one end and a stone spear point on the other. In between the two ends are attached a small gourd; seven quartz crystals; an unknown amount of white, red, yellow, and dark blue glass beads; and one stone bead. The twelfth charm or ornament consists of beads and discs of a root-like material separated by cylindrical wooden beads, all of which are painted red.

The thirteenth charm or ornament consists of a round piece of beaded hide, edged with light blue glass beads and embellished with different beaded designs on each side. One side is bordered by a beaded rope design that is made of alternating strings of black and light blue glass beads. Emanating from this border are four beaded triangles. Two of the triangles are yellow and green, and the other two are yellow, white, red, and blue. The center of the disc features a beaded cross. The opposite side of the charm is bordered with a rope design made of alternating black and pink beads. Emanating from the border are four black and white triangles, in the center of which is a beaded cross composed of triangles. The horizontal arm is red and green, and the vertical arm is red and yellow. Secured to the charm is a hide string to which is attached a mother of pearl shell, a quartz crystal, an obsidian point, and one broken basalt point. Black, white, and blue glass beads separate the attached pieces.

The fourteenth charm or ornament consists of a single white glycimeris shell attached to a piece of hide string. The fifteenth charm consists of a piece of hide cord that has five quartzite crystals, one worked piece of chert, and one quartz point attached with sinew.

The first cap is constructed with two panels of tanned hide that have been painted yellow and stitched with sinew, and surmounted by at least 50 owl feathers. Attached to the brim of one side of the cap are three trapezoid flaps with sheared tops. A band of black cloth lies beneath two of the flaps. The border is stitched with hide that has been painted blue. The lower border of the cap exhibits a beaded rope design that is made of alternating blue and white glass beads.

The second cap appears to be constructed of hide, but is covered with various types of materials, such as gray felt, calico, and possibly a grain bag. The lower border of the cap consists of a thick piece of leather, three quarters of which is covered with brass buttons. The remaining portion of the lower border bears three brass hammered plates attached with nails, and a silver plate edged with filigree and attached with wire. A painted blue border appears underneath the lower border. The lower border is topped by a second border which consists of a thin belt onto which are sewn at least 20 commercially-made mother of pearl buttons and 4 horn buttons. The belt also has two brass buttons which appear to be original to the belt itself. Between these two borders are seven large commercially–made shell buttons with one that is embossed with the image of a locomotive. The cap is crowned by at least 50 owl feathers, and is lined with red cotton, patterned cloth that has been stitched in place with cotton and hide.

The third cap is constructed from two pieces of tanned hide stitched together with sinew. The entire outside of the cap has been painted with yellow pigment. The edge of the cap is stitched with hide cord. A blue patterned cloth chin strap is stitched to the lower edge of the cap with cotton thread. To the top of the cap are attached three eagle feathers that are secured with sinew to a leather thong. The hat appears to have been mended in two different places. The fourth cap is constructed of two pieces of hide that have been painted yellow and stitched together with sinew. Six eagle feathers and six pieces of down that have been attached with sinew to six leather thongs are secured to the top of the cap. The cap is beaded in two separate places. Along one seam a double row of dark blue glass beads that is matched by a double row of white beads while the other side of the cap shows the same beading pattern, but has an additional curved line of white beads that intersects the white/blue line of beads about 3/4 of an inch above the rim. One side of the cap bears the impression of a cross, which indicates that an ornament had been attached at one time.

The fifth cap is constructed of two pieces of hide stitched together with hide. The cap is painted with yellow symmetrical designs. Above the cap's edge is a row of triangles that point upward. The cap is divided in half by a row of triangles that point upward and run from the bottom edge to the top and then down the other side. The two halves exhibit identical hour glass and iron cross designs. The cap is surmounted by four eagles feathers attached by sinew to four thongs. One of the feathers has a piece of down attached to it. The sixth cap is constructed from two pieces of canvas

stitched together with cotton thread. The partially worn canvas might have been painted entirely yellow. The bottom of the cap was made by folding the canvas upward about 1 1/2 inches. There is a chin strap of red patterned cloth. At least 40 eagle feathers and down face upwards and are attached with sinew inside the fold of the lower border. The top is surmounted by eight eagle feathers that have been attached to leather thongs with sinew, and each feather has a piece of down attached to it.

The seventh cap is constructed from two pieces of hide stitched together with sinew. The bottom of the cap exhibits a border of upward facing hide triangles stitched onto the cap with sinew. Inserted between the bottom of the cap and the triangle border is a red flannel cloth that goes around the cap's circumference. The cap does not appear to have been painted or ornamented. A chin strap made of hide is attached to the cap. The cap is surmounted by at least 50 owl feathers. The eighth cap is constructed from three pieces of hide stitched together with sinew and sisal. The bottom border of the cap consists of about a 1/2 inch of yellow felt cloth. Above the border is a single row of pink, blue, white, and black glass beads with no apparent pattern. One side of the cap is adorned with two beaded white crescents tipped with yellow beads and a white cross that is also tipped with yellow. Below the cross are two metal brooch-like objects, one of which appears to be a cross and the other, a bird. Dangling from this side of the cap are seven eagle feathers, some of which include down. The other side of the cap is embellished with two beaded light blue crescents above which is a cross that appears to have been made with black marking. The marking could be tarnish from a silver brooch that may have been attached. Dangling from this side of the cap are two eagle feathers and three pieces of down. Surmounting the cap are pieces of down and 16 eagle feathers, some of which are very large.

The first bag containing stone consists of a cotton bag filled with several quartz crystals and tied with metal wire. The second bag is a small buckskin bag with a flap. The flap is edged with light blue glass beads while the body of the bag is edged with yellow and clear glass beads. The beads form two designs. One design consists of three adjoining triangles, two that point to opposite sides and one that points upward. All three of the triangles are light blue with a single row of dark blue beads on the inside. The second beaded design consists of dark blue glass beads. The design looks like an ''L'' that is intersected by an upside down ''U.'' The bag holds a piece of worked stone in the shape of a knife. The third bag consists of a small, beaded buckskin bag that holds a piece of worked flint and an obsidian arrowhead. The bag has a flap whose edges are embellished with alternating dark and light blue glass beads. The body of the bag is edged with dark blue, white, clear, yellow, and red glass beads. The body of the bag features a beaded dark and light blue cross on one side, the other side has a beaded yellow crescent. The beads are sewn onto the bag with commercial thread.

The one fawn skin bag contains a smaller plaid cloth bag holding more than 50 black nuts; a white cloth bag with a striped design holding seeds; a cloth bag with striped design held closed with cotton cloth wrapping and containing pigment; a small perforated disc of plant material; a cloth bag with red striped design tied closed with black cloth and holding red beans; two small gourds that are perforated through the neck; a small knife with a wooden handle and a steel blade; and a rattle made from a K.C. baking powder can.

The one quartz crystal is a single piece measuring 7 cm by 2.3 cm by 2 cm.

The one quiver consists of canvas that is lashed with hide string onto a wooden spine. One side of the quiver is unadorned. The other side has a yellow painted border along the wooden spine and at both ends. At each end, the yellow border is topped by a red painted band; the bottom of the quiver has a canvas fringe. The center of the quiver is enclosed with a rawhide band which terminates in a fringe of hide strips that have been painted yellow on one side. One piece of fringe consists of five hide circles. One of the circles is painted yellow, two are painted black, and two are painted red. On either side of this band are two painted designs both of which feature two opposing red crescents. Yellow paint fills the space between the crescents on the top design; the bottom design has no pigment between the two crescents. Attached to the wooden spine is a leather carrying strap.

The one bow is painted red on its inside. The string of the bow is sinew and is also painted red.

Of the 10 arrows, 6 are made of reed and the other 4 are made of wood. The fletching of all 10 arrows consists of portions of what appear to be three different types of feathers (each arrow exhibits a different pattern). Each arrow has the same three feather types and each feather is attached by sinew; this sinew also attaches a piece of down. Inserted into the shaft are extensions of wood that have been painted black and which have been fastened with sinew. Nine of the arrows have metal points, and one has a stone point.

Museum records explicitly indicate that all but one of the cultural items were acquired by Dr. Pliny E. Goddard during museum-funded expeditions, in 1910 and 1914. The first and second charms or ornaments and the fawn skin bag were acquired on the second expedition, while the other 36 cultural items were collected on the first expedition. The museum accessioned the cultural items in the years they were collected. The cultural affiliation of the cultural items is San Carlos Apache, as based on museum records and consultation evidence presented by the Western Apache Working Group, which consists of the authorized NAGPRA representatives from the San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tonto Apache Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona.

The fifteenth charm–consisting of five quartzite crystals, one worked piece of chert and one quartz point, attached with sinew to a piece of hide cord–was found in museum storage with the other items that Goddard collected from the San Carlos Apache reservation. Given its similarity to and storage with other San Carlos Apache items, the museum believes this charm was also acquired by Goddard during one of his two museum-funded expeditions. The cultural affiliation of the charm is San Carlos Apache, as indicated by its similarity to and storage with other San Carlos Apache items, and consultation evidence presented by the Western Apache Working Group.

Officials of the American Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001, the 40 cultural items meet the definition of cultural items and are subject to repatriation under NAGPRA. Officials of the American Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the cultural items and the San Carlos Apache Tribe of the San Carlos Reservation, Arizona.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the cultural items should contact Nell Murphy, Director of Cultural Resources, American Museum of Natural History, Central Park West at 79th Street, New York, NY 10024, telephone (212) 769–5837, before April

8, 2009. Repatriation of the cultural items to the San Carlos Apache Tribe of the San Carlos Reservation, Arizona may proceed after that date if no additional claimants come forward.

The American Museum of Natural History is responsible for notifying the San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tonto Apache Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona that this notice has been published.

Dated: January 27, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–4842 Filed 3–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: American Museum of Natural History, New York, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the American Museum of Natural History, New York, NY, that meet the definition of ''cultural items'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The 37 cultural items are 9 charms or ornaments, 5 caps, 1 painted buckskin, 1 bow, 1 quiver, and 20 arrows.

The first charm or ornament is a small wooden ring covered with buckskin cord. Attached to the ring is a separate thong of hide that is inserted into a ring of turquoise; the thong terminates with a feather which is secured with sinew. A leather pouch is attached to the string by a leather thong. The opening of the bag is decorated with a band of glass beads. The first row is dark blue, the second and third are clear, and the fourth and fifth rows are green. Another leather thong secures a small turquoise pendant to which is also attached a feather fragment secured to the thong with sinew.

The second charm or ornament consists of eight strands of buckskin, four of which terminate with a red glass bead and a metal bead, and one of which terminates in a single red glass bead; the other three strands do not include beads. The strands are bound together by a band of beading that measures about 2 1/2 inches in width. The first inch of beading consists of alternating blue and white beads, and the remaining 1 1/2 inches having blue, red, white, and yellow beads. Above the beaded band is a hide knob to which is attached a shell (Olivella biplicata) and a small shell fragment. From the knob extend two long bird bone beads that are incised, one with a zigzag pattern and the other with hash marks. The two bird bone beads are topped with a red glass bead. A leather thong runs through all three beads and ends with two fringes. One fringe terminates in a red glass bead, and the other terminates in two red glass beads.

The third charm or ornament consists of a single piece of flint that has been chipped into the form of a spearhead. Attached to the base is a piece of hide string. The fourth charm or ornament consists of a single piece of flint that has been chipped into the form of a spearhead. The fifth charm or ornament consists of a wooden ring wrapped in pieces of hide. Three hide strings, about 7 inches in length, emanate from the ring and are tied together at the top. Inside the ring hangs a black and a white bead. From these two beads hang a small glass bead supported by a metal link. On the side of the ring are two pieces of haliotis in the form of pendants. A quill is attached with sinew to the smaller of the two pendants. A small tuft of dyed wool is also attached to this ring.

The sixth charm or ornament consists of a hide string to which are attached nine blue glass beads, one banded piece of stone secured with hide and sinew, and a piece of shell that has been worked into the shape of a crescent and secured by sisal. The seventh charm or ornament consists of a silver cross attached to a crescent. The bottom of the crescent has three perforations with a cord of hide through the center perforation. In the center of the cross is a perforation through which a hide thread has been inserted. The thread holds a piece of turquoise and a piece of down that is attached with sinew.

The eighth charm or ornament consists of four braided leather cords that measure about 20 inches in length. Attached to these cords are 11 eagle feathers, some of which have attachments. One feather has a blue glass bead; three feathers have each an Olivella biplicata shell; one feather has a white glass bead; one feather has a specimen of shell (possibly haliotis); one feather has a cowrie shell, dog canine, a black glass bead, and a white shell bead. The bottom of the charm has two flaps of hide in the shape of a trapezoid with a sheared border. The ninth charm or ornament consists of a large piece of hematite wrapped in buckskin. Pieces of the buckskin have been cut away to reveal the hematite. From the bottom of the bag hangs a cluster of quartz crystals, while the top of the bag features two leather thongs.

The first cap is constructed of two pieces of hide sewn together with sinew. The hide appears to be painted with yellow pigment. The cap also has a hide chin strap. From the bottom of the cap hangs a fringe of green and white glass beads. At about 1/4 inch above the fringe is a border with a beaded rope design created with alternating green and white beads. The cap is divided in half by a second yellow and green beaded rope design that starts at the fringe and runs to the top of the cap and then down the other side. Incorporated into this border, on both sides, is a cross and crescent design. On one side the cross and crescent are green, and on the other side they are yellow. Both sides are tipped by blue beads. The cap also features two other cross and crescent designs. One is entirely white, but tipped with black beads; while the other is all black, but tipped with white beads.

The second cap is constructed with 10 separate panels of hide, in varying sizes, stitched together with sinew. The hide appears to have been painted with yellow pigment. At the bottom of the cap is one lone strip (about 3 inches) of blue and white beaded rope design. It is unclear whether this beading formed a continuous border at one time. The cap features four beaded cross and crescent designs. Each crescent is blue, but bordered by white beads. Each cross is yellow, but bordered by black beads. This cap also exhibits a scatter of red pigment splotches. Two threads protrude through the cap's top, but there is no trace of what may have been attached to them.

The third cap is constructed from two pieces of hide stitched together with sinew. The hide appears to have been treated with yellow pigment. The edge of the cap exhibits a rope design made of alternating black and white glass beads. Another line of black and white beads runs vertically from the border up to the top and down the other side, dividing the cap in half. This vertical

border is intersected by horizontal beading that creates a black and white crescent. Above the crescent, a metal (possibly silver) tack has been attached. In each half of the cap, a beaded cross and crescent are separated by a metal tack. One of the crescents is black bordered by white beads and paired with a black cross. On the opposite side is a beaded white cross paired with a white crescent bordered by black beads. The top of the cap shows a leather thong, but nothing is attached to it. There is no sign as to what may have been attached to it. The cap has a chin strap of hide to which is attached a small beaded pouch. The bottom of the pouch is decorated by a cross of black beads bordered by white beads. The rim of the pouch is bordered by white and green beads, and held closed by sisal and hide rope.

The fourth cap is constructed from two pieces of tanned hide painted yellow and stitched together with sinew. The lower portion of the cap features a rope design border that is made of alternating blue and white beads. From this border four separate strands of beads continue to the top of the cap and down the other side, dividing the cap into quadrants. Two strands are black and yellow, and the others are white and blue. Onto each circle is attached a hammered silver ornament that is secured with hide. Between each ornament is a horseshoe shaped design of blue beads banded by yellow, inside of which are zigzag designs which seem to be ground crystals. The cap has a chin strap of leather. Surmounting the cap are 14 eagle feathers and pieces of down. The feathers are encircled with a rope design made of alternating black and white beads.

The fifth cap is constructed from two pieces of hide stitched together with sinew. The hide appears to have been painted with yellow pigment. The lower edge of the cap has a border of white and green glass beads. The cap exhibits four cross and crescent designs. The crescents were created with a green and white rope design, and the cross was created with green beads that are bordered by white beads. The cap is surmounted by five eagle feathers (three of which are fragmentary).

The painted buckskin consists of a single piece of hide that has five separate painted designs. The first design includes a blue disc from which project two blue crescents on each side. The disc is crowned with four yellow triangles. Secured to the disc's center is a hide string with an attached quill. Extending from the body of the disc is a painted zigzag line of alternating black and yellow lines. Twelve blue crescents extend from each bend of the zigzag. At the beginning of the zigzag, just below the disc, is a yellow silk folded ribbon that has a ''pendant'' of haliotis shell, a feather fragment and a quill wrapped in sinew attached to it. In the center of the zigzag is another cord of hide to which is attached a quill. The zigzag lines terminate in a blue or black disc from which emanate the remnant of a quill and a perforated pendant of haliotis that is secured with sinew onto a hide string. The second design consists of an anthropomorphic figure with raised hands. This figure appears to be wearing a gaan headdress. Secured to the figure's neck is a yellow silk ribbon that has a haliotis pendant and a piece of feather. On either side of the yellow ribbon are pieces of blue ribbon. Although only fragments of the blue ribbon remain, it appears that the blue and yellow ribbons were sewn in such a way as to create the pattern of a cross. The body of the figure consists of zigzag lines. On the chest the lines run in a horizontal direction, while below the waist, the zigzag lines are vertical. Almost the entire length of the body is bordered by blue/black triangles. The figure appears to be standing on a platform. From under the platform extend two yellow and black zigzag lines, each of which terminates with a short horizontal line consisting of four triangles. Underneath these triangles is a fairly large hole; it is unclear whether this is an attachment site or damage. The third design includes a small blue disc from which emanate two crescents on either side. To the center of the disc has been attached a pendant of haliotis, quill and feather. From the disc extend alternating yellow and black zigzag lines which connect to a larger disc. These lines are interrupted just above the second disc by a platform of blue triangles facing downward. The zigzag lines continue from the platform to create a border around the disc. The disc periphery is created by black/blue triangles, and terminating on the point of each triangle is a knob. The disc is divided into four quadrants that are created by zigzag lines that run vertically and horizontally. A yellow semi-circle with a black border appears in each quadrant. To the center of the disc are attached a yellow ribbon that runs vertically and a blue ribbon that runs horizontally. Through the center of the ribbon are attached a haliotis shell, feather and quill. The zigzag lines continue downward through the center bottom of the disc, where they are interrupted by a platform of black triangles that face upward. From the platform, the zigzag lines continue almost to the bottom of the hide where they run into a disc that is similar to the one at the top of the design. Attached to the bottom disc are the remnants of a feather and quill. Just below the large center disc is a pair of yellow discs on either side of the zigzag lines and surrounded by a black border of inward pointing black triangles. Emanating from the center of the disc to the left are a haliotis shell, feather and quill. A similar disc, on the right, has a thong which holds only a quill and feather. The fourth design is an anthropomorphic figure embellished with alternating yellow and black chevrons. The fifth design includes an irregularly shaped disc from which emanate two other discs, one on either side, that are bordered by spiraling crescents. Attached to the center of each disc are a feather and a quill supported by sinew. The main body of the design is a stalk-like figure, the top of which is formed by an arc of yellow triangles that point upward. The stalk-like body is painted with diagonal bands of black and yellow. Near the top of the stalk is attached a quill that dangles from a thong. Slightly below it is a yellow and blue silk ribbon that has a haliotis shell, feather, and quill attached to it. From either side of the stalk emanate blue crescents at regular intervals. To the center of the stalk is secured a dark blue silk ribbon upon which is attached the remnants of a feather supported by sinew. The stalk terminates in a disc that is formed by a black border from which emanate three black crescents, and has at its center the remnant of a feather.

The one quiver is highly adorned and consists of tanned hide lashed with hide string onto a wooden spine that is painted red. The top and bottom of the quiver are embellished with two bands of jingles. The top row is distinguished from the bottom row in that the jingles are suspended from rows of leather triangles painted black. The jingles are attached in pairs. Both ends of the quiver exhibit a painted border. The upper border is painted with a red band. Over the red band lies a row of leather triangles painted black. The bottom border is painted with a black band; red painted triangles emanate from this band and point upward. Below the top red border is a separate design which consists of a row of half yellow and half green diamonds. The diamonds are between two rows of triangles; the top row is red and the bottom row is yellow. Below these rows is a painted disc with an outer border that consists of yellow triangles. The inner border of the disc is composed of green triangles that face

inward. Below the disc are two bands of painted hide, each of which is bordered with red and black lines. In between these borders are diamond shaped cut-outs exposing red cotton cloth. Below the second border is another painted design that appears to be a jagged line with alternating yellow and white chevrons. Attached to the line are green crescents. Just below this is another border of red/yellow triangles encasing green/yellow diamonds.

The one bow consists of a piece of wood, and a bow string made of sinew. Three quarters of the bow's interior has been painted red. At the end of the bow, there is a secondary piece of hide.

The 20 arrows are made of reed. The fletching of each consists of portions of what appear to be three different types of feathers. Each arrow has the same three feather types and each feather is attached by sinew; this sinew also attaches a piece of down. Three quarters down the shaft is inserted a solid piece of wood that is attached with sinew. That sinew has a black or blue painted band. At the end are attached arrow points of quartz. The wood appears to have been treated with a substance – perhaps pitch or sap. Eight arrows are painted on the shaft end with a band of black/brown followed by an unpainted band and then a band of red; four arrows exhibit the same pattern described above except the black/brown is green; and six arrows are painted at the shaft end with a wide swatch of red with four narrow black bands.

In 1910, the cultural items were acquired by Dr. Pliny E. Goddard on a museum-funded expedition and the museum accessioned the items later that same year. The cultural affiliation of the cultural items is White Mountain Apache, as indicated by museum records and by consultation evidence presented by the Western Apache Working Group, which consists of the authorized NAGPRA representatives from the San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tonto Apache Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona.

Officials of the American Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001, the 37 cultural items meet the definition of cultural items and are subject to repatriation under NAGPRA. Officials of the American Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the cultural items and the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the cultural items should contact Nell Murphy, Director of Cultural Resources, American Museum of Natural History, Central Park West at 79th Street, New York, NY 10024, telephone (212) 769–5837, before April 8, 2009. Repatriation of the cultural items to the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona may proceed after that date if no additional claimants come forward.

The American Museum of Natural History is responsible for notifying the San Carlos Apache Tribe of the San Carlos Reservation, Arizona; Tonto Apache Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona that this notice has been published.

Dated: January 26, 2009

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E9–4843 Filed 3–6–09; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before February 21, 2009. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by March 24, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

FLORIDA

Sarasota County

Armistead, William Martin, House, 1510 Hyde Park St., Sarasota, 09000165

ILLINOIS

Cook County

IBM Building, 330 N. Wabash, Chicago, 09000166

Ramsey, Charles N., and Herry E. Weese House, 141 Kenilworth Ave., Kenilworth, 09000167

OHIO

Belmont County

Friends Boarding School and Ohio Yearly Meetinghouse Historic District, 61830 Sandy Ridge Rd., Barnesville, 09000168

Rock Hill Presbyterian Church, 56244 High Ridge Rd., Bellaire, 09000169

Hamilton County

Cheviot Fieldhouse, 3729 Robb Ave., Cheviot, 09000170

Knox County

Loveridge, Richard and Ann, House, 12526 Lower Green Valley Rd., Mount Vernon, 09000171

Stark County

Town Pump of East Sparta, The, Jct. of Walnut St. and Main Ave., East Sparta, 09000172

VIRGINIA

Pittsylvania County

Yeatts, John and Nancy, House, VA 795, Chatham, 09000173

Request for REMOVAL has been made for the following resources:

NORTH DAKOTA

Sheridan County

Winter House, NE Sheridan County, Goodrich, 79001775

PENNSYLVANIA

Philadelphia County

Stokely, William J., School, 1844–1860 N. 32nd St., Philadelphia, 86003336

[FR Doc. E9–4832 Filed 3–6–09; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Weekly Listing of Historic Properties

Pursuant to (36 CFR 60.13(b,c)) and (36 CFR 63.5), this notice, through publication of the information included herein, is to apprise the public as well as governmental agencies, associations and all other organizations and individuals interested in historic preservation, of the properties added to, or determined eligible for listing in, the National Register of Historic Places from January 19 to January 23, 2009.

For further information, please contact Edson Beall via: United States Postal Service mail, at the National

Register of Historic Places, 2280, National Park Service, 1849 C St., NW., Washington, DC 20240; in person (by appointment), 1201 Eye St., NW., 8th floor, Washington DC 20005; by fax, 202–371–2229; by phone, 202–354–2255; or by e-mail, *Edson_Beall@nps.gov*.

Dated: March 3, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

Key: State, County, Property Name, Address/Boundary, City, Vicinity, Reference Number, Action, Date, Multiple Name.

ALABAMA

Montgomery County

Tankersley Rosenwald School, 10 mi. S. on Montgomery on US 31 to Pettus Rd. to School Spur on W. side, Hope Hull vicinity, 08001332, Listed, 1/22/09 (The Rosenwald School Building Fund and Associated Buildings MPS).

ARIZONA

Maricopa County

Myrtle Avenue Residential Historic District, 6305–6423 W. Myrtle Ave., Glendale, 08001345, Listed, 1/22/09.

Pinal County

Evergreen Addition Historic District, Generally bounded by McMurray Blvd., Gilbert Ave., Florence Blvd., and Casa Grande Ave., Casa Grande, 08001346, Listed, 1/22/09.

ARKANSAS

Cleburne County

Disfarmer, Mike Meyer, Gravesite, In the Heber Springs Cemetery at the NR corner of Oak St., and S. 4th St., Heber Springs, 08001335, Listed, 1/21/09.

Conway County,

Earl Building, 201 N. St. Joseph St., Morrilton, 08001336, Listed, 1/22/09 (Arkansas Highway History and Architecture MPS).

Drew County

Ridgeway Hotel Historic District, 200–206 East Gaines St., Monticello, 08000952, Listed, 1/22/09.

Fulton County

AR 289 Bridge Over English Creek, AR289 over English Creek, Mammoth Spring vicinity, 08001338, Listed, 1/22/09 (Historic Bridges of Arkansas MPS).

Hempstead County

Southwestern Proving Ground Building No. 4, 259 Hempstead Co. Rd. 279, Hope vicinity, 08001339, Listed, 1/22/09 (World War II Home Front Efforts in Arkansas, MPS).

Nevada County

Ephesus Cemetery, ¼ mi. N. of Emmet on US 67, Emmet vicinity, 08001340, Listed, 1/22/09.

Pope County

Little Rock to Cantonment Gibson Rd—Fourth Street Segment, 4th St., between Union Grove and Blackland Sts., Atkins vicinity, 08001342, Listed, 1/22/09 (Cherokee Trail of Tears MPS).

Pulaski County

Block 35 Cobblestone Alley, W. of the N. end of Rock St., Little Rock, 08001343, Listed, 1/22/09.

Pulaski County

West 7th Street Historic District, Portions of 800–1100 blocks of W. 7th St., Little Rock, 08001341, Listed, 1/21/09.

Washington County

Illinois River Bridge at Phillips Ford, Co. Rd. 848 over the Illinois River, Savoy vicinity, 08001344, Listed, 1/22/09 (Historic Bridges of Arkansas MPS).

CALIFORNIA

Amador County

Kennedy Mine Historic District, 12594 Kennedy Mine Rd., Jackson vicinity, 08001347, Listed, 1/22/09.

KANSAS

Cloud County

Clyde School, 620 Broadway St., Clyde, 08001348, Listed, 1/22/09 (Public Schools of Kansas MPS).

Dickinson County

Wilson Pratt Truss Bridge, 2.9 m. W. of Rain Rd. on 3200 Ave., Chapman vicinity, 08001349, Listed, 1/22/09 (Metal Truss Bridges in Kansas 1861—1939 MPS).

Riley County

Persons Barn and Granary, 2103 Hwy. 18, Manhattan, 08001351, Listed, 1/22/09 (Agriculture-Related Resources of Kansas).

Rush County

Lone Star School, District 64, RR, 1¼ m. W. of Bison Ave., M., Bison vicinity, 08001352, Listed, 1/22/09 (Public Schools of Kansas MPS).

Shawnee County

Shoemaker, J.A., House, 1434 SW. Pass Ave., Topeka, 08001354, Listed, 1/22/09.

MAINE

Aroostook County

Lagassey Farm, 786 Main St., Saint Agatha, 08001356, Listed, 1/21/09.

Androscoggin County

Main Street-Frye Street Historic District, Frye St., and portions of Main St. and College St., Lewiston, 08001355, Listed, 1/23/09.

Somerset County

Kromberg Barn, E. side of E. Pond Rd., across from number 462, Smithfield, 08001357, Listed, 1/22/09.

Washington County

Plummer, Capt. John, House, 23 Pleasant St., Addison, 08001358, Listed, 1/21/09.

MISSOURI

Jackson County

1901 McGee Street Automotive Service Building, 1901–1907 McGee St., Kansas City, 08001359, Listed, 1/22/09.

NORTH CAROLINA

Buncombe County

Smith, Richard Sharp, House, 655 Chunns Cove Rd., Asheville, 08001361, Listed, 1/22/09.

Forsyth County

Old Richmond Schoolhouse and Gymnasium, 6315 and 6375 Tobaccoville Rd., Tobaccoville vicinity, 08001362, Listed, 1/21/09.

Harnett County

Harrington-Dewar House, 994 Fred Burns Rd., Holly Springs vicinity, 08001363, Listed, 1/23/09.

Mecklenburg County

Kilgo, Bishop John C., House, 2100 The Plaza, Charlotte, 08001364, Listed, 1/22/09.

Mecklenburg County

Robinson Rock House Ruin and Plantation Site, Reedy Creek Park—2900 Rocky River Rd., Charlotte, 08001365, Listed, 1/22/09.

Polk County

Mill Farm Inn, 701 Harmon Field Rd., Tryon vicinity, 08001366, Listed, 1/22/09.

NORTH DAKOTA

Richland County

Fort Abercrombie, Richland Co. Rte. 4, Abercrombie vicinity, 08001367, Listed, 1/22/09.

OHIO

Fairfield County

Fairfield County Children's Home, 1743 E. Main St., Lancaster, 08001196, Listed, 12/22/08.

OREGON

Lane County

Willakenzie Grange Hall, 3055 Willakenzie Rd., Eugene, 08001368, Listed, 1/22/09.

SOUTH CAROLINA

Newberry County

Hannah Rosenwald School, 61 Deadfall Rd., Newberry vicinity, 08001369, Listed, 1/22/09 (Rosenwald School Building Program in South Carolina, 1917–1932).

WASHINGTON

King County

Messenger of Peace Chapel Car, 38625 SE. King St., Snoqualmie, 08000998, Listed, 1/21/09.

WISCONSIN

Columbia County

Robertson, John A. and Martha, House, 456 Seminary St., Lodi, 08001370, Listed, 1/22/09.

[FR Doc. E9–4831 Filed 3–6–09; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Meetinghouse Community Pharmacy, Inc.; Affirmance of Suspension Order

On October 31, 2008, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Meetinghouse Community Pharmacy, Inc. (Respondent), of Dorchester, Massachusetts. The Order proposed the revocation of Respondent's DEA Certificate of Registration, BM3972747, which authorized it to dispense controlled substances in schedules II through IV as a retail pharmacy, and the denial of any pending application to renew or modify the registration on the ground that its ''continued registration is inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Show Cause Order alleged that Respondent was distributing ''a large volume of controlled substances pursuant to * * * prescriptions that it knows, or should know, [were] issued by practitioners not acting in the usual course of professional practice or that [were] issued for other than a legitimate medical purpose in violation of 21 CFR 1306.04(a).'' *Id.* The Order specifically alleged that Respondent was filling controlled-substance prescriptions issued by physicians who were not licensed in the States where Respondent's customers were located and thus lacked authority to prescribe to them and violated both State and Federal law. *Id.* at 1–2. (citing *United Prescription Servs., Inc.*, 72 FR 50397 (2007)).

Based on the above, I further concluded that Respondent's continued registration during the pendency of this proceeding would ''constitute an imminent danger to the public health and safety.'' *Id.* at 2 (citing 21 U.S.C. 824(d)). I therefore ordered the immediate suspension of Respondent's registration.[1] *Id.* at 2 (citing 21 U.S.C. 824(d)).

On November 1, 2008, the Order was served on Respondent. Since then, neither Respondent's owner, nor anyone else purporting to represent it, has requested a hearing on its behalf. Because more than thirty days have passed since service of the Order, and the Agency has not received a request for a hearing, I conclude that Respondent has waived its right to a hearing. 21 CFR 1301.43(d). I therefore enter this Decision and Final Order based on relevant material contained in the investigative file and make the following findings.

Findings

In 1994, Respondent was first registered with the Agency. Respondent held DEA Certificate of Registration, BM3972747, which authorized it to dispense controlled substances in schedules II through IV as a retail pharmacy at the registered location of 248 Bowdoin St., Dorchester, Massachusetts. Respondent's registration expired, however, on January 31, 2009, and it has not filed a renewal application.

Respondent is owned and managed by Baldwin Ihenacho. Mr. Ihenacho held a Massachusetts pharmacist license, which was suspended on November 1, 2008, and which expired on December 31, 2008. Respondent holds both a Massachusetts Retail Drug Store Permit and a Massachusetts Controlled Substances License, both of which do not expire until December 31, 2009. These licenses were, however, suspended on November 1 and 6, 2008, respectively.

On November 1, 2008, law enforcement authorities executed a search warrant and served the Immediate Suspension Order on Respondent. During the search, the authorities also arrested Mr. Ihenacho. Mr. Ihenacho was taken to a unit of the Boston Police Department. After being given the Miranda warnings, Mr. Ihenacho agreed to an interview.

During the interview, Mr. Ihenacho stated that several years earlier he had received a fax from Jack, an individual in the Dominican Republic who solicited him to fill prescriptions which were being issued through Web sites. Ihenacho called Jack and entered into an oral agreement with him under which he was paid a dispensing fee of $5.75 for each prescription Respondent filled.[2] Mr. Ihenacho stated that at one point he was receiving approximately 100 prescriptions a day from Jack and had to tell him that he could not fill that many scripts because it was interfering with his local business. According to Mr. Ihenacho, he received approximately $100,000 for filling the prescriptions from Jack and was owed an additional $145,000.

According to Mr. Ihenacho, the customers would either go to a Web site or call the company to order a drug and provide their medical history. The company would then provide the customer's purported medical history to a physician, who would decide whether to issue a prescription. The approved prescriptions would then be entered into a zip file and sent electronically to his pharmacy. Most of the controlled-substance prescriptions were for phentermine and alprazolam, which are schedule IV controlled substances. *See* 21 CFR 1308.14.

Mr. Ihenacho stated that he did not fill Internet prescriptions for customers who lived in Massachusetts. Mr. Ihenacho asserted that there were some States he did not ship to, and that an employee with the Massachusetts Board of Pharmacy had told him that some States prohibited the shipments.

When asked if he was concerned about the prescriptions being issued by doctors to patients who lived in different States, Mr. Ihenacho answered that he was concerned, but maintained that he had asked the doctors about the prescriptions and they were convincing. According to Mr. Ihenacho, when he would call a doctor, the doctor would tell him that he had been talking to the patient for years so he filled the prescriptions.

Mr. Ihenacho further stated that he had visited Jack at his office in the Dominican Republic, and had been introduced to Jack's cousin. The cousin told Mr. Ihenacho that he wanted to start his own Internet pharmacy business; Mr. Ihenacho started filling prescriptions for the cousin as well. According to Mr. Ihenacho, the cousin had paid him approximately $100,000 for a one-year period and owed him another $40,000. Mr. Ihenacho also told investigators that he had filled prescriptions for the owners of several other Internet schemes, two of whom paid him a fee of $10,000 a week. Moreover, at the time of his arrest, Mr. Ihenacho stated that he was currently filling approximately 150 Internet prescriptions per day; he also claimed

[1] I further ordered that the controlled substances in Respondent's possession be either placed under seal or removed for safekeeping. The Order further informed Respondent of its right to request a hearing on the allegations; gave the date, time and place of the hearing; explained the procedure for requesting a hearing or to submit a written statement of position in lieu of a hearing; and explained the consequences if Respondent failed to request a hearing. Show Cause Order at 2–3.

[2] The Web site operator also reimbursed Respondent for the cost of the drugs.

that the majority of his business was for non-controlled drugs.

Investigators determined that Respondent was shipping 4,000 to 5,000 prescriptions a month to customers located in approximately 46 States. The Investigators also obtained several e-mails which Mr. Ihenacho had sent to Jack. In an e-mail sent on September 29, 2006, Mr. Ihenacho wrote:

> Now, my concerns. I want to do business with you and I want to do it the right way. As a pharmacist trained here in the USA, I know that the Federal USA law concerning the prescribing of controlled substances by any doctor requires that the doctor be licensed and registered in any state where that doctor wants to practice. My observation so far is that it is only one doctor who is writing for everything for every patient, no matter which state the patient is located [in]. Could it be that this doctor is registered in all USA states? Please clarify this to me and if so, I would like to see such a blanket registration and license of the doctor.

The following week, Mr. Ihenacho reiterated his concern. In an October 5, 2006 e-mail to Jack, Mr. Ihenacho:

> You did not send me any information as to which states that we cannot ship to. Please furnish me with this information ASAP so that we can be more careful here. If I ship to any state that I am not supposed to, it might cost me my license. * * * Also, I really need to speak with the Doctor directly. * * * I must have to speak with him so that I can make sure that every thing is alright with his prescribing abilities in the states that he is prescribing. This is very important.

Five months later, the issue apparently had still not been resolved. In a March 8, 2007 e-mail, Mr. Ihenacho wrote:

> Again, you have not addressed all of the issue[s] that I raised in my letter to you. * * * Do you understand how much trouble that I will be in if and when the DEA comes to me? I don't think that you understand, making money is good but I believe that it must be made in a good and honest manner with great respect to the law. I do have an issue with the doctors who are writing for your clients. Yesterday, you said something about hiring some nurses to get involved in screening patients and that you will have qualified doctors to work with them to make sure that anyone who calls in for any diet pill or a sedative hypnotic such as Diazepam, clonazepam, lorazepam, etc[.,] does indeed need them. If you can establish a good relationship between the patient and the doctor through hiring nurses who actually go to these patient[']s homes to see them, then I believe that is legal because the nurse will report to the doctor wh[a]t he or she feels about the patient[']s request for the medication. * * * I do not feel very comfortable at all feeling [sic] medications where I know that there is really no doctor/patient[] interaction. I have tried to get at least one patient profile, but so far, I have not ben [sic] able to get one. I need to have a documented history of the patients and doctors conversations that warrants them to receive these medications through pharmacies such as mine.

Notwithstanding the concerns he expressed in these e-mails, Respondent proceeded to dispense controlled-substance prescriptions which were written by doctors who were located in different States than where the ''patients'' resided. For example, the investigative file indicates that Respondent dispensed numerous prescriptions issued by Dr. Onochie Aghaegbuna, a physician who was licensed in Virginia,[3] to patients in other States where he was not licensed. These include prescriptions for phendimetrazine, a schedule III stimulant, which were written for residents of Honolulu, Hawaii, and Sewell, New Jersey, as well as residents of Pasadena and Placerville, California. Respondent also dispensed prescriptions for alprazolam issued by Dr. Aghaegbuna to residents of Woodbridge, New Jersey, and Fort Worth, Texas, and prescriptions for phentermine 37.5 mg. to residents of Myrtle Beach, South Carolina, and West Babylon, New York.

As part of the various Internet prescribing schemes, Respondent also filled the prescriptions issued by other physicians. For example, Dr. Lynnea N. Burr of San Antonio, Texas, issued a prescription for phendimetrazine to a resident of Glencoe, Illinois; a prescription for diazepam 10 mg., to a resident of St. Louis Park, Minnesota; a prescription for phentermine 37.5 mg., to residents of St. Louis, Missouri; Portsmouth, New Hampshire, South Park, Pennsylvania; Bernice, Oklahoma; and Dearborn, Michigan; and prescriptions for alprazolam 2 mg., to residents of Shelton, Connecticut and Morrisville, Pennsylvania.

Discussion

Section 304(a) of the Controlled Substance Act (CSA) provides that ''[a] registration * * * to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a).[4] In determining the public interest, the CSA directs that the following factors be considered:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
> (2) The applicant's experience in dispensing * * * controlled substances.
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
> (5) Such other conduct which may threaten the public health and safety.

Id. 823(f).

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem appropriate in determining whether a registration'' is consistent with the public interest and whether a registrant has committed acts which warranted the suspension of his/her registration. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005).

As explained below, the investigative file amply demonstrates that Respondent's experience in dispensing controlled substances and compliance record is characterized by its repeated filling of unlawful prescriptions under both Federal and State laws. Moreover, I further note that the State of Massachusetts has suspended Respondent's pharmacy license and controlled substances registration.[5]

[3] On March 31, 2008, Dr. Aghaegbuna entered into a consent order with the Virginia Board of Medicine under which the Board found that he had prescribed without establishing valid-doctor relationships and Dr. Aghaegbuna surrendered his State license.

[4] Section 304(d) further provides that ''[t]he Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety.'' 21 U.S.C. 824(d).

[5] While Respondent's DEA registration expired on January 31, 2009, and there is no evidence that Respondent has filed a renewal application, I conclude that this case is not moot. This case began with an immediate suspension, Respondent has not surrendered its state licenses, and there is no evidence that Respondent has gone out of business. *See William Lockridge*, 77791, 77797 (2006) (noting case is not moot where order creates collateral consequences or where conduct is capable of repetition yet evading review); *RX Direct Pharmacy, Inc.*, 72 FR 54070 (2007). Furthermore, in executing the Suspension Order, Respondent's controlled substances were seized. Under 21 U.S.C. 824(f), ''upon a revocation order becoming final,'' any controlled substances which were seized ''shall be forfeited to the United States,'' and ''[a]ll right, title, and interest in [the] controlled substances * * * shall vest in the United States.'' As I have previously recognized, a litigant cannot defeat the effect of this provision by simply allowing its registration to expire. Moreover, it is unclear

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Laws

Under DEA's regulation, a prescription for a controlled substance is unlawful unless it has been ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). The regulation further provides that while ''[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, * * * a *corresponding responsibility rests with the pharmacist who fills the prescription.*'' *Id.* (emphasis added). Continuing, the regulation states that ''the person knowingly filling such a purported prescription, as well as the person issuing it, [is] subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' *Id.*

DEA has long interpreted this provision ''as prohibiting a pharmacist from filling a prescription for a controlled substance when he either 'knows or has reason to know that the prescription was not written for a legitimate medical purpose.' '' *Medicine Shoppe-Jonesborough*, 73 FR 363, 381 (2008) (quoting *Medic-Aid Pharmacy*, 55 FR 30043, 30044 (1990)), *aff'd Medicine Shoppe-Jonesborough* v. *DEA*, 2008 WL 4899525 (6th Cir. 2008); *see also Frank's Corner Pharmacy*, 60 FR 17574, 17576 (1995); Ralph J. Bertolino, 55 FR 4729, 4730 (1990); *United States* v. *Seelig*, 622 F.2d 207, 213 (6th Cir. 1980). This Agency has further held that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' Bertolino, 55 FR at 4730 (citations omitted).[6]

In *United Prescription Services, Inc.*, I further held that ''[a] physician who engages in the unauthorized practice of medicine is not a 'practitioner acting in the usual course of * * * professional practice.' '' 21 CFR 1306.04(a). This rule derives from the text of the CSA, which defines the ''[t]he term 'practitioner' [to] mean[] a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance.'' 21 U.S.C. 802(21). *See also* 21 U.S.C. 823(f) (''The Attorney General shall register practitioners * * * to dispense * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''). As the Supreme Court has explained: ''In the case of a physician [the CSA] contemplates that *he is authorized by the State to practice medicine* and to dispense drugs in connection with his professional practice.'' *United States* v. *Moore*, 423 U.S. 122, 140–41 (1975) (emphasis added). A controlled-substance prescription issued by a physician who lacks the license necessary to practice medicine within a State is therefore unlawful under the CSA. *Cf.* 21 CFR 1306.03(a)(1) (''A prescription for a controlled substance may be issued only by an individual practitioner who is * * * [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession[.]'').

As found above, Respondent's owner knew that the Internet prescriptions he filled were unlawful. Indeed, as Mr. Ihenacho wrote in an e-mail to the owner of one of the schemes: ''As a pharmacist trained here in the USA, I know that the Federal USA law concerning the prescribing of controlled substances by any doctor requires that the doctor be licensed and registered in any state where that doctor wants to practice. * * * My observation * * * is that it is only one doctor who is writing for everything for every patient, no matter [where] the patient is located.'' Moreover, in a further e-mail, Mr. Ihenacho wrote that he needed to speak with the doctor who was prescribing in Jack's scheme so he could ''make sure that every thing is alright with his prescribing abilities in the state that he is prescribing.''

Mr. Ihenacho was thus well aware of the legal requirements for a valid prescription. In any event, state prohibitions against the unlicensed practice of medicine are a common feature of the regulation of medical practice, and those who practice the profession of pharmacy are obligated to know these rules.[7] *See, e.g.*, Cal. Bus. & Prof. Code 2052 (prohibiting unlicensed practice of medicine); Cal. Health & Safety Code § 11352(a) (prohibiting furnishing a controlled substance ''unless upon the written prescription of a physician * * * licensed to practice in this state''); Haw. Rev. Stat. 453–1 (defining practice of medicine); *id.* 453–2 (requiring license to practice); 225 Ill. Comp. Stat. Ann. 60/3 (licensure requirement); *id.* 60/3.5 (prohibiting unlicensed practice); *id.* 60/49 (listing acts constituting holding oneself out to the public as a physician); *id.* 60/49.5 (requiring persons engaged in telemedicine to hold Illinois license); Mich. Comp. Laws 333.17001 (defining practice of medicine), *id.* 17011(1) (requiring license to practice); *id.* 333.7303 (requiring controlled substance registration to dispense); N.H. Rev. Stat. Ann. 329:1 (defining practice of medicine); *id.* 329:24 (unlicensed practice); Tex. Occ. Code 155.001; *see also id.* 151.056(a) (''A person who is physically located in another jurisdiction but who, through the use of any medium, including an electronic medium, performs an act that is part of a patient care service initiated in this state, * * * and that would affect the diagnosis or treatment of the patient, is considered to be engaged in the practice of medicine in this state and is subject to appropriate regulations by the board.''); 22 Tex. Admin. Code 174.4(c) (''Physicians who treat and prescribe through the Internet are practicing medicine and must possess appropriate licensure in all jurisdictions where patients reside.''); Tex. Health & Safety Code 481.061(a) (requiring state registration to dispense controlled substance); *id.* 481.063(d) (requiring as a condition for registration that ''a

whether Respondent has been indicted, and if so, whether forfeiture of the controlled substances has been sought in that proceeding. I thus conclude that this case remains a live controversy.

[6] The Supreme Court has recently explained that ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore*, 423 U.S. 122, 135 (1975)).

[7] Even if there was no direct evidence of Mr. Ihenacho's knowledge, I would still hold that he had reason to know the prescriptions were illegal. As the California Court of Appeal has noted: the ''proscription of the unlicensed practice of medicine is neither an obscure nor an unusual state prohibition of which ignorance can reasonably be claimed, and certainly not by persons * * * who are licensed health care providers. Nor can such persons reasonably claim ignorance of the fact that authorization of a prescription pharmaceutical constitutes the practice of medicine.'' *Hageseth* v. *Superior Court*, 59 Cal. Rptr. 3d 385, 403 (Ct. App. 2007).

In Hageseth, the California Court of Appeal upheld the State's jurisdiction to criminally prosecute an out-of-state physician, who prescribed a drug to a California resident over the Internet, for the unauthorized practice of medicine. Moreover, the Medical Board of California has issued numerous Citation Orders to out-of-state physicians for Internet prescribing to state residents. *See, e.g., Citation Order Harry Hoff* (June 17, 2003); *Citation Order Carlos Gustavo Levy* (Nov. 30, 2001). It has also issued press releases announcing its position on the issuance of prescriptions by physicians who do not hold a California license. See Medical Board of California, *Record Fines Issued by Medical Board to Physicians in Internet Prescribing Cases* (News Release Feb. 10, 2003) (available at *http://www.mbc.ca.gov/NR_2003_02–10_internetdrugs.htm*).

practitioner [be] licensed under the laws of this State'').

As I have previously explained, an entity which voluntarily engages in commerce by shipping controlled substances to persons located in other States is properly charged with knowledge of the laws regarding both the practice of medicine and pharmacy in those States. *United*, 72 FR at 50408. In short, given that Dr. Aghaegbuna was licensed to practice medicine in Virginia, and yet was prescribing to persons who did not reside in that State and who frequently lived hundreds of—and in many instances more than a thousand—miles away,[8] Respondent had ample reason to know that the prescriptions were unlawful under both the CSA and the laws of numerous States. *See id.* at 50409.[9]

As the forgoing demonstrates, Respondent knowingly violated Federal law in dispensing thousands of prescriptions which lacked a legitimated purpose and were issued by practitioners acting outside of the usual course of professional practice. 21 CFR 1306.04(a). Respondent's experience in dispensing controlled substances is thus characterized by its repeated and flagrant violations of both the CSA and State laws; the scope of its illegal dispensings clearly establish that its continued registration was ''inconsistent with the public interest,'' and posed ''an imminent danger to the public health or safety'' which warranted the immediate suspension of its registration.[10] 21 U.S.C. 824(a) & (d).

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 28 CFR 0.100(b) & 0.104, I affirm my order which immediately suspended the now-expired DEA Certificate of Registration, BM3972747, issued to Meetinghouse Community Pharmacy, Inc. This order is effective immediately.

Dated: February 26, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–4909 Filed 3–6–09; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated November 26, 2008, and published in the **Federal Register** on December 5, 2008, (73 FR 74194), Cerilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78665–2402, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
Fenethylline (1503)	I
Gamma hydroxybutyric acid (2010)	I
Ibogaine (7260)	I
Lysergic acid diethylamide (7315)	I
2,5-Dimethoxy-4-(n)-propylthiophenethylamine(7348)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390)	I
4-Bromo-2,5-dimethoxyamphetamine (7391)	I
4-Bromo-2,5-dimethoxyphenethylamine (7392)	I
4-Methyl-2,5-dimethoxyamphetamine (7395)	I
2,5-Dimethoxyamphetamine (7396)	I
3,4-Methylenedioxyamphetamine (7400)	I
3,4-Methylenedioxy-N-ethylamphetamine (7404)	I
3,4-Methylenedioxymethamphetamine (7405)	I
4-Methoxyamphetamine (7411)	I
Alpha-methyltryptamine (7432)	I
Diethyltryptamine (7434)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N-Benzylpiperazine (7493)	I
Etorphine (except HCl) (9056)	I
Heroin (9200)	I
Morphine-N-oxide (9307)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Dextromoramide (9613)	I
Dipipanone (9622)	I
Trimeperidine (9646)	I

[8] In particular, I rely on the prescriptions Dr. Aghaegbuna issued to residents of California, Hawaii, and Texas. In preparing this Order, I have visited the Web sites of the medical licensing authorities of these States and verified that Dr. Aghaegbuna was not licensed by them.

I have also visited the Web sites of the respective State authorities of Illinois, Michigan, and New Hampshire, and determined that Dr. Burr was not licensed in these States. Respondent nonetheless dispensed prescriptions issued by Dr. Burr for residents of these States in violation of state and Federal laws.

[9] Respondent also had ample reason to know that prescriptions were unlawful because he knew that the prescribers were not physically examining the patients. As Mr. Ihenacho wrote in a March 8, 2007 e-mail, ''I do not feel very comfortable at all feeling [sic] medications where I know that there is really no doctor/patient interaction.'' Indeed, under numerous State medical practice standards, with only limited exceptions, a physician must take a medical history and physically examine a patient in order to properly diagnose the patient and recommend treatment options including prescribing a drug. *See, e.g.*, N.J. Admin. Code 13:35–7.1A(a); S.C. Code Regs. 81–28.

[10] To make clear, I would have revoked Respondent's registration had it not expired prior to the issuance of this Order.

Drug	Schedule
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Meperidine (9230)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273)	II
Morphine (9300)	II
Oripavine (9330)	II
Thebaine (9333)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Fentanyl (9801)	II

The company plans to import small quantities of the listed controlled substances for the manufacture of analytical reference standards.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Cerilliant Corporation to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Cerilliant Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: March 4, 2009.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 06–78]

Steven M. Abbadessa, D.O.; Grant of Restricted Registration

On August 7, 2006, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Steven M. Abbadessa, D.O. (Respondent), of St. Louis, Missouri. The Show Cause Order proposed the denial of Respondent's pending application for a DEA Certificate of Registration as a practitioner, on the ground that his ''registration would be inconsistent with the public interest.'' *Id.* at 1 (citing 21 U.S.C. 823(f)).

The Show Cause Order specifically alleged that ''[o]n or about January 1981, [Respondent] illegally possessed and distributed * * * cocaine in violation of 21 U.S.C. 841(a)(1),'' that Respondent was subsequently charged and arrested, and that he had admitted to agents that he had been involved ''in the illegal distribution of cocaine, a schedule II controlled substance,'' but that ''no further prosecution was undertaken'' because he cooperated with authorities. *Id.*

The Show Cause Order next alleged that on December 4, 2001, Respondent was arrested by local police at a hotel in Clayton, Missouri, where he was found to have in his possession cocaine, as well as two prescription controlled substances—a combination drug containing hydrocodone, a schedule III controlled substance, and alprazolam, a schedule IV controlled substance. *Id.* The Order further alleged that the hydrocodone and the alprazolam ''had been dispensed in the name of an acquaintance'' of Respondent. *Id.*

Relatedly, the Show Cause Order alleged that Respondent was subsequently indicted in state court on one felony count of possession of cocaine, and two felony counts of obtaining controlled substances by fraud. *Id.* The Order further alleged that on January 31, 2003, Respondent pled guilty to all three counts, but that he was allowed to withdraw his pleas after he completed a ''one-year drug program.'' [1] *Id.* at 1–2.

Respondent, through his counsel, requested a hearing on the allegations. ALJ Ex. 2. The matter was assigned to Administrative Law Judge (ALJ) Gail Randall, who conducted a hearing in St. Louis, Missouri, on May 15 and 16, 2007. At the hearing, both the Government and Respondent put on testimony and introduced documentary evidence into the record. Following the hearing, both parties submitted briefs containing their proposed findings of fact, conclusions of law, and argument.

On February 13, 2008, the ALJ issued her recommended decision (ALJ). In her decision, the ALJ concluded that the

[1] The Order also noted that on March 10, 2003, Respondent had surrendered his DEA registration, that in February 2004, the Missouri State Board for the Healing Arts had entered into a settlement agreement with Respondent under which his medical license was placed on probation for seven years, and that in April 2006, Respondent's state controlled substances registration had been restored. *Id.* at 1–2.

Government had established grounds for the denial of Respondent's application. ALJ at 55. The ALJ held, however, that Respondent had accepted responsibility for his misconduct and had ''provided ample mitigating evidence and adequate assurances that he is able to responsibly handle [controlled substances] and is willing to abide by restrictions and/or requirements placed upon him.'' *Id.* at 57. The ALJ thus recommended that Respondent's application be granted subject to three restrictions. *Id.* Thereafter, the Government filed exceptions to the ALJ's decision.

Having considered the entire record in this matter, I adopt the ALJ's recommended decision except for her conclusions regarding the hardship imposed by Respondent's lack of a registration, which is not a relevant consideration under the Controlled Substances Act. I hold that while the Government made out a *prima facie* case to deny the application, Respondent has convincingly demonstrated that he can be entrusted with a new registration subject to conditions. However, I impose additional conditions beyond those recommended by the ALJ. I therefore reject the Government's exceptions and will grant Respondent a new registration subject to the conditions as set forth below. I make the following findings.

Findings

Respondent is a Doctor of Osteopathy (D.O.) and a board-certified proctologist. Respondent holds a license as an Osteopathic Physician and Surgeon from the Missouri State Board of Registration for the Healing Arts. RX 16, at 25. Effective February 9, 2004, Respondent's state license was placed on probation for a period of seven years. *Id.* Respondent also held a DEA Certificate of Registration from 1987 until he surrendered it on March 7, 2003. GX 4.

Respondent is, however, currently authorized to practice medicine subject to numerous conditions. These include, *inter alia:* (1) That he ''abstain completely from the personal use or possession of controlled substances * * * unless that use of the drug has been prescribed by a person licensed to prescribe such drug and with whom [he] has a bona fide physician/patient relationship,'' RX 16, at 26; (2) that he participate in the Missouri State Medical Association's Physician Health Program (MPHP), *id.* at 25–26; (3) that he completely abstain from the use of alcohol, *id.* at 27; (4) that he ''submit to biological fluid testing'' at his own expense and that the presence of any drug not supported by a valid prescription which had been submitted to the Board is a violation of his discipline, *id.*; (5) that he ''cause a letter of evaluation from [a] chemical dependency professional or from the rehabilitation or aftercare program to be submitted to the Board'' each quarter, *id.;* and (6) that he agree to ''unannounced visits from the Board's representatives to monitor his compliance with'' the agreement. *Id.* at 28.

On November 10, 2003, Respondent applied for a new Missouri Controlled Substance Registration, his previous state registration having lapsed on March 31, 2003. GX 10, at 6. On August 24, 2004, the Missouri Bureau of Narcotics and Dangerous Drugs (BNDD) denied Respondent's application and issued an administrative complaint.[2] *Id.* On April 6, 2005, Respondent and the State entered into a stipulation and consent order under which Respondent acknowledged that the State had ''sufficient evidence'' to support the allegations of the denial letter and that cause existed to deny Respondent's application. *Id.* The parties agreed, however, that Respondent would accept the State's denial of his application, but that the State would consider a new application on or after January 1, 2006, and would grant the application provided that he did not commit new violations of controlled-substance laws and regulations and complied with his agreements with the state medical board and the Missouri Physicians Health Program. *Id.* at 8.

On or about January 5, 2006, Respondent submitted a new application for a state controlled substances registration. GX 11, at 3. On April 3, 2006, Respondent and the State entered into a settlement agreement under which Respondent again agreed that cause existed under Missouri law to deny his application. *Id.* at 3–4. The parties agreed, however, that the State would grant him a new registration subject to extensive probationary terms. *Id.* at 4.

The terms included, *inter alia:* (1) That Respondent maintain duplicate copies of ''serially numbered'' prescriptions and that copies be ''maintained separately from each patient's charts,'' (2) that Respondent ''not prescribe or administer controlled substances for himself, his immediate family or his employees except in a life-threatening emergency,'' (3) that Respondent ''not order, purchase, or accept controlled substances,'' (4) that Respondent ''not obtain'' any controlled substance unless it is prescribed to him by a practitioner with whom he ''has a legitimate practitioner-patient relationship,'' and that he inform any treating practitioner ''of his prior chemical dependence before he is given a prescription,'' (5) that Respondent ensure that any prescribing practitioner notify the BNDD of any prescription that was issued to him including the medical purpose of the prescription, (6) that Respondent shall remain a member of MPHP and ensure that quarterly reports were released to the BNDD, (7) that the BNDD ''shall have authority to obtain biological * * * and hair samples'' at Respondent's expense, and (8) that both state and DEA investigators ''shall have access to all required controlled drug records at any time during regular office hours.'' *Id.* at 4–6. Respondent was thus granted a new state controlled substance registration; the probationary terms remain in effect until April 3, 2011. *Id.* at 1.

Respondent's Drug-Related Incidents

The 1981 Incident

In 1981, DEA Agents in Kirksville, Missouri, were notified by an informant that Respondent was a ''large cocaine dealer.'' Tr. 51. Through the informant, a meeting was arranged at which an Agent posed as someone interested in buying cocaine from Respondent. *Id.* at 52–53. Respondent told the Agent that he could supply him with ''two to three ounces of cocaine'' and gave him a sample to test. *Id.* at 52. Respondent wanted money upfront, but the Agent refused to provide it. *Id.* Respondent and the Agent ended the meeting by agreeing to meet at a later date. *Id.* at 53.

The following day, Respondent and the Agent had a telephone conversation during which the former told the latter that he could get him ''all the cocaine he wanted,'' which he thought was ''three or four ounces.'' GX 3, at 2. Respondent did not, however, consummate a deal with the Agent. *Id.* Respondent did not hear again from the Agent for several weeks, when the latter called and told Respondent that he had some marijuana and cocaine for sale and asked if Respondent would ''take it on consignment.'' *Id.*

Respondent agreed to meet the Agent. *Id.* Upon his arrival at the meeting, Respondent was arrested and charged with cocaine distribution. *Id.* Respondent cooperated with the authorities; as a result of his cooperation, two other persons were arrested. Tr. 99. Because of his cooperation, Respondent's case was sealed and he was not convicted of an offense. *Id.* at 98–99.

[2] The incident which prompted the denial (and this proceeding) is discussed below.

The 1992 Incident

In 1992, Respondent was treated for headaches by a neurologist, who prescribed Vicodin to him. Tr. 255–56. When Respondent continued to seek refills of the Vicodin over a sustained period of time, the neurologist raised with him the subject of whether he was addicted. *Id.* at 256. Respondent agreed to contact the MPHP and underwent an in-patient evaluation which lasted seven to eight days. *Id.* Upon being discharged, Respondent participated in the MPHP program for approximately six years, during which he attend weekly Caduceus meetings and submitted to drug testing. *Id.* at 259. Respondent left the program in 1998, thinking that he ''was okay.'' *Id.* at 260. While Respondent was fine for a little while, he eventually started drinking again and then abusing drugs again. *Id.*

The 2001 Incident

On December 4, 2001, an employee of a Ritz-Carlton hotel located in Clayton, Missouri contacted local police and reported that he had observed cocaine in the room in which Respondent was staying. *Id.* at 14–15. Upon their arrival, the police went to Respondent's room, knocked on the door, and were let in by a cab driver named Rodney. *Id.* at 16. Respondent walked out of the bedroom area, observed the officers who were in uniform, and ran back into the bedroom. *Id.* at 16–17. The officers pursued Respondent and subdued him. *Id.* at 17. On a table, the officers found a bag containing 14.38 grams of cocaine, a black plastic container which held seven-tenths of a gram of cocaine, and assorted paraphernalia used to prepare and snort the drug such as plates, straws, a calling card and a credit card. *Id.* at 18.

The officers also seized two prescription drug vials; one contained thirty-seven tablets of hydrocodone, the other contained forty-one tablets of alprazolam. *Id.* at 18–19. The labels on the vials listed Rodney as the patient and Respondent as the prescriber (and included his DEA number); the quantities dispensed were forty tablets of hydrocodone and forty-two tablets of alprazolam. *Id.* Respondent was subsequently arrested and taken to the police station for booking. *Id.* at 22.

Rodney told the police that he had first met Respondent two days earlier when he drove him from a restaurant to his home; on that occasion, Respondent had asked Rodney for his business card because he was having car problems. *Id.* at 20–21. Upon meeting Respondent on December 4th, Respondent told Rodney that he was going to call in some prescriptions in Rodney's name and asked Rodney if he could pick them up at the pharmacy. *Id.* at 21. Respondent gave him money, and Rodney picked up the prescriptions that were found in the hotel room. *Id.*

At the police station, Respondent admitted that he had written the two prescriptions. *Id.* at 23. He was also observed as being in ''an agitated state, pacing back and forth in his cell'' and hitting his head against the wall. *Id.* According to the arresting officer, who had extensive experience in narcotics investigations, Respondent showed signs of impairment. *Id.* at 24.

Respondent was subsequently charged with three felony offenses under state law: One count of possession of a controlled substance, and two counts of fraudulently attempting to obtain a controlled substance. GX 5. On January 31, 2003, Respondent pled guilty to the charges and was allowed to enter into the St. Louis County Drug Court Program. GXs 5 & 7. Under the program, Respondent was required to, *inter alia,* undergo treatment, submit to urine and breath tests, not possess or use either controlled substances (unless prescribed by his doctor) or alcoholic beverages, and attend weekly court sessions for a minimum period of one year. GX 7. Respondent successfully completed the program and was allowed to withdraw his guilty pleas. GX 8.

Respondent's Evidence Regarding His Rehabilitation

Following his December 2001 arrest, and before even entering the Drug Court Program, Respondent sought treatment from the MPHP program. Tr. 140–42. On December 17, 2001, Respondent entered the Talbott Recovery Campus to be treated for chemical dependency. RX 6, at 1. Respondent was treated at Talbott for approximately four months and was discharged on April 6, 2002. *Id.* According to the discharge summary, Respondent had ''progressed well though his treatment process and * * * was able to develop healthier and more positive ways of coping with life without engaging in self destructive behaviors.'' *Id.* at 5.

On February 7, 2003, Respondent's attending physician at Talbott wrote a letter to Respondent's counsel. RX 5. The attending physician noted that Respondent ''has complied with all the recommendations of our treatment team in aftercare. He has been active in recovery groups and attends our Return Visits. His urine drug screens have remained negative.'' *Id.*

The physician further wrote that Respondent ''is doing well in recovery. He impresses us as willing to comply with all recommendations and continued participation in recovery activities.'' *Id.* Finally, the physician stated his belief that Respondent ''is competent to practice medicine. He appears committed to his patients and his profession. We would support any administrative decision to allow him to continue to practice medicine.'' *Id.*

As further evidence of his rehabilitation, Respondent introduced an affidavit (dated March 15, 2007) of Ms. Tina Steinman, Executive Director of the Missouri State Board of Registration for the Healing Arts. RX 4, at 1–2. According to Ms. Steinman, ''[a]s of the date of [the] affidavit,'' Respondent ''is in compliance with the *Settlement Agreement* that he signed with the [state board] that was effective February 9, 2004.'' *Id.* at 1.

Respondent also called several witnesses to testify regarding his rehabilitation, including Robert Bondurant, the coordinator of the MPHP. Tr. 111. In his testimony, Mr. Bondurant explained that if a physician failed a drug test or had ''some other adverse activity,'' he would not support the physician before the licensing authority. *Id.* at 118. Mr. Bondurant further explained that MPHP used several monitoring mechanisms including random testing for both street drugs and prescription drugs; contacting the physician's family members, employers and colleagues; and monitoring the physician's attendance and participation in support groups and Caduceus meetings. *Id.* at 122 & 138.

With respect to Respondent, Mr. Bondurant explained that he joined the MPHP shortly after being treated at Talbott and had signed a new agreement in 2004 after the State Board placed him on probation. *Id.* at 143. Mr. Bondurant further testified that Respondent had done everything that Talbott had recommended for his aftercare, and that he had joined MPHP two years before he was ordered to do so by the State Board. *Id.* at 144–45. Moreover, at the time of the hearing, Respondent, who was then five years into the process of his rehabilitation, was continuing to go to AA and Caduceus meetings. *Id.* at 146.

Mr. Bondurant also testified that Respondent had been subjected to numerous drug tests as part of both the Drug Court Program and MPHP, and that every test was negative. *Id.* at 152–53. Mr. Bondurant testified that MPHP will randomly call Respondent for a drug test and that he had never refused to undergo a test. *Id.* at 153–54. Respondent is also required to call the State Board every morning to determine whether he has been selected for testing.

Id. at 154. The State Board has never reported to Mr. Bondurant that Respondent has tested positive for a controlled substance.[3] *Id.* Nor has Mr. Bondurant received any other adverse information from the Board regarding Respondent. *Id.* at 156.

Mr. Bondurant further testified that he had no information that would indicate that Respondent was currently using or abusing controlled substances that had not been prescribed to him. *Id.* at 161. He also opined that Respondent is ''in a very solid recovery,'' but that his addiction is ''going to be a lifetime issue for him.'' *Id.* at 162. Finally, Mr. Bondurant testified that he believed that Respondent could safely handle and prescribe controlled substances, and that he had ''no reason to believe that he'' poses a threat to public safety. *Id.* at 166.

Respondent also elicited the testimony of R.S., a dentist who, at the time of hearing, had know him for six years from his participation in the St. Louis Caduceus group *Id.* at 201–02, 210. R.S. testified that Respondent's ''level of commitment to his recovery is outstanding,'' that Respondent had operated on him, and that he would not have let Respondent do so if he did not ''have his head in the right place.'' *Id.* at 212. R.S. also stated that he had referred his wife and several friends to Respondent and that he could not think of any reason as to why he would not safely prescribe controlled substances. *Id.* at 212 & 214.

Respondent further called Ralph Orlovick, Ph.D., a clinical psychologist, who specializes in the treatment of chemical dependency and who has run the MPHP's aftercare program (Caduceus Group) since 1995. *Id.* at 270; RX 15. Dr. Orlovick explained that Respondent ''accept[s] responsibility for his own behavior,'' Tr. 295–96, and ''has an extremely deep acceptance of the fact that he is an addict in recovery and has established a lifestyle that maintains and protects that * * * recovery.'' *Id.* at 287. He also testified that Respondent was ''a different person * * * than he was'' when he first entered the program, *id.* at 289–90; that he had ''no fears or concerns about'' Respondent's regaining a registration, *id.* at 294; and that ''the length of [his] recovery and the ways he has been managing his life [were] excellent indices reflecting his readiness to get a [registration] in a responsible way.'' *Id.* at 295. Dr. Orlovick further testified that he did not know of any reason why the Agency should not grant Respondent's application, and that he had the tools necessary to continue his recovery. *Id.*

Respondent testified that while he was allowed to withdraw his guilty pleas to the three charges which arose out of his December 2001 arrest, the acts ''absolutely happened and I take full responsibility.''[4] *Id.* at 352. Respondent further testified that he was never sanctioned for non-compliance during his participation in the drug-court program, and that he did all of the things he was required to do as part of the program. *Id.* at 354–56.

Respondent also testified regarding the settlement agreement he had entered into with the Missouri Board. In this testimony, Respondent acknowledged that he was chemically dependent. *Id.* at 358–60. He also testified regarding the various terms of the agreement, including that he must call every morning to determine whether he has been selected to provide either a urine or hair sample. *Id.* at 360.

Respondent also testified regarding his obtaining a new state controlled substances registration and indicated that while he had not yet had to institute the terms and conditions imposed by the Missouri BNDD because he is still unable to legally prescribe a controlled substance, he was ''absolutely'' willing to do so, and that it would be ''no'' problem for him to do so. *Id.* at 369–70. Respondent testified that his probation with the BNDD would last for ''five years.'' *Id.* at 372. He also testified that he considered holding a DEA registration to be ''an absolute privilege,'' *id.* at 373; that he had attended a three-day continuing medical education course on the prescribing of controlled substances, *id.* at 375; and that he ''would do anything required'' to regain his registration, including agreeing to warrantless searches, submitting to drug testing, and maintaining a prescription log. *Id.* at 385.

Finally, Respondent testified that he had not harmed any patient during the period in which he was abusing drugs and there is no evidence to the contrary. *Id.* at 388. Nor is there any evidence that Respondent has ever used his prescribing authority to deal drugs to others.

The Government put on no rebuttal case.[5]

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that ''[t]he Attorney General may deny an application for [a practitioner's] registration if he determines that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, the Act requires the consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether an application for a registration should be denied. *Id.* Moreover, I am ''not required

[3] The record establishes that the testing screens for prescriptions opiates including hydrocodone and oxycodone.

[4] On cross-examination, Respondent was asked if he ''attribute[d] this whole [1981] incident to like youthful indiscretion or how do you characterize this?'' Tr. 391. Respondent answered: ''Yes.'' *Id.*

[5] In applying for a new registration, Respondent submitted extensive documentation regarding the 2001 incident, the criminal charges and their disposition, the voluntary surrender of his DEA registration, and the actions taken by both the Missouri Board and BNDD. *See* RX 16. He also included various letters of support. These included the letter from his attending physician at Talbott; a letter from the MPHP supporting his application to the state BNDD which indicated that he was ''in complete compliance'' with the program, and that both the program's Medical Director and Coordinator (Mr. Bondurant) supported his request for a state registration; and finally, a letter from Dr. Orlovick which discussed Respondent's participation in the Caduceus Group and concluded that ''[h]e is now fully ready, and deserving, of receiving his BNDD and DEA number.'' RX 16, at 8, 47, & 49.

At the hearing, a Diversion Group Supervisor (GS) who oversaw the pre-registration investigation acknowledged that these materials had been submitted as part of the application. Tr. 84. The GS testified, however, that while he reviewed the application, he had not reviewed all of the attachments and had not talked about Respondent's application with any person other than the DI who was assigned the investigation. *Id.* at 105.

The GS also testified that the DI who performed the investigation obtained no evidence that any of the information provided by Respondent was inaccurate or that Respondent was again abusing controlled substances. *Id.* at 86. Finally, the DI testified that in light of all of the information contained in Respondent's application, he could not explain why it would now be inconsistent with the public interest to grant his application. *Id.* at 101. When asked ''what more'' Respondent had to do to establish that his registration would be consistent with the public interest?, the GS answered: ''My personal opinion, I believe he's had two or three chances to abide by the regulations * * * to handle controlled substances and I believe he failed at that.'' *Id.* at 108–09.

to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

In this case, it is not disputed that Respondent violated Federal law both in 1981, when he was charged with cocaine distribution, and most significantly, in December 2001, when he possessed cocaine and obtained for his own use, two prescription controlled substances, hydrocodone and alprazolam, by writing fraudulent prescriptions which were issued in the name of a cab driver. The Government has therefore made out a *prima facie* case to deny his application.

This Agency has repeatedly held, however, that a proceeding under section 303 '' 'is a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused * * * their DEA Certificate of Registration, and who have not presented sufficient mitigating evidence to assure the Administrator that they can be entrusted with the responsibility carried by such a registration.' '' *Samuel S. Jackson*, 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988)). Therefore, where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008) (quoting *Jackson,* 72 FR at 23853 (2007) (quoting *Leo R. Miller*, 53 FR 21931, 21932 (1988))), *aff'd, Medicine Shoppe-Jonesborough* v. *DEA*, slip. op. at 9–10 (6th Cir. Nov. 13, 2008). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA*, 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe*, 73 FR at 387; *accord Jackson*, 72 FR at 23853; *John H. Kennedy*, 71 FR 35705, 35709 (2006); *Prince George Daniels*, 60 FR 62884, 62887 (1995). See also *Hoxie* v. *DEA*, 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

The Government raises two arguments in support of its contention that Respondent's application should be denied. In its proposed findings, the Government contends that ''[a]lthough Respondent presented substantial expert and peer testimony in support of his rehabilitation, he does not appear to have taken full responsibility for his past forays into addiction and drug abuse.'' Gov. Proposed Findings at 6. In its Exceptions, however, the Government argues that ''[t]he evidence that the applicant presented at the hearing as to his rehabilitation was sparse and less than convincing.'' Gov. Exceptions at 2.

As for the contention that Respondent has not taken ''full responsibility for'' what it describes as his ''past forays,'' apparently the Government relies on Respondent's testimony regarding the 1981 episode, as well as the reasons he gave for the problems he had in 1991 and 2001. The Government's contention is wholly unpersuasive.

As for the 1981 arrest for cocaine distribution, twenty-seven years have elapsed since this event and there is no evidence that Respondent ever subsequently engaged in the unlawful distribution of either illicit (street) or prescription controlled substances to others. Furthermore, Respondent did not deny that he had committed the acts.

The Government apparently also finds fault with Respondent's testimony regarding what led to his becoming addicted in 1991. *See* Prop. Findings at 4 (''He attributed his 1991–1992 drug use to chronic headaches.''). The Government, however, offered no evidence to refute Respondent's testimony that he was prescribed controlled substances as treatment for a legitimate medical condition, and that he became addicted over the course of that treatment. Nor is Respondent the first person to become addicted to a drug prescribed in the course of legitimate medical treatment. Related to this incident, the Government also ignores that Respondent voluntarily entered treatment and underwent treatment and aftercare for approximately six years. Moreover, in discussing this period of his life, Respondent did not deny that he was chemically dependent.

Finally, the Government contends that Respondent ''attributed his 2001 conviction to personal stress'' [6] and that he ''failed recovery after several years of rehabilitation.'' *Id.* The Government, however, offered no evidence showing that Respondent's testimony was false, and in any event, it is not clear why his explanation—''a number of things, personal things, stress,'' Tr. 393—regarding the cause of his relapse, establishes that he has failed to accept responsibility.

In any event, the great weight of the evidence refutes the contention. Notably, Respondent fully acknowledged his misconduct in writing the prescriptions to the cab driver. Moreover, with respect to his addiction, Respondent produced ample evidence demonstrating that he acknowledges that he is chemically dependent. This includes both Respondent's testimony and written admission regarding his addiction. *See* GX 9, at 3 (settlement agreement with state board; ''Respondent has admitted he is chemically dependent''); Tr. 261 (''I went [to treatment] because something had to change * * * I couldn't keep doing what I was doing''); *id.* at 358–59 (acknowledging his admission in the state board settlement agreement); *see also* GX 1, at 4 (answer to DEA application's liability questions; ''I am committed to a lifelong recovery program and will follow all continuing recommendations of MPHP and the [state] Board.'').

Moreover, both Dr. Orlovick, the psychologist who runs MPHP's aftercare program, and Mr. Bondurant, the MPHP Program Coordinator, testified that Respondent acknowledges his addiction. *See id.* at 287 (testimony of Dr. Orlovick; Respondent ''has an extremely deep acceptance of the fact that he is an addict in recovery and has established a lifestyle that maintains and protects that * * * recovery''); *id.* at 295 (testimony of Dr. Orlovick; Respondent ''accept[s] responsibility for his own behavior''). *Id.* at 164 (testimony of Mr. Bondurant; ''over the intervening years [Respondent] has learned that he does have limitations and that the addiction issue is a life-long process and he is not stronger than the addiction''). It is thus clear that Respondent has accepted responsibility for both his misconduct and addiction.

As for the contention that Respondent has not sufficiently established his rehabilitation, in its proposed findings, the Government acknowledged that ''Respondent presented substantial expert and peer testimony in support of his rehabilitation,'' *Id.* at 6. In its Exceptions, however, the Government does an about-face and now argues that ''[t]he evidence that the applicant presented at the hearing as to his rehabilitation was sparse and less than convincing.'' Gov. Exc. at 2. Even ignoring the inconsistency between its initial and subsequent positions, I conclude that Respondent put forward compelling evidence of his

[6] The Government's own exhibit establishes that Respondent was not convicted of any offense related to the 2001 incident, which was nol-prossed. *See* GX 8.

rehabilitation.[7] Specifically, in addition to his own testimony, Respondent introduced the affidavit of the Missouri Board's Executive Director that he was ''in compliance with the *Settlement Agreement*,'' RX 4, at 1; a letter from the physician who treated him at Talbott, RX 5; and again, the testimony (and letters) of Mr. Bondurant, Dr. Orlovick, and R.S., a dentist who was also a member of Respondent's aftercare group.

More specifically, Respondent's treating physician at Talbott wrote that his drug screens were negative, that he was ''doing well in recovery,'' that he was ''willing to comply with all recommendations and continued participation in recovery activities,'' and that he ''is competent to practice medicine.'' RX 5. Mr. Bondurant testified as to Respondent's compliance with the conditions of the MPHP; that he had never failed or refused to undergo a drug test (whether the test was ordered by the Drug Court, MPHP, or the Board); that he had not received any adverse information regarding Respondent, who is ''in a very solid recovery''; and that he had ''no reason to believe that [Respondent] would'' pose a threat to public safety. Tr. 153–54, 156, 161–62, 166.

To similar effect, Dr. Orlovick testified that Respondent ''has established a lifestyle that maintains and protects [his] recovery,'' and that he had ''no fears or concerns about'' Respondent's regaining a registration. *Id.* at 287 & 294. Dr. Orlovick also testified that ''the length of [Respondent's] recovery and the ways he has been managing his life [are] excellent indices reflecting his readiness to'' responsibly hold a registration. *Id.* at 295. Dr. Orlovick further stated that he did know of any reason why Respondent's application should not be granted and that he had the tools necessary to maintain his recovery. *Id.*

Finally, R.S., who has known Respondent for six years from their participation in Caduceus meetings, testified that Respondent's ''commitment to his recovery is outstanding.'' *Id.* at 212. He also stated that he could not think of any reason why Respondent would not responsibly prescribe controlled substances. *Id.* at 214.

In response to this evidence, much of which was available at the time Respondent applied for a new registration, the Government offered nothing. I hold, however, that Respondent's evidence as to his rehabilitation is convincing and reject the Government's contention to the contrary. Indeed, as the Supervisory DI testified, he could not explain why it would be inconsistent with the public interest for Respondent to hold a registration. I therefore conclude that Respondent has established that granting his application would be consistent with the public interest. 21 U.S.C. 823(f).

Sanction

As Respondent himself recognizes, the record nonetheless supports imposing conditions on his registration. Resp. Proposed Findings at 21–22. Under the Settlement Agreement with the State Board, Respondent is required to maintain duplicate serially numbered prescriptions separately from patient charts for each controlled substance prescription he writes. GX 11, at 4. Respondent has agreed to provide or make available these records to this Agency and has also agreed to consent to inspections of these records without the Government having to obtain an administrative warrant. Resp. Prop. Findings at 22. These requirements are therefore imposed as conditions of Respondent's registration.

Relatedly, the record also supports the ALJ's recommendation that Respondent must maintain and submit on a quarterly basis, a log listing in chronological order, all controlled substance prescriptions he issues. The log shall include the prescription number, patient name and address, name, amount and strength of the drug prescribed, and number of refills authorized. The log shall also include any prescriptions and refills authorized by Respondent by telephone.

According to the terms of his agreement with the State BNDD, Respondent is not authorized to ''order, purchase or accept'' any controlled substances. GX 11, at 5. The BNDD Order further provides that Respondent ''shall not dispense any controlled substances other than by administering or prescribing.'' *Id.*

It is unclear whether Respondent seeks authority to administer controlled substances at his clinic (as opposed to in a hospital setting), whether the BNDD agreement authorizes him to do so, and if he is permitted to do so, how he can legally obtain them.[8] Moreover, the extent to which Respondent performs procedures in his clinic which require the administration of a controlled substance is also not fully established on this record.

In the event Respondent seeks authority to administer controlled substances at the clinic, he must first provide evidence from the Missouri BNDD clearly stating that he is authorized to do so. Respondent must also explain how any controlled substances will be lawfully obtained (notwithstanding his agreement with the BNDD prohibiting his ordering and purchasing them), how they will be stored, and how they will be accounted for. Respondent shall not administer controlled substances at his clinic until he complies with this condition and receives written approval from this Agency. Respondent can, however, administer a controlled substance in a hospital setting.

Respondent shall not prescribe any controlled substance to himself or any family member. Respondent shall not obtain a controlled substance for his own use unless it has been prescribed by another practitioner in accordance with the prescription requirement of federal law. *See* 21 CFR 1306.04 (''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'').

Respondent shall also ensure that the MPHP quarterly status reports are submitted to the Agency. All reports and logs are to be submitted to the Special Agent in Charge (or his designee), St. Louis Field Division, no later than fifteen days following the end of the quarter. Respondent shall also promptly notify the Special Agent in Charge (or his designee) of any action taken by either the State Board or BNDD against his license or state registration. Failure to comply with any of the conditions specified above shall be grounds for the suspension or revocation of Respondent's registration.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) & 0.104, I hereby order that the application of Steven M. Abbadessa, D.O., for a DEA Certificate of Registration as a practitioner be, and it

[7] Notwithstanding the suggestion in the Government's proposed findings, there is no evidence that Respondent has relapsed following the treatment he received in 2002.

[8] The record establishes that another doctor, who was alternatively characterized as Respondent's associate or partner, administers controlled substances at his clinic. Tr. 244. According to Respondent, while his associate/partner holds a DEA and state registration, the latter is not authorized under agreements with the state authorities to stock controlled substances and no controlled substances are currently being stocked at the clinic. The record does not establish how Respondent's partner/associate obtains and maintains the controlled substances which are used at his clinic.

hereby is, granted, subject to the conditions set forth above. This Order is effective immediately.

Dated: February 26, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–4906 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 06–28]

Joseph Gaudio, M.D.; Suspension of Registration

On September 16, 2005, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Joseph Gaudio, M.D. (Respondent) of Alpine, New Jersey. The Show Cause Order sought the revocation of Respondent's DEA Certificate of Registration, which authorizes him to handle controlled substances as a practitioner, and the denial of any pending applications to renew or modify his registration, on the ground that he had committed acts which rendered his continued registration ''inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Show Cause Order alleged that Respondent had issued prescriptions for controlled substances which lacked a legitimate medical purpose, and that in doing so, he had acted outside of the usual course of professional practice. *Id.* at 1 & 6. The Show Cause Order specifically alleged that Respondent had ''prescrib[ed] controlled substances to Internet customers despite never establishing a genuine doctor-patient relationship with the Internet customer.'' *Id.* at 5. Relatedly, the Show Cause Order alleged that Respondent ''did not see customers, had no prior doctor-patient relationships with the Internet customers, did not conduct physical exams, * * * did [not] create or maintain patient records,'' and that ''[t]he only information usually reviewed prior to issuing drug orders was the customer's online questionnaire.'' *Id.* at 6.

The Show Cause Order also alleged that ''[a] review of prescriptions filled by [Carrington Healthcare System/ Infiniti Services Group] revealed that [Respondent] ha[d] issued drug orders for controlled substances to Internet customers throughout the United States, including Georgia, Texas, Pennsylvania, Alabama, Louisiana, and Kentucky.'' *Id.* The Show Cause Order further alleged that ''[a] review of prescriptions filled by [Carrington/Infiniti] for the period October 13, 2004 to January 21, 2005, revealed that [Respondent] ha[d] issued 16 drug orders to Internet customers in at least nine different states.'' *Id.*

On October 21, 2005, Respondent, through his counsel, requested a hearing on the allegations. The matter was assigned to Administrative Law Judge (ALJ) Gail Randall, who conducted a hearing on May 2–5, 2006, in New York, NY. At the hearing, both parties put on testimony and introduced documentary evidence. Thereafter, both parties submitted briefs containing their proposed findings of fact, conclusions of law, and arguments.

On November 2, 2007, the ALJ issued her recommended decision. In her decision, the ALJ concluded that ''[t]he Government has clearly demonstrated that the Respondent's Internet practice and his resulting issuance of controlled substance prescriptions * * * violated the Controlled Substances Act.'' ALJ at 43. Applying the totality of the circumstances test, the ALJ concluded, however, that the revocation of Respondent's registration was not warranted. *Id.* at 43–44.

The ALJ specifically noted that ''Respondent's conduct encompassed a one year period,'' that Respondent had ''voluntarily cease[d]'' his conduct, but that he had not done so until three months after he was served with the Show Cause Order. *Id.* at 43. While the ALJ deemed Respondent's cessation of his conduct as ''commendable because of its voluntary nature,'' she further explained that he ''demonstrated a lack of sound judgment'' in ''continuing to'' prescribe after being served with the Show Cause Order. *Id.* at 44. The ALJ also found of concern ''Respondent's failure to be totally truthful during his testimony.'' *Id.*

The ALJ reasoned, however, that Respondent was ''a very educated, dedicated and talented physician practicing in a sometimes difficult specialty, pain management,'' and that the revocation of his registration would render him ''being unable to handle controlled substances'' in his specialty. *Id.* Because the record demonstrated that Respondent had practiced medicine for eleven years, and that ''the only instances of [his] improper handling of controlled substances were related to his'' Internet prescribing, the ALJ recommended that Respondent's registration be continued subject to the condition that he ''not engage in any activity involving prescribing controlled substances and the Internet.'' *Id.*

Having considered the entire record in this matter, I hereby issued this Decision and Final Order. I adopt the ALJ's conclusions that Respondent violated both the Controlled Substances Act (CSA) and various state standards of medical practice in issuing prescriptions to persons who ordered drugs through an Internet site. For reasons explained below, I reject the ALJ's recommended sanction as inconsistent with agency precedent and will order the suspension of Respondent's registration for a period of one year. I make the following findings.

Findings

Respondent is a medical doctor who is board certified in both anesthesiology and pain management and is licensed to practice medicine in the States of New York and New Jersey. Tr. 488. Respondent is also the holder of a DEA Certificate of Registration, which authorizes him to dispense controlled substances in schedules II through V as a practitioner. GX 1, at 2. While the expiration date of Respondent's registration was September 30, 2006, Respondent submitted a renewal application on August 4, 2006. *See* Reply to Respondent's Status Report, at 1. I therefore find that Respondent's prior registration has remained in effect pending the issuance of this Final Order and that Respondent also has an application pending before the Agency. *See* 5 U.S.C. 558(c).

Respondent attended medical school at The Autonomous University of Guadalajara, and the New York Medical College. RX 1, at 2. Subsequently, Respondent did his residency in anesthesiology at St. Luke's/Roosevelt Hospital, an institution which is affiliated with the Columbia University College of Physicians and Surgeons, where he received an award given to the Outstanding Graduate Resident in Anesthesiology. *Id.* Respondent also did a fellowship in Pain Management at the Memorial Sloan Kettering Cancer Center, where he was elected Chief Fellow. *Id.* at 1.

Upon completion of his fellowship, Respondent joined New Jersey Anesthesia Associates (NJAA), a group of physicians which provides anesthesia services at St. Barnabas Medical Center. Tr. 345–47. Respondent is a partner in NJAA. *Id.* at 347. In addition to providing anesthesia, Respondent also treats both acute and chronic pain patients. *Id.* at 555–56. Respondent is also an attending physician and clinical professor at St. Barnabas, where he trains residents in anesthesia. *Id.* at 360.

Respondent came to the attention of the Agency during its investigation of a

large criminal conspiracy which was run by Johar Saran, and which used the Internet to unlawfully distribute controlled substances. *Id.* at 156–159; *see also* GX 16 (Indictment, *United States* v. *Saran, et al.,* No. 305–CR–0240P (N.D. Tex. 2005). As part of the investigation, DEA Investigators conducted trash runs at the premises of Carrington Health Care System, an entity owned by Saran which was located at 301 E. Stephens, Suite 100, Arlington, Texas. Tr. 159, 185. During the trash runs, investigators found various documents including ''Drug Prescription'' sheets and copies of some prescription labels which are placed on pill vials. *See* GXs 17–29.

The ''Drug Prescription'' sheets listed a patient's name, address, birth date, age, sex, phone number, medication history, and allergies. *See* GXs 17–24. In the block titled ''Physician,'' the sheets listed Respondent's name, address, phone numbers, and DEA number. *Id.* In the block titled ''Rx,'' the sheets gave the date, drug name (which in each instance was a schedule III controlled substance containing hydrocodone), quantity, number of refills, instructions for taking the drug, instructions to the pharmacist as to whether substitution was permitted or the drug was to be dispensed as written, and bore the electronic signature of Respondent. *See id.* In a block entitled ''Pharmacy Services Use Only,'' each of the sheets listed a number, as well as the date and time of a consultation, and included the notation ''LBRTY.'' *Id.* [1] Finally, each of the sheets included shipping information. *Id.*

The prescription labels listed ''Triphasic Pharmacy,'' with an address of ''301 E. Stephens St. Ste 100'' in Arlington as the dispensing pharmacy. GXs 25–31. The labels also listed the patient's name, the drug, a date, the quantity dispensed, a prescription number, instructions for taking the drug, number of refills, and a physician's name. *Id.* Respondent was listed as the prescribing physician on eight of the prescription labels, each of which indicated that the customer had received a schedule III controlled substance containing hydrocodone. *See id.*

Several months later, Respondent was served with the Show Cause Order. Tr. 51–52. When asked by a DI whether he had prescribed over the Internet, Respondent admitted that ''he had a contract with a company called Liberty Med,'' that ''he reviewed on-line patient applications of Liberty Med,'' and that he ''was paid $20 per on-line patient consultation.'' *Id.* at 52. Respondent also told the DI that he reviewed MRIs and X-rays. When asked if he maintained patient records, Respondent told the DI that Liberty Med ''kept them.'' *Id.* at 53.

In his testimony, Respondent explained that in October 2004, one of his partners in NJAA introduced him to Liberty Medical and Mr. Craig Boswell, whose mother ran the company. Tr. 371–72. Respondent's partner told him that ''he understood [that Liberty] was a legitimate company that practices Internet-based medicine and that I might be interested in talking to Craig Boswell concerning possibly doing work for them.'' *Id.* at 371.

Respondent met with Boswell, who told him that the company ''was not one of these companies opening and shutting in a week or month, [that it] was a legitimate company, [and that] they wanted to set up consultation services doing this internet website.'' *Id.* at 373. Boswell further advised Respondent that Liberty ''deal[t] with patients who have medical records, who have been seen by other physicians, who have radiological evidence of pain.'' *Id.* Boswell also told Respondent that Liberty would carefully screen the patients, that ''they would make sure that the patient wasn't sourcing meds from another facility,'' and that ''they would also obtain'' the address and phone number of the patient's primary physician ''so that we could call them if there is any question as to whether'' the person was ''a legitimate patient.'' *Id.* at 374.

Boswell subsequently asked Respondent if he would perform on-line consultations for Liberty. *Id.* The consultations were to involve ''interview[ing] the patients'' and ''mak[ing] a recommendation'' to prescribe drugs based ''on all the information.'' *Id.*

In his testimony, Respondent maintained that he asked Boswell whether this was permissible. *Id.* at 375. Respondent stated that Boswell ''assured [him] that everything was legitimate,'' that Boswell told him that ''he was in the Armed Forces,'' and that ''he had two men in his squad [who] were in the DEA and [that] he constantly bounced questions off of them * * * always to make sure that he was within the limits of the law.'' *Id.* Boswell also told Respondent that ''there were certain states that did not allow internet prescribing'' and that persons from these states would be excluded. *Id.* at 376.

Respondent did not, however, seek legal advice regarding the lawfulness of Boswell's proposal. *Id.* at 375. Moreover, even though he understood that he would be prescribing to patients throughout the country, he did not undertake any inquiry on his own into the laws of any State pertaining to the propriety of the proposed activity. *Id.* at 512. Instead, he concluded that Liberty was engaged in legitimate activity because Boswell had been referred to him by his partner and Boswell was ''concerned about making sure that everything was done correctly,'' *id.* at 375, and had told him that ''he had reviewed all the laws pertaining to this.'' *Id.* at 512.[2]

In November 2004, Respondent entered into a written contract with Liberty; Respondent performed online consultations and prescribings for it from approximately December 2004 through December 2005. *Id.* at 507. Respondent was paid $20 per consultation and received the same fee regardless of whether he prescribed a drug.[3] *Id.* at 382–83, 508, 601. Respondent did consultations for Liberty five days a week, and did so every week between December 2004 and December 2005, except for three weeks during which he took vacation. *Id.* at 516. Respondent performed twenty to fifty consultations a week; he also testified that while he was ''not exactly sure,'' he issued twenty to thirty prescriptions a week. *Id.* The record is, however, unclear as to how many of the prescriptions were for controlled substances. *Id.* at 568.[4] According to

[1] At the top of all but one of the sheets was the notation: ''From: Dr. Joseph Gaudio, M.D.,'' and a date and time which was typically only a short period after the date and time listed for the consultation. *See* GXs 17, 18, 20, 21, 22, 23.

[2] Respondent also maintained that ''to find out more'' he had talked with another physician who performed online consultations for Liberty. *Id.* at 509. Respondent did not, however, testify as to the specifics of this conversation. *Id.* Respondent did not meet any of the medical professionals who worked for Liberty and did not know where the business was located. *Id.*

[3] Respondent maintained that his compensation from Liberty was only ''a very small part of [his] income'' and that ''it was more of my interest in telemedicine that drove me to do it.'' Tr. 383. Respondent testified that he was involved in a start-up company, Technology Integrated for Medical Application (TIMA), which conducted academic research with major institutions, and that TIMA was developing systems to engage in medical monitoring of people from remote locations. *Id.* at 505. Respondent explained that ''[w]e can speculate that some day we'll be able to diagnose patients from a distance where you can have a doctor in a remote location who doesn't have the expertise in a certain area that can receive expertise from * * * physicians in another area based on giving real time information back to those physicians.'' *Id.* at 506.

[4] Respondent testified that he prescribed both narcotics and non-narcotics and that the estimated number of prescriptions referred to ''all in total.'' Tr. 568. Notably, the Government introduced no evidence showing the number of controlled-substance prescriptions he issued during the course of his contract with Liberty; nor did it introduce evidence showing the number of controlled

Respondent, he prescribed hydrocodone, Vicodin (a schedule III controlled substance which contains hydrocodone), and oxycodone, a schedule II controlled substance. *Id.* at 547. *See Physicians' Desk Reference* 526 (59th ed. 2005); see also 21 CFR 1308.12(b)(1) & 1308.13(e).

Liberty gave Respondent a user name and password, which he used to access PSDOCTOR, a Web-based software program which listed his appointments; according to Respondent, he ''would call the patient and obtain a detailed history.'' *Id.* at 377. Respondent testified that through PSDOCTOR, he could retrieve patient records including a patient's history (including the patient's complaint, what drugs the patient was taking, what surgeries the patient had undergone, and the patient's name and address), charts, and exams including radiological reports. *Id.* at 377–78. Respondent also testified that ''sometimes [the patients] would * * * also submit physical exams.''[5] *Id.* at 378.

Respondent maintained that he would ''call the patients because [he] want[ed] to actually talk to the patients before [he] made any decisions on the patient,'' that ''[t]he history was very important,'' *id.* at 378–79, and that the calls would last an average of twenty minutes. *Id.* at 615. He also testified that he performed a telephonic consultation with every patient he prescribed to. *Id.* at 614–15.

Relatedly, Respondent maintained that based on his experience as a pain doctor, he could ''get a sense of whether the patient was telling me the truth because certain pains in certain areas elicit certain responses.'' *Id.* at 379. He also testified that most patients did not ''have the savvy'' to dupe him and that ''sometimes [he] would lead patients down the wrong path to see if they were telling the truth * * * because there are a lot of drug seekers out there.'' *Id.* at 381–82. He also stated that if a patient told him something that did not match what was in their medical record, ''we would either call their primary doctor'' or ''deny them.'' *Id.* at 382. Respondent also testified that he ''denied a lot of patients and some of the records will show that.'' *Id.*

The ALJ found that some of Respondent's testimony was contradicted in several material respects by other evidence. *See* ALJ at 12 (¶ 36). While Respondent testified that he never prescribed without conducting a telephone consultation with the patient, and that the consultations lasted twenty minutes on average, Ms. A.B., who received hydrocodone pursuant to a prescription issued by Respondent on December 8, 2004, *see* GX 17, stated to a DI that within a couple of hours after she faxed medical records to Liberty,[6] she received a telephone call from a doctor which lasted approximately ''one minute.'' GX 35, at 1–2. The doctor, whose name she did not recall, asked her what her pain was. *Id.* at 2. Ms. A.B. told the doctor that she had previously been treated by a doctor in North Carolina for headaches caused by nerve damage incurred in an automobile accident; the doctor then agreed to prescribe for her, ninety tablets of hydrocodone/apap.[7] *Id.* Ms. A.B. further stated that the doctor did not discuss with her how her progress would be monitored, what to do if she experienced side effects, and how to contact him in an emergency. *Id.*

Another DI interviewed K.B., who had also obtained a combination drug containing hydrocodone through the Liberty Web site. *See* GX 21; Tr. 116–151. K.B. told the DI that she had become aware of Liberty through a pop-up ad and that she went to the Web site and filled out a questionnaire. Tr. 117. On August 4, 2004, K.B. sent Liberty an MRI report showing that she had a herniated disk. *Id.* at 118; RX 15, at G0190–91. ''A couple of days later,'' Tr. 118, K.B. was contacted by a woman who stated that she was a representative of Liberty. *Id.* According to K.B., the woman performed a consultation and told K.B. that a prescription had been approved by Respondent.[8] *Id.* at 118 & 131.

On or about December 15, 2004, K.B. received ninety tablets of Lortab (hydrocodone/apap (10/500)), a schedule III controlled substance, pursuant to a prescription issued by Respondent. *Id.* at 119–20, GX 21; *see also PDR* at 3240. K.B. received approximately twenty-five prescriptions through Liberty, the majority of which were authorized by Respondent. Tr. 132, 141, 148, 150. K.B. never had a conversation with Respondent, *id.* at 140, and had no contact with Liberty with respect to any of the subsequent orders she placed other than when she contacted the Web site to determine the status of an order. *Id.* at 121. K.B. further told the DI that she became addicted to hydrocodone. *Id.* at 122. K.B. also obtained drugs from another Web site during a portion of the period in which she obtained drugs through Liberty; her primary care physician did not know that she was acquiring drugs through the internet. *Id.* at 120–22.[9]

DEA Investigators also attempted to contact the persons identified in Respondent's Exhibits 19–45, as patients who were denied prescriptions. Tr. 470. The DIs could not contact most of the individuals and were able to speak with only eight of them. *See id.* at 634–44. Of these eight persons, the record establishes that Respondent prescribed to only one of them, Ms. S.A. *See* GX 26.[10] More specifically, on

prescription he issued during a defined period of time.

[5] Respondent testified that ''on the average,'' the physical exam had to be no more than ''approximately six months'' old, but that ''sometimes we required records more recent than six months and sometimes patient[s] could have records up to eight months [old] or more.'' Tr. 571. Respondent maintained, however, that in each instance, he would have a conversation with a patient before prescribing and that this provided ''an independent basis'' to determine whether the patient's symptoms were continuing.'' *Id.* at 572.

Moreover, the ''Consent for Treatment'' forms that are in several patient files indicate that a patient could receive the ''first prescription with an agreement that I will fax my medical records and a photo ID * * * within 27 days and before my next prescription is due for refill.'' RX 11, at G0156 (signed on ''12/8/04''); RX 10, at G0151 (signed on ''12/5/05''). This suggests that in some instances, Respondent may have issued prescriptions without even reviewing a patient's records.

[6] Those records included a progress note dated September 16, 2004, which indicated that A.B.'s physician had prescribed ninety Lorcet (10/650 mg.), with no refills. RX 6, at G0050. Lorcet is a schedule III controlled substance which combines hydrocodone with acetaminophen. *See PDR,* at 1287.

[7] Apap is an abbreviation for acetaminophen.

[8] Having found that K.B. faxed a copy of the MRI report on August 4, 2004, four months before Respondent began his contract with Liberty, I find that Respondent did not issue the initial prescription which K.B. received from Liberty. I do find, however, that Respondent issued a prescription to K.B. on December 15, 2004. *See* GX 21.

[9] Investigators also attempted to interview several other persons whose names were listed on the prescription sheets found during the trash runs. Some of the individuals could not be located, Tr. 162 & 165, others were uncooperative. *Id.* at 163. Investigators were unable to contact the persons named on the prescription labels because the labels did not contain addresses. *Id.* at 169.

[10] For example, while a DI spoke to L.L.'s daughter (RX 20), she did not know whether her mother ever spoke with Respondent. Tr. 635. R.T. (RX 24) stated that he never received drugs from Liberty, Tr. 637, and there is no evidence to the contrary. While M.A. stated that he did not speak with Respondent, *id.* at 637–38, documentary evidence indicated that Respondent did not issue a prescription because he felt that M.A. ''IS WANTING MEDS FOR SOMEONE ELSE.'' RX 26. Again, there is no evidence establishing that Respondent issued a prescription to M.A.

A.F. (RX 27) acknowledged taking Vicodin and sending medical records somewhere. Tr. 638. He did not, however, remember where, *id.;* and in any event, there is no evidence that Respondent prescribed to him. M.K. (RX 31) acknowledged receiving hydrocodone from Liberty ten times, that he received his first order without a consultation, and that his ''subsequent orders usually did involve a two to three minute conversation with someone claiming to be a physician or a physician's assistant.'' Tr. 640. Again, there is no evidence establishing that Respondent (as opposed to other doctors who worked for Liberty) prescribed to him. RX 31.

Continued

December 7, 2004, Respondent prescribed to S.A. ninety tablets of hydrocodone/apap (7.5/750 mg.).

Ms. S.A. stated that she ordered hydrocodone from Liberty ''at least ten times and that she did not speak to any physician on the first two occasions.'' [11] Tr. 643. S.A. further stated that on subsequent orders, she had ''very short conversations lasting approximately one minute or less,'' but could not recall the name of any person she had talked to. *Id.* at 643–44.

Respondent testified that S.A.'s medical record supported the prescription he issued and that the drug and dosage he prescribed was appropriate for her condition. Tr. 451. Yet the evidence suggests that the most recent medical report available to Respondent was an ''Operative Report'' for a procedure which had been performed nearly eight months earlier. *See* RX 7, at G0112. Moreover, Respondent offered no explanation as to why S.A.'s condition was of such a nature as to justify prescribing based on an eight-month-old report.

A DI also interviewed R.Z., to whom Respondent prescribed 90 tablets of Vicodin ES (7.5/750 mg.), on January 5, 2005. GX 18. R.Z. told the DI that she had become aware of Liberty in approximately November 2004; someone at Liberty put R.Z. in contact with a man ''who claimed to be a doctor.'' Tr. 72. R.Z. could not, however, remember the name of the doctor, but did recall having a phone conversation of ''approximately ten minutes'' duration with him in which she was asked questions about her condition, what type of pain she had, what type of pain medication she needed, how she tolerated pain medications, and her blood pressure. *Id.* at 73. The doctor then told R.Z. that he would prescribe to her ninety tablets of Vicodin. *Id.* at 74. R.Z. also told the DI that she had faxed to Liberty an x-ray report which showed that she had a bulging disk.[12] *Id.* R.Z. further told the DI that she had received from Liberty monthly prescriptions for ninety tablets of Vicodin over ''a thirteen to fourteen-month period.'' [13] *Id.* at 77–78.

Respondent testified that the prescription he issued was consistent with the findings contained in the x-ray report. *Id.* at 459; RX 10, at G0154. The x-ray report contains the notations: ''Record Received on 1/31/05,'' and ''Verified on 1/31/05 By MW.'' *Id.* In addition, the record includes a handwritten note dated ''1/31/05,'' which states in relevant part: ''Attention Leisha, Here are the results of the xray I had on my back. * * * I would like my refill sent when it becomes time to do so.'' *Id.* at G0153. Respondent further testified that ''I don't see a physical exam here but it would be something that we would require.'' Tr. 459. He also maintained that in order for R.Z. to get an x-ray, ''she had to have some history,'' because ''you can't refer yourself for an x-ray.'' *Id.*

Even so, that a patient needs a referral to obtain an x-ray, does not establish that Respondent reviewed R.Z.'s history and a physical exam report before he prescribed to her. Indeed, the absence of a physical exam report in R.Z.'s file is consistent with her statement that she sent in only the x-ray report. *See* Tr. 89. I therefore find that contrary to Respondent's testimony, he did not review a physical exam report before prescribing to R.Z.[14]

As for Respondent's statement that the Vicodin prescription he issued to R.Z. was consistent with the findings of the x-ray report, the evidence shows that he issued the prescription on January 5, 2005, nearly four weeks before Liberty received the x-ray report. Respondent therefore could not have issued the prescription on the basis of the report.

With respect to K.B. (whose interview with a DI is described above), Respondent also maintained that a report for an MRI which had been done ten months earlier, *see* RX 15, at G0190; established that the hydrocodone prescription he issued was appropriate. Tr. 467. Respondent then testified that Respondent ''had been on Toradol and Ultram and had not received results.'' *Id.* Continuing, Respondent stated that ''[s]he also had gotten Lortab it seems. If you look at G0195, in the middle where it says 2/19/04, it says renewed her Lortab and Flexeril.'' *Id.* at 467–68.

Notably, both pages G0194 and G0195, which appear to contain progress notes of various visits K.B. made to an orthopedic clinic between January 15, 2003, and November 29, 2004, have the notations: ''Record Received on 1/31/05,'' and ''Verified on 1/31/05 By MW.'' RX 15, at G0194–95. Moreover, each page has a header indicating that it was faxed on January 31, 2005. *See id.* As found above, Respondent issued the prescription to K.B. on December 15, 2004, approximately six weeks before these documents were faxed to Liberty. GX 21. Here again, Respondent could not have relied on the documents when he issued the prescription to K.B., notwithstanding his testimony that ''we would require'' a physical exam. Tr. 459.[15]

M.B. (RX 33) acknowledged that he received hydrocodone from Liberty four times and ''recalled talking to someone at the Liberty Meds Web site but [did not] remember who.'' Tr. 641. K.K. (RX 36) acknowledged ordering hydrocodone ''four or five'' times, but identified a different doctor as the prescriber. Tr. 641–42. Similarly, T.A. (RX 37) stated that he had ordered hydrocodone from Liberty ''two or three'' times, and that he had conversations with either a doctor or physician's assistant lasting ''two to three minutes,'' but could only identify a different doctor as the person he spoke to. *Id.* at 642. As above, there is no evidence establishing that Respondent prescribed to either M.B. or T.A.

[11] Here again, the evidence shows that S.A. faxed her records to Liberty on August 25, 2004, four months before Respondent began his contract with Liberty. RX 7, at G0113–14.

[12] R.Z. stated that she had sent in only the x-ray report and filled out an online questionnaire. Tr. 89. R.Z. was never directed to obtain further tests (such as a new x-ray), and stated that she did not believe that Liberty ever contacted her primary doctor. *Id.* at 79, 89–90.

[13] R.Z. also stated that she had conversations every three to four months regarding her condition with a woman from Liberty who claimed to be a physician. Tr. 76, 87. R.Z. testified that she had a single conversation with a male caller. *Id.* at 96.

[14] The ALJ noted that it ''is unclear * * * whether or not the Respondent had access to, or actually reviewed medical records prior to prescribing controlled substances to any of Liberty's customers discussed at the hearing.'' ALJ at 19 n.10. While this is correct with respect to some patients, with respect to R.Z., it is clear that Respondent prescribed without having any medical records that supported the prescription.

In the context of discussing his prescribing through Liberty, Respondent also testified that ''I will always'' have some ''data'' and ''I won't just place them on a prescription.'' Tr. 442. Perhaps Respondent was testifying about his prescribing practices at the time of the hearing. Or perhaps he considered the answers Liberty's customers gave to the questionnaires to be ''data.'' In any event, the evidence establishes that he prescribed to R.Z. without either reviewing a physical exam report or the x-ray report.

[15] As found above, Respondent never spoke with K.B. Tr. 140. During the period she was obtaining controlled substances from Liberty, K.B. was under the care of another physician; K.B., however, never told the latter physician that she was receiving drugs from Liberty. *Id.* at 122, 142–43.

Respondent maintained that Liberty was ''unable to provide all the records'' because of problems it was having with its ''IT person.'' Tr. 410. However, the files for some of the patients appear extensive, *see* RXs 3 (22 pages), 5 (18 pages), 6 (64 pages), 7 (17 pages), & 14 (23 pages), thus prompting the question of why Liberty was able to provide so much documentation for these patients but not for some of the others. Moreover, the patient files indicate that the patients almost always faxed or mailed their records to Liberty. Thus, even if the records were scanned into Liberty's computer system, Respondent offered no evidence to establish what happened to the original records. Finally, there is no evidence that Respondent requested a subpoena for the records. While the ALJ apparently found that Respondent credibly testified that he did not receive all of the information he requested, ALJ Dec. at 13 n.3., I conclude that the patient files Respondent introduced into evidence fairly reflect the patient files as obtained by Liberty.

The ALJ further reasoned that Respondent's testimony supported ''the requirement that [he] maintain his own patient records.'' Id. It is further noted that under the New Jersey Board of Medical Examiners' regulation which governs the prescribing of controlled substances, ''[t]he practitioner shall keep accurate and complete

Other Patients

On January 5, 2005, Respondent issued a prescription to K.A., a Texas resident, for ninety tablets of hydrocodone/apap (10/500mg). GX 27. The record contains extensive progress notes showing that K.A. was being treated by a San Antonio, Texas pain management specialist during 2004 and 2005 for neck pain.[16] See RX 3. Respondent testified that K.A. ''has various different problems * * * that would cause one to have a ton of severe pain.'' Tr. 426. Respondent testified that based on his review of the record, the medication and dosage he prescribed was appropriate. *Id.* at 432. Respondent offered no testimony, however, as to whether he contacted the pain management specialist who was treating K.A. *See generally id.* at 426–32.

On December 20, 2004, Respondent prescribed to P.G., a Minnesota resident, ninety tablets of hydrocodone/apap (10/500 mg.) with one refill. GX 19. Although the most recent progress note in P.G.'s record, which was dated April 13, 2004, indicated that he had ''[c]hronic low back with right lower extremity radicular pain,'' and that his local physician had issued him a prescription for twenty tablets of Percocet p.r.n., P.G.'s physician further observed that ''[l]ong-term use of narcotics for back pain is not in his best interest and therefore he is given only 20 tablets at this time.'' RX 4, at G0024. While Respondent testified that his prescription was appropriate, Tr. 435, when asked on cross-examination whether the eight-month-old progress note was of sufficient recency to make a diagnosis, he testified: ''It really depended also on the patients and the physical findings but this does seem like it was two months later than we usually accept. * * *'' *Id.* at 525.

On January 5, 2005, Respondent prescribed to D.C., a resident of Georgia, ninety tablets of hydrocodone/apap (10/325 mg.). GX 24. The most recent progress note in her file prior to this prescribing was dated June 24, 2004, and indicated that the physician's impression was: ''Probable right C7 radiculopathy.'' RX 5, at G0035. When asked by his counsel whether this would ''indicate that pain should be in a particular area?,'' Respondent answered: ''Yes, she should have the pain in the right upper extremity. *If I had spoken* with this person about giving her a treatment, I would have first tried to elicit where her pain was coming from.'' Tr. 437 (emphasis added). Respondent then discussed the findings of a physical exam which occurred on April 21, 2005, and which he obviously could not have relied on when he issued the prescription three months earlier. *See id.* at 437–38.

Next, Respondent maintained that he would try to confirm with the patient whether their reported pain matched with ''what it should be.'' *Id.* at 439. He also maintained that his prescribing was consistent with the drug (Vicodin 7.5) that the physician, who physically examined her three months later, had prescribed. *Id.* at 440; RX 5, at G0032.

On cross-examination, Respondent acknowledged that while the medical records showed that D.C. had been by an orthopedist and neurologist, neither had referred her to him. Tr. 527. When asked what his treatment plan was for D.C., Respondent could not recall. *Id.* He also did not refer her to a pain clinic near where she lived. *Id.* at 528.

On December 15, 2004, Respondent prescribed to S.K., a resident of Texas, ninety tablets of hydrocodone/apap (10/325mg.), with one refill. GX 22. Again, Respondent testified that the prescription he wrote ''would be consistent with what she's experiencing on physical exam here.'' Tr. 454. While Respondent testified that S.K.'s records ''were accessed through PSDoctor,'' *id.* at 455; the only medical exam report in S.K.'s file is dated ''6/1/05,'' and was faxed on June 10, 2005. *See* RX 8, at G0129–31. Respondent therefore could not have relied on the report in issuing the prescription.

On January 6, 2005, Respondent prescribed to S.B., a South Carolina resident, ninety tablets of Lortab (10/500mg.). GX 27. SB's patient file contains only three documents: a copy of her driver's license, a ''consent for treatment'' form dated ''12/8/04,'' and the results of a blood test taken on October 28, 2003. *See* RX 11. Respondent maintained that S.B.'s file was ''incomplete,'' and that ''she would'' have been asked to provide other data. Tr. 460. The ALJ did not, however, make any findings regarding the credibility of Respondent's testimony pertaining to S.B. In light of the other instances in which Respondent prescribed even though a patient's file was missing information, I find that it is more likely than not that he prescribed to S.B. without obtaining any additional medical documentation.

On January 5, 2005, Respondent prescribed to K.S., a resident of Texas, ninety tablets of hydrocodone/apap (10/500) with one refill. GX 29. K.S.'s records include extensive progress notes which show that she had last been seen by a physician on September 28, 2004, and had last been prescribed a controlled substance (codeine/apap) on December 20, 2004. RX 14, at G0182.

Respondent testified that ''[i]t seemed like she had really good follow-up here according to these progress notes,'' Tr. 462–63, and that the prescription he wrote ''would be appropriate for'' the condition documented in the record. *Id.* at 465. Respondent offered no explanation as to why he was prescribing to a patient who had received a controlled substance prescription from another physician only two weeks earlier. Moreover, given his acknowledgment that K.S.'s records showed that she was receiving good follow-up care, he offered no testimony that he had contacted K.S.'s physician to coordinate her care and ensure that she was not engaged in doctor shopping.[17]

On January 3, 2005, Respondent prescribed ninety tablets of hydrocodone/apap (10/325 mg.) to E.M., a New Hampshire resident.[18] Beside two copies of E.M.'s driver's license, her patient file contains two forms: (1) A Family and Medical Leave Act certification that E.M. had a serious illness, and (2) an Office of Workers Compensation Programs' form documenting a medical examination (performed on October 1, 2004) and diagnosis and supporting the need for certain restrictions on E.M.'s work-related duties. *See* RX 16 at G0200–01. The latter form indicates that E.M. had low back pain and tendonitis in her hand and shoulder. *Id.* at G0201. The form, however, contains no

records.'' N.J. Adm. Code 13:35–7.6(g) (emphasis added). There is, however, no requirement under federal law that an ''individual practitioner * * * keep records of controlled substances in Schedules II, III, IV, and V which are prescribed in the lawful course of professional practice, unless such substances are prescribed in the course of maintenance or detoxification treatment of an individual.'' 21 CFR 1304.03. I do not decide whether it was permissible under the New Jersey regulation for Respondent to maintain medical records through the Liberty Web site.

[16] Based on the progress notes as well as K.A.'s Texas driver's license, I find that K.A. was a resident of Texas. *See* RX 3, at G0001.

[17] K.S.'s file includes a letter which forwarded some records to Liberty. On the letter, there is a handwritten notation that the records had been reviewed, but that the clinic, which treated K.S., was ''closed for lunch.'' RX 14, at G0170.

[18] While the ALJ found that E.M. was a Texas resident, ALJ at 27 (FOF 90), RX 16 includes copies of E.M.'s driver's license which appears to indicate that she was a New Hampshire resident. Moreover, the fax header indicted that the documents were faxed to Liberty from a phone number with a 603 area code, which is an area code for New Hampshire.

The ALJ also noted that the prescription label (GX 29) was dated ''1/3/04.'' ALJ at 27 n.18. Based on the undisputed evidence that Respondent did not commence working for Liberty until December 2004, the ALJ found that the actual date of the prescription was January 3, 2005. Id.; *see also* Tr. 535. I adopt this finding.

documentation of her vital signs. *See id.* Moreover, when asked by his counsel whether the prescription he issued to E.M. was appropriate, Respondent answered that ''we do prescribe medicine for'' tendonitis and carpal tunnel, but that ''it seems like this chart is incomplete,'' Tr. 469, and that ''[i]t might have been missing EMGs or other things.'' *Id.* at 536. He again testified that it was his practice to look for other data before prescribing such as ''radiographic or EMGs.'' *Id.* at 537. While Respondent acknowledged that E.M.'s record did not have any such data, he then maintained that ''this might be an incomplete record.'' *Id.*

Yet several of the documents contained in E.M.'s patient file indicate that they were faxed to Liberty on December 31, 2004. *Id.* at G0202–03.[19] Again, Respondent offered no credible explanation as to why E.M's file as turned over to him had these documents (which Liberty obtained shortly before he issued the prescription to her) but not the others which ''might have been missing.'' *Id.* at 536. I therefore find that there were no such additional documents in E.M.'s patient file when he prescribed to her.

On December 15, 2004, Respondent issued to L.F., a resident of New Jersey, a prescription for ninety tablets of hydrocodone/apap (7.5/750mg.) with one refill. GX 23. Respondent testified that L.F.'s records showed that his physician ''did a physical exam,'' and that ''[t]here is also one on 10/8/04 by the same physician which was consistent with what was found on 10/8/03, * * * you can see the same vertebral bodies marked off, so it's very consistent with what the patient is having.'' Tr. 456. Respondent maintained that L.F. had a condition which ''merit[ed] intervention for pain,'' *id.,* and that the dosage he prescribed was consistent with his condition. *Id.* at 457.

On cross-examination, the Government asked Respondent to compare the handwriting of the two reports of ''Examination Findings,'' which were dated ''10/8/03'' and ''10/8/04'' respectively. *Id.* at 530; *see also* RX 9, at G0142 & G0145. Respondent acknowledged that ''[a]ll the handwriting [on the two reports] is in exactly the same position.'' Tr. 530. Respondent testified, however, that when he prescribed to L.F., he ''did not'' recognize that one of the documents had probably been falsified. *Id.* Moreover, none of the documents in L.F's file contained his vital signs. *See* RX 9. And as with the other Liberty patients, Respondent did not physically examine L.F., even though he lived in northern New Jersey, and near where he practiced.[20] *See id.* at G0147, GX 23.

On December 7, 2004, Respondent prescribed to L.W., another New Jersey resident, ninety tablets of hydrocodone/apap (10/325 mg.) with one refill. GX 20. L.W.'s patient file consisted of three pages: a progress note dated June 17, 2004, a sheet indicating that L.W. was faxing her driver's license, and a blurred copy of a driver's license. *See* RX 12. The progress note lists several diagnostic codes and under the handwritten notation of ''CODES,'' states: ''polycystic ovaries,'' ''adhesions,'' and ''pelvic pain.'' RX 12, at G0158. Next to the column for history, the document includes a notation of ''Percocet # 120.'' *Id.*

With respect to L.W., Respondent maintained that ''[t]hese patients have pelvic pain generally to the lower abdomen.'' Tr. 461. Respondent then testified that ''[t]here is no radiological exam that you would do to tell you anything differently[,] [b]ut obviously they know she has polycystic ovaries according to this physician's history and physical.'' *Id.* Respondent testified that the prescription was appropriate for a patient with this condition, and that he believed someone had verified L.W.'s identity with her physician because ''her license was blurred.'' *Id.* Respondent did not, however, testify that he called Respondent's physician.

Respondent's Other Evidence

Respondent also testified that he had proposed that Liberty use a narcotic contract under which a patient was required to agree not to give or sell his drugs to others, as well as not to seek drugs from other physicians. Tr. 384; *see also* RX 11, at G0156. According to the contract, a patient would be dismissed for failing to comply. Tr. 384. Yet Respondent was not ''sure how'' Liberty determined whether a patient was obtaining drugs from other sources such as another Web site. *Id.* at 385.

Respondent gave conflicting testimony as to whether he had prescribed oxycodone to Liberty's patients. First, he testified that he did so at a frequency that was ''pretty much equal'' to that of his hydrocodone prescribing. *Id.* at 585. Later, however, when Respondent was asked by the ALJ as to whether he ever recalled prescribing schedule II controlled substances to a Liberty patient, he appeared to backtrack from this testimony answering: ''Yes, there was a patient in our system you mean.'' *Id.* at 605.[21]

Respondent further testified that he believed that his prescribing practices complied with New Jersey's regulations and were consistent with a 2001 DEA Guidance Document. With respect to the New Jersey regulation, which provides that ''a practitioner shall not dispense drugs or issue prescriptions to an individual, * * * without first having conducted an examination, which shall be appropriately documented in the patient record,'' except for in six defined circumstances, N.J. Admin Code § 13:35–7.1A, Respondent testified that exceptions three (''[f]or continuation medications on a short term basis for a new patient prior to the patient's first appointment'') and four (''[f]or an established patient who, based on sound medical practice, the physician believes does not require a new examination before issuing a new prescription''), ''could apply.'' Tr. 589; *see also* N.J. Admin. Code § 13:35–7.1A(b)(3) & (4). Respondent did not, however, identify any patient he prescribed to over the

[19] Again, while Respondent testified that the records that he requested from Liberty were incomplete, he offered no explanation as to why Liberty was able to provide some records for a patient but not the missing ones. Moreover, the evidence indicates that many of the patients faxed their records to Liberty. Even if these records were scanned into a database, Respondent offered no evidence as to what became of the original documents.

[20] Respondent practiced pain management at a clinic in Livingston, New Jersey. RX 1; ALJ at 5. L.F. lived in Wallington, and L.W. lived in Warren, New Jersey. RXs 20 & 23. In accordance with 5 U.S.C. § 556(e), I take official notice of the fact that all three of these cities are located in northern New Jersey. *See* 5 Rand McNally, *Business Traveler's Road Atlas 62,* 68–69 (1994). Notwithstanding the proximity of his clinic to L.F.'s and L.W.'s residences, Respondent did not require them to appear for a physical examination.

An agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947). In accordance with the Administrative Procedure Act and DEA's regulation, Respondent is ''entitled on timely request to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). Accordingly, Respondent may file a motion for reconsideration within fifteen days of service of this order which shall commence with the mailing of the order.

[21] The ALJ also found that Respondent authorized refills of schedule II controlled substances and that he ''was unaware of the forms needed to actually prescribe a schedule II controlled substance.'' ALJ 14 (citing Tr. 604–05). Respondent testified, however, that he was not ''aware of'' ''a requirement for a Schedule II substance to be prescribed on a specifically identified form.'' Tr. 605.

Except for in an emergency situation, the dispensing of a schedule II controlled substance requires ''a written prescription signed by the practitioner,'' and the ''original written, signed prescription [must be] presented to the pharmacist for review prior to the actual dispensing of the controlled substance.'' 21 CFR 1306.11(a). However, no special form is required to prescribe a schedule II drug and Respondent's testimony was correct. Federal law does, however, prohibit the refilling of a schedule II controlled substance. 21 U.S.C. 829(a).

Internet who later came in for an appointment. Nor did he testify that any of the persons whose names were found on the prescription sheets and labels was an established patient.

Respondent also maintained that his Internet prescribing was consistent with the statements in this Agency's Guidance Document, *Dispensing and Purchasing Controlled Substances Over the Internet,* 66 FR 21181 (2001). More specifically, Respondent maintained that his practices were consistent with the Guidance Document because ''[w]e always had the patient's chief complaint, history was taken, a physical examination was done by another physician, and we collected all the evidence together and then I made my decision based on all the evidence including the radiographical evidence.'' Tr. 417. Respondent further maintained that ''it was not'' his practice to prescribe based solely on Internet correspondence. *Id.*

Finally, Respondent's counsel read to him the following question and answer from the Guidance Document:

> *I am a Physician. Does the need for a Physical Exam Mean that I Cannot Engage in Telemedicine and Prescribe Controlled Substances?*
>
> No, DEA does not intend to limit the ability of doctors to engage in telemedicine. If the patient cannot travel to your office, but you supervise an exam given by a nurse or other professional, you can then prescribe the needed medications based on the results, to the extent that State law allows. In this case, your decision on the appropriateness of the medication is based on facts (symptoms, blood pressure, etc.) that have been verified by a qualified third party and observed by you electronically.

GX 6, at 5; Tr. 418.[22]

Respondent was then asked by his counsel whether his Internet practice was consistent with this statement. Tr. 418–19. Respondent answered: ''Yes. In fact, we've exceeded those, also communicating with the physicians, not just electronically but via telephone.'' *Id.* at 419. Respondent then explained that ''the radiographical reports were read by a physician radiologist, the physical exams were done by another physician, so sometimes we have a couple of physicians involved in the process. *Id.*[23]

Respondent did not, however, identify a single instance in which he supervised and observed a physical exam as it was being performed by another qualified medical professional. Moreover, Respondent did not have any recollection as to having spoken to any of the physicians who were identified in the patient records that were introduced into evidence in this proceeding. *Id.* at 573. Finally, he was unaware as to whether any of the patient notes he made were ever sent by Liberty to the primary care physicians of those he prescribed to. *Id.* at 614. He also never gave written referrals for Liberty patients to see local doctors. *Id.* at 512.

Respondent testified that he had stopped performing telemedicine consultations for Liberty in late December of 2005. *Id.* at 487. He also represented that it was not his ''present intention'' to resume internet based prescribing. *Id.*

As noted above, Respondent introduced into evidence a number of printouts from Liberty's software with the heading ''Patient Information for Appointment.'' *See* RXs 19–45. These printouts establish that in several instances, patients were denied drugs because they were receiving them from other sources. *See* RXs 19, 21, 27, 32, 33, 39. Moreover, in other instances Respondent did not approve a prescription, *see* RX 23, 34, 43; and in at least one case, Respondent denied a prescription because he felt the person ''was wanting meds for someone else.'' RX 26. Moreover, the printouts suggest that in other instances, either Liberty or Respondent denied requests because the person was seeking the drugs too soon, RX 22, 35, 36; the patient's records had not been verified, RX 28; or the patient needed to be evaluated and send in records before Respondent approved a refill. RX 42 & 44. Only one of these printouts, however, corresponds with a patient (S.A.) who was identified above as having received a prescription which was issued by Respondent.[24] *Compare* RX 44 with GX 26.

Discussion

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to ''dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). With respect to a practitioner, the Act requires the consideration of the following factors in making the public interest determination:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing * * * controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
>
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
>
> (5) Such other conduct which may threaten the public health and safety.

Id. section 823(f).

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked.'' *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

In this matter, it is undisputed that neither the State of New York nor the

[22] At the hearing, Respondent's counsel slightly altered the text of the answer published in the Guidance Document. The alteration did not, however, materially change the meaning of the answer.

[23] Respondent also testified that the first time he saw the 2001 Guidance Document was at the hearing. Tr. 522.

[24] The National Center on Addiction and Substance Abuse (CASA) has reported that ''[t]he number of people who admit abusing controlled prescription drugs increased from 7.8 million in 1992 to 15.1 million in 2003.'' National Center on Addiction and Substance Abuse, *Under the Counter: The Diversion and Abuse of Controlled Prescription Drugs in the U.S.* 3 (2005) (GX 3). Moreover, ''[a]pproximately six percent of the U.S. population (15.1 million people) admitted abusing controlled prescription drugs in 2003, 23 percent more than the combined number abusing cocaine (5.9 million), hallucinogens (4.0 million), inhalants (2.1 million) and heroin (328,000).'' *Id.* Relatedly, ''[b]etween 1992 and 2003, there has been a * * * 140.5 percent increase in the self-reported abuse of prescription opioids''; in the same period, the ''abuse of controlled prescription drugs has been growing at a rate twice that of marijuana abuse, five times greater than cocaine abuse and 60 times greater than heroin abuse.'' *Id.* at 4.

CASA has further reported that teenagers ''represent an especially vulnerable group,'' because ''[t]eens may view prescription drugs as relatively safe either when abused alone or in combination with alcohol or other drugs.'' *Id.* According to CASA, ''[i]n 2003, 2.3 million teens ages 12 to 17 (9.3 percent) reported abusing a controlled prescription drug in the past year; 83 percent of them reported abusing opioids.'' *Id.* Moreover, ''[b]etween 1992 and 2002, the number of [first time] teenage prescription opioid abusers increased by 542 percent.'' *Id.* at 35.

Finally, CASA noted that ''[i]nternet sites not adhering to state licensing requirements, medical board standards or federal law have enabled consumers to obtain controlled prescription drugs without a valid prescription or physician supervision and without regard to age.'' *Id.* at 63. CASA also noted that ''illegal [i]nternet pharmacies have introduced a new avenue through which unscrupulous buyers and users can purchase controlled substances for unlawful purposes.'' *Id.* Moreover, ''[t]he age of the customers appears not to be an issue for Internet pharmacies,'' and that there are ''no mechanisms in place to block children from purchasing controlled drugs over the Internet.'' *Id.* at 66.

State of New Jersey has taken action against Respondent's medical license (factor one). It is also undisputed that Respondent has not been convicted of an offense related to controlled substances under federal or state law (factor three).[25] This proceeding focused, however, on Respondent's experience in dispensing controlled substances and his record of compliance with applicable laws. As discussed below, the evidence pertaining to these factors is disturbing and establishes—at a minimum—that Respondent committed numerous violations of both Federal and state laws.

Factor Two and Four—Respondent's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Controlled Substance Laws

Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' *Id.* As the Supreme Court recently explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135 (1975)).

Under the CSA, it is fundamental that a practitioner must establish a bonafide doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Moore,* 423 U.S. at 141–43. The CSA, however, generally looks to state law to determine whether a doctor and patient have established a bonafide doctor-patient relationship. *See Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007); *Dispensing and Purchasing Controlled Substances Over the Internet,* 66 FR at 21182–83.[26]

Moreover, ''[a] physician who engages in the unauthorized practice of medicine'' under state laws ''is not a 'practitioner acting in the usual course of * * * professional practice'" under the CSA. *United Prescription Services,* 72 FR at 50407 (quoting 21 CFR 1306.04(a)). As explained therein, this rule is supported by the plain meaning of the Act, which defines the ''[t]he term 'practitioner' [to] mean[] a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance,'' 21 U.S.C. 802(21), and ''[t]he term 'dispense' [to] mean[] to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner.'' *Id.* section 802(10). *See also id.* section 823(f) (''The Attorney General shall register practitioners * * * to dispense * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.'').

As I noted in *United Prescription Services*, shortly after the CSA's enactment, the Supreme Court explained that ''[i]n the case of a physician [the Act] contemplates that *he is authorized by the State to practice medicine* and to dispense drugs in connection with his professional practice.'' *Moore*, 423 U.S. at 140–41 (emphasis added) (quoted at 72 FR 50407). A controlled-substance prescription issued by a physician who lacks the license or other authority required to practice medicine within a State is therefore unlawful under the CSA. *See* 21 CFR 1306.04(a) (''An order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning an intent of'' the CSA); *cf.* 21 CFR 1306.03(a)(1) (''A prescription for a controlled substance may be issued only by an individual practitioner who is * * * [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession[.]'').[27]

Under the regulation of the New Jersey Board of Medical Examiners, ''a practitioner shall not dispense drugs or issue prescriptions to an individual * * * without first having conducted an examination, which shall be appropriately documented in the patient record.'' N.J. Admin Code § 13:35–7.1A(a). This rule further requires that ''[a]s part of the patient examination, the practitioner shall'':

1. Perform an appropriate history and physical examination;
2. Make a diagnosis based upon the examination and all diagnostic and laboratory tests consistent with good medical care;
3. Formulate a therapeutic plan and discuss such plan, along with the basis for the plan and the risks and benefits of various treatment options, with the patient; and
4. Ensure the availability of the physician or coverage for appropriate follow-up care.

Id.

It is undisputed that Respondent did not perform a physical examination on any of the Liberty patients he prescribed to, including those who were New Jersey residents. Instead, Respondent asserted that two exceptions provided in the New Jersey rule ''could apply'' to his internet prescribing. Tr. 589. The first of these authorizes the prescribing of ''continuation medications on a short term basis for a new patient prior to the patient's first appointment''; the second authorizes prescribing ''[f]or an established patient who, based on sound medical practice, the physician believes does not require a new examination before issuing a new prescription.'' N.J. Admin Code 13:35–7.1A(b)(3) & (4).

As the record establishes, none of Respondent's Liberty patients were ever expected to see him for a ''first appointment,'' and none did. Moreover, Respondent offered no evidence that any of his Liberty patients were his ''established patients.''[28]

[25] Under settled precedent, neither of these factors is dispositive. *See Edmund Chein,* 72 FR 6580, 6590 n.22 (2007); *Mortimer B. Levin,* 55 FR 8209, 8210 (1990).

[26] On October 15, 2008, the President signed into law, the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425, 122 Stat. 4820 (2008). Section 2 of the Act prohibits the dispensing of a prescription controlled substance ''by means of the Internet without a valid prescription,'' and defines, in relevant part, the ''[t]he term 'valid prescription' [to] mean[] a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by * * * a practitioner who has conducted at least 1 in-person medical evaluation of the patient.'' 122 Stat. 4820. Section 2 further defines ''[t]he term 'in-person medical evaluation' [to] mean[] a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals.'' *Id.* These provisions do not, however, apply to Respondent's conduct.

[27] As the California Court of Appeal has noted: the ''proscription of the unlicensed practice of medicine is neither an obscure nor an unusual state prohibition of which ignorance can reasonably be claimed, and certainly not by persons * * * who are licensed health care providers. Nor can such persons reasonably claim ignorance of the fact that authorization of a prescription pharmaceutical constitutes the practice of medicine.'' *Hageseth* v. *Superior Court*, 59 Cal. Rptr.3d 385, 403 (Ct. App. 2007).

[28] I acknowledge that in Gonzales, the Supreme Court stated that ''[a]s for the federal law factor, though it does require the Attorney General to decide '[c]ompliance' with the law, it does not suggest he may decide what the law says. Were it otherwise, the Attorney General could

In his brief, Respondent also contends that New Jersey's exception ''[f]or a patient examined by a healthcare professional who is in collaborative practice with the practitioner'' also applies. *Id.* § 13:35–7.1A(b)(5); *see* Resp. Prop. Findings 52. However, with respect to this exception, Respondent testified that ''I don't know what collaborative means there,'' Tr. 589, and in any event, there is no credible evidence that Respondent collaborated with any of the practitioners who may have previously examined the Liberty patients. *Id.* at 573 & 614.

Respondent thus failed to establish a legitimate doctor-patient relationship under the New Jersey regulation. I therefore further hold that Respondent's prescriptions to the Liberty patients were not ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice,'' 21 CFR 1306.04(a) and thus violated the CSA as well.

Respondent's prescriptions also violated numerous laws of the States where the patients were located. Respondent prescribed controlled substances to two residents of Georgia, A.B. and D.C. Under the rules of the Georgia Composite State Board of Medical Examiners, it is ''unprofessional conduct'' to ''[p]rovid[e] treatment and/or consultation recommendations via electronic or other means unless the licensee has performed a history and physical examination of the patient adequate to establish differential diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended.'' Ga. Comp. R. & Regs. 360–3.02(6).[29] Moreover, Respondent violated Georgia law because he engaged in the unlicensed practice of medicine. *See* Ga. Code Ann. § 43–34–31.1.[30]

Respondent also prescribed controlled substances to four residents of Texas, S.A., K.A., S.K., and K.S. Respondent did not hold a Texas medical license. *See* Tex. Occup. Code § 155.001; *see also id.* § 151.056(a) (''A person who is physically located in another jurisdiction but who, through the use of any medium, including an electronic medium, performs an act that is part of a patient care service initiated in this state, * * * and that would affect the diagnosis or treatment of the patient, is considered to be engaged in the practice of medicine in this state and is subject to appropriate regulations by the board.''); 22 Tex. Admin. Code § 174.4(c) (''Physicians who treat and prescribe through the Internet are practicing medicine and must possess appropriate licensure in all jurisdictions where patients reside.'').

Respondent also lacked the state registration required to prescribe a controlled substance. *See* Tex. Health & Safety Code § 481.061(a) (requiring state registration to dispense); id. § 481.063(d) (requiring as a condition for registration that ''a practitioner [be] licensed under the laws of this state''). Respondent thus also violated Texas law, and the CSA, in prescribing controlled substances to that State's residents. *See Moore*, 423 U.S. at 140–41 (''In the case of a physician [the CSA] contemplates that *he is authorized by the State to practice medicine* and to dispense drugs in connection with his professional practice.'') (emphasis added); *United Prescription Services*, 72 FR at 50407 (''A controlled-substance prescription issued by a physician who lacks the license [or other authority required] to practice medicine within a State is * * * unlawful under the CSA.''); 21 U.S.C. 802(10) (defining '' 'dispense' [to] mean[] to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner'').

Respondent prescribed a controlled substance to R.Z., a Massachusetts resident. Massachusetts law follows nearly verbatim the CSA's prescription requirement. *Compare* Mass. Gen. Laws ch. 94C, § 19(a), *with* 21 CFR 1306.04(a). In December 2003, the Massachusetts Board of Registration in Medicine issued the following interpretation of the State's prescription law:

> [t]o satisfy the requirement that a prescription be issued by a practitioner in the usual course of his professional practice, there must be a physician-patient relationship that is for the purpose of maintaining the patient's well-being and the physician must conform to certain minimum norms and standards for the care of patients, such as taking an adequate medical history and conducting an appropriate physical and/or mental status examination and recording the results. Issuance of a prescription, by any means, including the Internet or other electronic process, that does not meet these requirements is therefore unlawful.

Commonwealth of Massachusetts, Board of Registration in Medicine, *Policy 03–06 INTERNET PRESCRIBING* (Adopted Dec. 17, 2003).[31] As the Board's interpretation makes plain, Respondent acted outside of the usual course of professional practice when he prescribed a controlled substance to R.Z., and therefore violated both Massachusetts law and the CSA.[32]

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authoritatively interpret 'State' and 'local laws,' which are also included in 21 U.S.C. 823(f), despite the obvious constitutional problems in his doing so.'' 546 U.S. at 264.

In determining whether Respondent established a legitimate doctor-patient relationship with the Liberty patients, this Agency must necessarily examine state law. Moreover, the requirement that a practitioner must generally perform a physical exam in order to properly diagnose a patient is one which is universally accepted throughout the medical community and by state medical boards. *See* American Medical Association, *Guidance for Physicians on Internet Prescribing* (GX 8); *see also* Federation of State Medical Boards, *Internet Prescribing Language By State* (available at *http://www.fsmb.org/ncip_resources.html/*).

Notably, Respondent cites no decision of either the New Jersey Board of Medical Examiners or the New Jersey courts holding that conduct similar to his internet prescribing was lawful under the exceptions which he contended ''could apply.'' Tr. 589. If Respondent had, this Agency would, of course, respect that decision.

[29] It is noted that the rule does ''not prohibit a licensee who is on call or covering for another licensee from treating and/or consulting a patient of such other licensee.'' Ga. Comp. R. & Regs. 360–3–.02(6). Respondent did not maintain that he was covering for, or consulting with, other physicians who were treating either A.B. or D.C.

[30] This statute provides:

(a) A person who is physically located in another state * * * and who, through the use of any means, including electronic * * * or other means of telecommunication, through which medical information or data is transmitted, performs an act that is part of a patient care service located in this state * * * that would affect the diagnosis or treatment of the patient is engaged in the practice of medicine in this state. Any person who performs such acts through such means shall be required to have a license to practice medicine in this state and shall be subject to regulation by the board.

Ga. Code Ann. § 43–34–31.1(a). While the statute includes exceptions when, *inter alia*, the physician ''[p]rovides consultation services at the request of a physician licensed in this state,'' or ''[p]rovides consultation services in the case of an emergency,'' *id.* § 43–34–31.1(b)(1) & (2), neither exception applies to Respondent.

[31] The ALJ also noted that Respondent was required to be licensed to practice medicine in Massachusetts and that ''[o]nly a practitioner who is authorized to prescribe controlled substances may do so.'' ALJ at 39 (citing Mass. Gen. Laws. ch. 94C, § 18(a)). In light of the Massachusetts' Board clear interpretation as set forth in its policy on Internet Prescribing, I conclude that it is unnecessary to address whether Respondent also violated the State's provisions requiring a license and controlled substance registration which appear to allow an out-of-state practitioner to issue a prescription to a state resident in some instances. *Id.* § 18(c).

[32] The ALJ also found that Respondent violated Minnesota law when he prescribed to P.G. because he lacked either a state medical license or a telemedicine registration. ALJ at 39–40 (citing Minn. Stat. § 147.081). The ALJ observed that Minnesota allows a physician to provide telemedicine services if four conditions are met including that the physician register with the State. ALJ at 40 (citing Minn. Stat. § 147.032 Subd. 1(a)). The Minnesota statute, however, exempts a physician who holds a valid license to practice in another state ''if * * * the services are provided on an irregular or infrequent basis,'' which is defined as ''if the person provides the services less than once a month or provides the services to fewer than ten patients annually.'' *Id.* Subd. 2(2).

The Government's evidence established that Respondent issued only a single prescription to P.G.; there is no evidence that he prescribed to any other Minnesota residents. While it may well be the

Continued

Respondent also issued a prescription for controlled substance to E.M., a New Hampshire resident. In April 2004, the New Hampshire Board of Medicine issued Guidelines on internet prescribing. In pertinent part, the Board stated:

> The members of the NH Board of Medicine have interpreted that a sufficient examination in the establishment of a valid physician-patient relationship cannot take place without an initial face-to-face encounter with the patient. It requires at a minimum: (1) Verifying the person requesting the medication is who they claim to be; (2) establishing a diagnosis through the use of acceptable medical practices, such as patient history, mental status exam, physical exam, and appropriate diagnostic and laboratory testing by the prescribing physician; (3) discussing with the patient the diagnosis and the evidence for it, and the risks and benefits of various treatment options; and (4) ensuring availability of the physician or coverage for the patient for appropriate follow-up care; (which usually includes a face-to-face encounter at least once a year and as often as is necessary to assure safe continuation of medication). Complete management of a patient by Internet, e-mail, or other forms of electronic communication is inappropriate.

New Hampshire Board of Medicine, *Guidelines for Physician Internet and Telephone Prescribing* (April 7, 2004).

Moreover, under New Hampshire law, ''[a]ny person shall be regarded as practicing medicine * * * who shall diagnose, treat * * * or prescribe any treatment of medicine for any disease or human ailment.'' N.H. Rev. Stat. § 329:1. Moreover, practicing medicine without a license or as ''otherwise authorized according to the law of'' the State constitutes the ''unlawful practice'' of medicine.[33] *Id.* § 329:24. I thus conclude that Respondent acted outside of the usual course of professional practice in prescribing a controlled substance to E.M. and violated both New Hampshire law and the CSA.

Respondent also prescribed a controlled substance to S.B., a South Carolina resident. In May 2001, the South Carolina Board of Medical Examiners promulgated its regulation on ''Contact with Patients before Prescribing.'' S.C. Code Regs. 81–28. This regulation declares that ''[i]t is unprofessional conduct for a physician to initially prescribe drugs to an individual without first establishing a proper physician-patient relationship.'' *Id.* Continuing, the regulation states that forming ''a proper relationship'' requires that a physician:

> (1) Personally perform an appropriate history and physical examination, make a diagnosis, and formulate a therapeutic plan. This process must be documented appropriately; and
>
> (2) Discuss with the patient the diagnosis and evidence for it, and the risks and benefits of various treatment options; and
>
> (3) Insure the availability of the physician or coverage for appropriate follow-up care.

Id.[34] Here too, Respondent failed to establish a valid doctor-patient relationship with S.B. under South Carolina law and thus violated the CSA when he prescribed a controlled substance to her. 21 CFR 1306.04(a).

Respondent also issued a prescription to K.B., a resident of Alabama. Under Alabama law, ''[t]he practice of medicine * * * across state lines means the practice of medicine * * * as defined in Section 34–24–50(1), as it applies to * * * [t]he rendering of treatment to a patient located within this state by a physician located outside this state as a result of transmission of individual patient data by electronic or other means from this state to such physician or his or her agent.'' Ala. Code § 34–24–501(a); *see also id.* § 34–24–50 (defining the ''practice of medicine'' as meaning ''[t]o diagnose, treat, correct, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality''). Moreover, under Alabama law, ''[n]o person shall engage in the practice of medicine * * * across state lines in this state * * * unless he * * * has been issued a special purpose license to practice medicine * * * across state lines.'' *Id.* § 34–24–502(a).

Respondent did not hold either a medical license or a special purpose license to practice medicine across state lines as required by Alabama law. In issuing the prescription to K.B., Respondent not only violated Alabama law, he acted outside of the usual course of professional practice and thereby violated the CSA as well.

As the foregoing demonstrates, Respondent repeatedly violated both the CSA and various State laws in prescribing to Liberty's customers. Respondent nonetheless contends that the Supreme Court's decision in *Gonzales* ''indicates that the continuation of his registration should not turn on [this Agency's] determination of whether in fact he had satisfied the relevant standards for establishing a doctor-patient relationship.'' Resp. Br. at 51; *see also id.* at 52 (arguing that *Gonzales* ''militates against a determination by the agency, for purposes of determining whether [Respondent's] registration should be revoked, as to whether [his] practices with internet patients satisfied state * * * standards for effective medical practice'').

Contrary to Respondent's view, *Gonzales* expressly recognized that one of the core purposes of the prescription requirement was to ''ensure[] [that] patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse.'' 546 U.S. at 274. Respondent's internet prescribing practices beg the question of how he was supervising the persons to whom he prescribed, to prevent them from becoming addicted to, or engaging in recreational abuse of, the drugs.[35] Examining whether Respondent established legitimate doctor-patient relationships under state law with those to whom he prescribed, is thus a necessary incident of determining whether he violated the CSA.

Respondent further argues that the DEA 2001 Guidance ''does not require the doctor personally to take the history or perform the [physical] examination.'' Resp. Br. at 50. Relatedly, Respondent contends that ''in terms of the indicia'' of a legitimate doctor-patient relationship as stated in the Guidance, ''there is clearly room for a physician to issue a prescription premised in part upon an examination or history conducted by another professional.'' *Id.*

At the hearing, however, Respondent testified that he had not seen the Guidance prior to this proceeding, Tr.

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case that Respondent issued additional prescriptions to P.G. or other Minnesota residents, the Government has not proved that he engaged in the unauthorized practice of medicine within Minnesota.

[33] Respondent produced no evidence that his internet practice came within any of the exceptions to New Hampshire's licensing requirement. *See* N.H. Rev. Stat. § 329:21.

[34] Similar to other State's regulations (such as New Jersey's), the South Carolina rules recognizes several circumstances in which a physician can lawfully prescribe to a patient he had not personally examined. *See* S.C. Code of Regs. R. 81–28(B). Respondent has not, however, demonstrated that his prescribing to S.B. came within any of the exceptions that excuse a physician from personally examining his patient before prescribing.

[35] Respondent contends that his internet practice ''was not substantially different from the evaluation process he would perform when he was contacted by a nurse from [the hospital] while he was on call,'' in that ''without examining the patient directly, [he] would draw upon his substantial experience and expertise to get the information he needed * * * to determine what care the patient required.'' Response to Gov.'s Exceptions at 5. It does not require a degree in medicine, however, to recognize that there is a critical difference between the two situations. In the on-call situation, a nurse is personally observing the patient and likely relating the patient's vital signs and other information regarding the patient's symptoms/condition to the physician. In contrast, even when Respondent, in the course of his internet prescribing, reviewed the results of physical examinations, he had no current information available as to the patient's vital signs and other symptoms.

414–15; Respondent therefore could not have been induced into believing that his conduct was legal by the Guidance. Moreover, the Guidance made clear that its discussion of the criteria for establishing a legitimate doctor-patient relationship was based on a summary of the standards adopted by the various States. *See* 66 FR at 21182 (GX 6, at 4).[36]

As Respondent acknowledged, he did not conduct his own review of state laws or seek legal advice concerning the legality of prescribing through the Liberty website. At the time he commenced his contract with Liberty, numerous state medical boards had already issued either policy statements or regulations (including those States discussed above) which addressed the legality of a physician's prescribing to patients he had not personally examined. Moreover, at the time Respondent commenced his contract with Liberty, this Agency had published several final orders revoking practitioners' registrations based on their prescribing over the internet and without performing a physical examination.[37] *See, e.g., Marvin L. Gibbs, Jr., M.D.*, 69 FR 11658, 11661 (issued Mar. 11, 2004); *Mark Wade, M.D.*, 69 FR 7018, 7021–22 (issued Feb. 12, 2004); *Rick Joe Nelson, M.D.*, 66 FR 30752, 30753 (2001) (noting immediate suspension of practitioner's registration based on internet prescribing).

In his response to the Government's Exceptions, Respondent contends that because of Boswell's ''attentiveness to regulatory and compliance issues,'' he was ''led * * * to believe that his internet practice would be proper.'' Response to Gov.'s Exceptions 7. This is not a persuasive argument. Indeed, one would think that a licensed professional and the holder of an appointment as a clinical professor would be well aware of such state laws and regulations as those prohibiting the unauthorized practice medicine and those defining something as fundamental to the practice of medicine as the steps necessary to establish a legitimate doctor-patient relationship. As the California Court of Appeal has explained:

> [the] proscription of the unlicensed practice of medicine is neither an obscure nor an unusual state prohibition of which ignorance can reasonably be claimed, and certainly not by persons * * * who are licensed health care providers. Nor can such persons reasonably claim ignorance of the fact that authorization of a prescription pharmaceutical constitutes the practice of medicine.

Hageseth v. *Superior Court*, 59 Cal. Rptr.3d 385, 403 (Ct. App. 2007).

Respondent further contends that his case is distinguishable from other Agency cases involving internet prescribers. *See* Resp. Br. at 43–46. More specifically, Respondent contends that in contrast to other internet prescribers, he ''issued no more than a handful of prescriptions a day,'' that he prescribed ''only after reviewing the patient's medical record and conducting a searching personal interview,'' that he ''only prescribed medications that were pertinent to his area of medical expertise,'' and that he ''rejected many requests for medication that he deemed inappropriate.'' *Id.* at 43. Relatedly, Respondent contends that Liberty attempted to identify persons who were obtaining drugs from multiple sources and that it verified medical records. *Id.* at 45. He also contends that ''[h]e genuinely made a good faith effort'' to practice ''medicine properly and effectively.'' Resp. to Gov.'s Exceptions at 10.

As to these contentions, the evidence is mixed. While there is no evidence rebutting his contention that he issued only a small number of prescriptions each day, by his own admission he consulted for Liberty for approximately one year during which he issued between 800 and 1200 prescriptions. However, the record does not establish the extent to which these prescriptions were for controlled substances. Moreover, he continued to prescribe for three months after being served with the Order to Show Cause.[38] While it seems likely that he prescribed controlled substances during this period, the Government did not establish the scope of his controlled substance prescribing activity after he was served with the Order.

Moreover, notwithstanding his contention that he prescribed only after reviewing a patient's medical record and ''conducting a searching'' interview, the evidence establishes that in some instances (R.Z. and S.K.) he prescribed before Liberty even obtained the records, and that in other instances he relied on records that—according to his own testimony—were outdated (P.G) and even indicated that narcotics were not in the patient's best interest. Relatedly, as the ALJ noted, other evidence casts serious doubt as to his assertions that he always conducted a consultation with the patients, let alone a searching interview of them. ALJ at 12. (FoF 36).

On the other hand, there is some evidence that Liberty rejected patients who were seeking drugs from multiple sources, or who were seeking drugs to give to others. There is also evidence that in some instances, Liberty verified a patient's records with the patient's original physicians although it is unclear what this process involved and how often it was undertaken.[39] Relatedly, even though the patient files typically included photocopies of a driver's license, there is no guarantee that the drugs were actually going to these persons.

Moreover, the ALJ found that Respondent ''declined to prescribe medications in many instances where Liberty customers were directed to him.'' ALJ at 17 (FoF 52). The Government produced no evidence to rebut Respondent's contention as to the frequency of his refusals to prescribe. Relatedly, there is also evidence that Respondent rejected a request for drugs when he thought the person would divert or was seeking drugs from multiple sources. Moreover, there is evidence that Respondent refused to prescribe because a person's complaint (and the supporting records) had not been verified.

[36] The Guidance is not a regulation and thus does not have the force and effect of law. Rather, it is a Notice which simply provides guidance.

[37] Respondent also contends that his shortfalls were of one ''seeking to practice in an area where the technical requirements are both widely dispersed and in flux.'' Resp. Br. 46; *see also id.* at 52. However, at the time he commenced his contract with Liberty, each of the States discussed above had already either enacted laws, or issued regulations or policy statements, addressing the propriety of this activity. And in any event, Respondent cannot credibly argue that his conduct should be excused because the legal requirements were in flux when he made no inquiry as to what the requirements were.

[38] With respect to his prescribing following the service of the Show Cause Order, Respondent does not maintain that he did not prescribe controlled substances in this period. Rather, he argues that I should consider the fact that the Order alleged that he ''improperly prescribed drugs [phentermine and phendimetrazine] that he never in fact prescribed.'' Response to Gov.'s Exceptions at 11. Respondent ignores, however, that the Show Cause Order also quoted the prescription requirement of 21 CFR 1306.04(a), and the New Jersey regulation setting forth the requirements for prescribing a drug including that a ''practitioner shall * * * perform an appropriate history and physical examination.'' Show Cause Order at 1 & 3. Moreover, the Show Cause Order alleged that Respondent was prescribing to persons that he was not physically examining and had no prior doctor-patient relationship with, and was thus violating 21 CFR 1306.04. *Id.* at 6. The Show Cause Order thus provided Respondent with fair warning as to the illegality of his conduct.

[39] For example, did Liberty's employees simply ask whether a person had been a patient? Did they ask whether the patient was still being treated by the physician? Did they ask what the physician's diagnosis was? And did they ask if there was any evidence that the patient had engaged in drug seeking behavior? Moreover, in some instances, Respondent prescribed before the records were even sent to Liberty. Finally, in at least one case (patient L.F.), it appeared that some of the records were fraudulent.

While the record as a whole may not conclusively show that Respondent knowingly diverted, at the very least it establishes that Respondent acted with reckless disregard for his obligations as a practitioner under both the CSA and numerous state laws. Moreover, Respondent acknowledged that he prescribed schedule II drugs and authorized refills of these prescriptions, in violation of federal law. *See* 21 U.S.C. 829(a).[40] The Government has therefore proved that Respondent has committed acts that render his registration ''inconsistent with the public interest.'' *Id.* § 824(a)(4).

Sanction

Under Agency precedent, where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must '' 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson*, 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller*, 53 FR 21931, 21932 (1988)). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA*, 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe*, 73 FR at 387; *see also Jackson*, 72 FR at 23853; *John H. Kennedy*, 71 FR 35705, 35709 (2006); *Prince George Daniels*, 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA*, 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

The ALJ acknowledged that the Government had ''clearly demonstrated'' that Respondent's internet prescribing practices violated the CSA. ALJ at 43. While the ALJ recognized that Respondent's internet prescribing was ''egregious conduct,'' *id.*, that he ''fail[ed] to be totally truthful during his testimony,'' *id.* at 44, and that he ''demonstrated a lack of sound judgment'' in continuing his internet prescribing for three months following the service of the Show Cause Order, *id.*, she also noted that he ''is clearly a very educated, dedicated and talented physician,'' *id.*; that he had been practicing medicine for eleven years, and that ''the only instances of [his] improper handling of controlled substances were related to his'' internet prescribing. *Id.* Balancing Respondent's misconduct against his overall practice, the ALJ recommended that I continue his registration, subject only to the condition that he not prescribe over the internet. *Id.*

As explained above, this Agency has repeatedly held that accepting responsibility for one's misconduct is an ''important factor'' in the public interest determination. *See Hoxie*, 419 F.3d at 483 (upholding Agency's consideration of whether registrant/applicant has admitted fault); *Jackson*, 72 FR at 23853; *Kennedy*, 71 FR at 35709; *Daniels*, 60 FR at 62887. The ALJ, however, made no finding as to whether Respondent had accepted responsibility for his misconduct.

While Respondent testified that it was not his ''present intention'' to resume internet prescribing,[41] the record as a whole does not establish that he has accepted responsibility for his misconduct. I acknowledge that the DI who served Respondent with the Show Cause Order described him as cooperative, and that Respondent admitted that his internet prescribing was even more extensive than that shown by the Government. In his testimony, however, Respondent continued to maintain that his prescribing without performing a physical exam was lawful under New Jersey's regulation. Moreover, Respondent did not acknowledge that he violated either the CSA, or any other state laws and regulations, whether they related to the standards for establishing a legitimate doctor-patient relationship or addressed the unauthorized practice of medicine. Respondent's failure to acknowledge the illegality of his conduct does not inspire confidence that he will refrain from engaging in similar acts in the future.

Moreover, while a registrant must accept responsibility and demonstrate that he will not engage in future misconduct in order to establish that his/her continued registration is consistent with the public interest, these are not the only factors that are relevant in determining the appropriate sanction. As I have previously noted, ''[n]either *Jackson* nor any other agency decision holds * * * that the Agency cannot consider the deterrent value of a sanction in deciding whether a registration should be [suspended or] revoked.'' *Southwood Pharmaceuticals, Inc.*, 72 FR 36487, 36504 (2007).[42]

In *Southwood*, I explained that ''even when a proceeding serves a remedial purpose, an administrative agency can properly consider the need to deter others from engaging in similar acts.'' *Id.* (citing *Butz* v. *Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187–88 (1973)). I further noted that the ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest, *see* 21 U.S.C. 801, and the broad grant of authority conveyed in the statutory text, which authorizes the [suspension or] revocation of a registration when a registrant 'has committed such acts as would render [his] registration * * * inconsistent with the public interest,' *id.* section 824(a)(4), and [which] specifically directs the Attorney General to consider ['such other conduct which may threaten public health and safety,' *id.* section 823(f)].'' *Southwood*, 72 FR at 36504.

I acknowledge that Respondent has impressive credentials, and that except for his internet prescribing, there is no evidence that he violated the CSA or state laws in his years of practice as an anesthesiologist and pain management specialist. However, under any circumstance, Respondent's conduct as an internet prescriber would be disturbing. That he holds an appointment as a clinical professor renders his conduct even more so. Relatedly, Respondent's testimony as to why he believed that his Internet prescribing was lawful and failed to perform his own inquiries into the legality of this practice is especially unpersuasive and does not excuse his failure to obey the law.

Moreover, Respondent's Internet prescribing was not a brief sojourn into illegality. Rather, he engaged in his

[40] Respondent also provided Liberty with an electronic copy of his signature. Tr. 511 & 570. While Respondent credibly testified that he had no reason to suspect that Liberty was using his signature to authorize prescriptions which he had not approved, he acknowledged that he had no way of determining whether Liberty was misusing his signature. *Id.* at 570. This Agency has previously held that failing to safeguard one's signature constitutes conduct inconsistent with the public interest. *See Robert G. Hallermeier, M.D.*, 62 FR 26818, 26820 (1997).

[41] Notably, while the ALJ credited this testimony, she was less than impressed with Respondent's testimony that he did not intend to resume internet prescribing. *See* ALJ 15 n.4 (''Although [Respondent] appeared to be credible when he testified here to his intent, I do question how he resolves this intent with his continued interest in telemedicine.''). Indeed, intentions can change, and Respondent's statement is hardly an unequivocal statement that he will not resume such conduct in the future.

[42] Southwood was decided before the ALJ issued her recommended decision in this matter. The ALJ did not, however, even acknowledge the decision.

misconduct for a year, during which time he likely issued between 800 to 1,200 prescriptions. Yet the record does not establish the extent to which these prescriptions were for controlled substances.[43]

I acknowledge that proceedings under Section 304 are non-punitive. But even were I to ignore that Respondent has not accepted responsibility for his misconduct, and credit his testimony that he did not intend to resume his internet practice, I would still conclude that a lengthy suspension of his registration is warranted.

As found above, the diversion and abuse of prescription drugs has increased dramatically, with the number of people admitting to such abuse (approximately 15.1 million) exceeding by twenty-three percent, the number who abuse cocaine, hallucinogens, inhalants and heroin combined. Moreover, the growth rate of prescription drug abuse is twice the growth rate of marijuana abuse and five times the growth rate of cocaine abuse; between 1992 and 2002, the growth in prescription opioid abuse among teenagers grew by 542 percent.

The use of the internet and telephone to prescribe to individuals with whom a physician has not established a bona fide doctor-patient relationship is one of the primary means by which controlled substances are being diverted and obtained for recreational abuse. The growth of this means of diversion represents a grave threat to public health and safety. Accordingly, this Agency has repeatedly revoked the registrations of numerous practitioners who have committed similar acts by prescribing over the internet without establishing legitimate doctor-patient relationships. *See, e.g., Kamir Garces-Mejias*, 72 FR 54931 (2007); *William Lockridge*, 71 FR 77791 (2006); *Mario Diaz*, 71 FR 70788 (2006). The ALJ did not, however, even acknowledge any of the numerous Agency decisions to this effect.

Respondent maintains that his case is distinguishable from these and other reported decisions involving internet prescribers because he ''genuinely believed * * * that he was practicing medicine properly and effectively[,]'' and ''genuinely made a good faith effort to do so.'' Response to Gov.'s Exceptions at 10. He also contends that he ''is an extraordinarily dedicated and tireless physician who saw the internet as a way to care for more patients,'' and that while he ''can be faulted'' for ''having trusted colleagues and new business associates when he should have been more skeptical,'' ''the price should not be his career.'' *Id.* at 14.

It is true that in other Agency decisions revoking the registrations of internet prescribers, the evidence strongly supported the conclusion that the physicians were engaged in intentional acts of diversion. Here, by contrast, the evidence does not establish that he knowingly distributed controlled substances to those who were seeking the drugs to abuse them or to sell them to abusers. His conduct—which is extraordinary for its recklessness—nonetheless violated the CSA.

Continuing Respondent's registration, subject only to the condition that he refrain from prescribing over the Internet, is no sanction at all given the numerous state laws and new Federal law which prohibit this practice in the manner Respondent engaged in it. Adopting the ALJ's recommendation would not only ''ignore how irresponsibly [Respondent] acted,'' *Southwood*, 71 FR at 36503; it would also signal to others that one can ignore the law (and his obligation to determine what the law is) and yet incur no consequence for having done so. Given the extraordinary harm to public health and safety caused by internet prescribing, this is not the message that should be sent to those who contemplate prescribing controlled substances in this manner. Rather, such persons should understand that they are responsible for knowing the law and acting in conformity therewith, and that there will be serious consequences for those who fail to do so.

Accordingly, I conclude that Respondent's registration should be suspended for a period of one year. Moreover, Respondent's pending application for renewal of his registration will be held in abeyance during the course of the suspension. Upon completion of the suspension, his application will be approved provided that he fulfills the following condition. Because Respondent has not acknowledged that his internet prescribing practices violated the CSA, he must provide a sworn statement to this effect. If Respondent complies with this condition (and he commits no other acts which would warrant the denial of his application), the Agency will expeditiously grant his renewal application. If, however, if he fails to do so, his application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I hereby order that the DEA Certificate of Registration issued to Joseph Gaudio, M.D., be, and it hereby is, suspended for a period of one year. I further order that Respondent's pending application to renew his registration be, and it hereby will be, held in abeyance pending the completion of the period of suspension and Respondent's providing to this Agency a sworn statement acknowledging that his internet prescribing activities violated the Controlled Substances Act and DEA regulations. This Order is effective April 8, 2009.[44]

Dated: February 26, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–4903 Filed 3–6–09; 8:45 am]

BILLING CODE 4410–09–P

[43] It is also noted that Respondent continued his internet prescribing for three months after he received the Show Cause Order, even though the Order put him on notice as to the requirements for a lawful prescription under both the CSA and state law. While Respondent did not dispute that he prescribed controlled substances during this period, I do not rely on this conduct in setting the sanction because the Government did not identify a single controlled substance prescription that he issued following the service of the Show Cause Order. If the Government had shown specific instances of Respondent's prescribing of controlled substances following service of the Order, I would have found that he knowingly diverted controlled substances and revoked his registration.

[44] Respondent can choose to commence serving his suspension earlier by tendering his Certificate of Registration and any order forms he has been issued to the nearest DEA office.

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

F.C.S.C. Meeting Notice No. 2–09

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business and other matters specified, as follows:

Date and Time: Wednesday, March 18, 2009, at 10:30 a.m.

Subject Matter: Issuance of Proposed Decisions, Amended Proposed Decisions, Final Decisions and Orders in claims against Albania.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room

6002, Washington, DC 20579. Telephone: (202) 616–6975.

Mauricio J. Tamargo,

Chairman.

[FR Doc. E9–4956 Filed 3–5–09; 11:15 am]

BILLING CODE 4410–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Maritime Advisory Committee for Occupational Safety and Health (MACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: MACOSH meeting, notice of.

SUMMARY: The Maritime Advisory Committee for Occupational Safety and Health (MACOSH) was established to advise the Assistant Secretary of Labor for OSHA on issues relating to occupational safety and health in the maritime industries. The purpose of this **Federal Register** notice is to announce the MACOSH meeting scheduled for March 2009.

DATES: The Committee will meet on March 24, 2009, from 8:30 a.m. to 5 p.m.

ADDRESSES: The Committee will meet at the U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. On Tuesday, March 24, 2009, the committee will meet in conference room N–3437. Mail comments, views, or statements in response to this notice to Danielle Watson, Office of Maritime, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone (202) 693–1870; fax: (202) 693–1663.

FOR FURTHER INFORMATION CONTACT: For general information about MACOSH and this meeting, contact: Joseph V. Daddura, Director, Office of Maritime, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693–2067. Individuals with disabilities wishing to attend the meeting should contact Danielle Watson at (202) 693–1870 no later than March 17, 2009, to obtain appropriate accommodations.

SUPPLEMENTARY INFORMATION: All MACOSH meetings are open to the public. All interested persons are invited to attend the MACOSH meeting at the time and location listed above. The MACOSH agenda will include: A presentation on the Federal Advisory Committee Act, and committee ethics training; an OSHA activities update; introduction of the new and returning MACOSH committee members; a review of the accomplishments from the previous meetings during the last charter; and goals for the next two years, including establishment of the MACOSH workgroups.

Public Participation: Written data, views, or comments for consideration by MACOSH on the various agenda items listed above should be submitted to Danielle Watson at the address listed above. Submissions received by March 17, 2009, will be provided to Committee members and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits.

Authority: This notice was prepared under the direction of Donald G. Shalhoub, Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to Sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), Secretary of Labor's Order 5–2007 (72 FR 31159), and 29 CFR part 1912.

Signed at Washington, DC, this 4th day of March, 2009.

Donald G. Shalhoub,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E9–4882 Filed 3–6–09; 8:45 am]

BILLING CODE 4510–26–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2008–8]

Notice of Public Hearings: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Public Hearings.

SUMMARY: The Copyright Office of the Library of Congress will be holding public hearings on the possible exemptions to the prohibition against circumvention of technological measures that control access to copyrighted works. In accordance with the Copyright Act, as amended by the Digital Millennium Copyright Act, the Office is conducting its triennial rulemaking proceeding to determine whether there are particular ''classes of works'' as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses if they are prohibited from circumventing such technological measures.

DATES: The first public hearing will be held in Palo Alto, California on Friday, May 1, 2009, at 9:00 a.m. Public hearings will also be held in Washington, DC on Wednesday, May 6, 2009, Thursday, May 7, 2009, and Friday, May 8, 2009, at 10:00 a.m. Requests to testify must be received by 5:00 p.m. E.D.T. on Friday, April 3, 2009. *See* **SUPPLEMENTARY INFORMATION** for additional information on other requirements.

ADDRESSES: The Palo Alto hearings will be held in the Moot Court Room of the Stanford Law School, Crown Quadrangle, Palo Alto, CA.

The Washington, DC round of public hearings will be held in the Copyright Hearing Room, LM–408 of the James Madison Building of the Library of Congress, 101 Independence Ave, SE., Washington, DC. *See* **SUPPLEMENTARY INFORMATION** for additional address information and other requirements.

FOR FURTHER INFORMATION CONTACT: Robert Kasunic, Principal Legal Advisor, Office of the General Counsel, Copyright GC/I&R, PO Box 70400, Washington, DC 20024–0400. Telephone (202) 707–8380; fax (202) 707–8366. Requests to testify may be submitted through the request form available at http://www.copyright.gov/1201/.

SUPPLEMENTARY INFORMATION: On October 6, 2008, the Copyright Office published a Notice of Inquiry seeking comments in connection with a rulemaking pursuant to section 1201(a)(1) of the Copyright Act, 17 U.S.C. 1201(a)(1), which provides that the Librarian of Congress may exempt certain classes of works from the prohibition against circumventing a technological measure that controls access to a copyrighted work. 73 FR 58073 (October 6, 2008). On December 29, 2008, the Copyright Office published a Notice of Proposed Rulemaking listing the proposed exemptions and requesting responsive comments. 73 FR 79425 (December 29, 2008). For all of the documents submitted and published within the current rulemaking proceeding, and for a more complete statement of the background and purpose of the rulemaking, please see the Copyright Office's website at: http://www.copyright.gov/1201/. The 19 initial written comments proposing classes of works to be exempted and the 56 responsive comments also have been posted on the Office's website; *see* http://www.copyright.gov/1201/.

The Office will be conducting public hearings in Palo Alto, California and Washington, DC to hear testimony

relating to the proposed exemptions in this rulemaking. Interested parties are invited to submit requests to testify at these hearings. The date for the hearing in Palo Alto, CA is May 1, 2009. The dates for the Washington, DC hearings are May 6, May 7, and May 8, 2009. Depending on the number of requests to testify received by the Copyright Office, it may not be necessary to conduct hearings on all of the available days. The hearings will be organized by subject matter, and while the Copyright Office will attempt to accommodate preferences for particular dates, such accommodations may not be possible.

Requirements for persons desiring to testify:

A request to testify must be submitted to the Copyright Office. All requests to testify must clearly identify:

- the name of the person desiring to testify,
- the organization or organizations represented, if any,
- contact information (address, telephone, and email),
- the class of work on which you wish to testify (if you wish to testify on more than one proposed class of work, please state your order of preference),
- a brief summary of your proposed testimony,
- a description of any audiovisual material or demonstrative evidence, if any, that you intend to present,
- a description of any material you intend to distribute, if any, at the hearing,
- the location of the hearing at which you wish to testify (Washington, DC or Palo Alto, CA),
- dates on which you wish to testify in order of preference. *Note*: Because the agenda will be organized based on subject matter, we cannot guarantee that we can accommodate requests to testify on particular dates.

Depending on the number and nature of the requests to testify, it is possible that the Office will not be able to accommodate all requests to testify.

All persons who submit a timely request to testify will receive confirmation by email or telephone. The Copyright Office will notify all witnesses of the date and expected time of their appearance, and the time allocated for their testimony.

Addresses for requests to testify:

Requests to testify must be submitted via the Copyright Office's website form located at http://www.copyright.gov/1201/ and must be received by 5:00 p.m. E.D.T. on Friday, April 3, 2009. Persons who are unable to send requests via the website should contact Rob Kasunic, Principal Legal Advisor, Office of the General Counsel at (202) 707–8380 to make alternative arrangements for submission of their requests to testify.

Form and limits on testimony at public hearings:

There will be time limits on the testimony allowed for persons testifying that will be established after receiving all requests to testify. In order to avoid duplicative and cumulative testimony and to ensure that all relevant issues and viewpoints are addressed, the Office encourages parties with similar interests to select common representatives to testify on behalf of a particular position. A timely request to testify does not guarantee an opportunity to testify at these hearings.

The Copyright Office stresses that factual arguments are at least as important as legal arguments. The hearings provide an opportunity to explain and, in some cases, demonstrate the factual basis of an argument. The Copyright Office encourages persons who wish to testify to provide demonstrations of particular problems or solutions as supplements to testimony. While testimony from attorneys who can articulate legal arguments in support of or in opposition to a proposed exempted class of works is useful, testimony from witnesses who can explain and demonstrate pertinent facts is strongly encouraged by the Office.

If audiovisual demonstrations or handouts will be used at any hearing, the Copyright Office requires submission of such materials to the Copyright Office 48 hours prior to the hearing in order to make this information available to the other witnesses on the same panel, and to ensure technological compatibility. If a demonstration will consist of proprietary hardware or software, witnesses may need to provide representative handouts to be distributed to other witnesses prior to the hearing.

An LCD projector and screen will be available in the hearing rooms. Other electronic or audiovisual equipment necessary for a presentation should be brought by the person testifying. Persons intending to bring such equipment into the Library of Congress, *e.g.*, laptops, slide projectors, etc., are encouraged to give the Office advance notice and to arrive early in order to clear security screening by the Library police.

The Office intends to organize individual sessions of the hearings around particular or related classes of works proposed for exemption. If a request to testify involves more than one proposed exemption or related exemption, please specify, in order of preference, the proposed exemptions on which you would prefer to testify.

Following receipt of the requests to testify, the Copyright Office will prepare an agenda of the hearings which will be posted on the Copyright Office website at: http://www.copyright.gov/1201/. The Copyright Office will also provide additional information on directions and parking for all persons testifying at the Palo Alto, CA round of hearings. To facilitate this process, it is essential that all of the required information listed above be included in a request to testify.

Dated: March 4, 2009

David O. Carson,

Copyright General Counsel.

[FR Doc. E9–4913 Filed 3–6–09; 8:45 am]

BILLING CODE 1410–30–S

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 09–08]

Notice of the March 11, 2009 Millennium Challenge Corporation Board of Directors Meeting; Sunshine Act Meeting—Correction

AGENCY: Millennium Challenge Corporation.

TIME AND DATE: 10 a.m. to 12 p.m., Wednesday, March 11, 2009.

PLACE: Department of State, 2201 C Street, NW., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Information on the meeting may be obtained from Romell Cummings via e-mail at *Board@mcc.gov* or by telephone at (202) 521–3600.

STATUS: Meeting will be closed to the public.

MATTERS TO BE CONSIDERED: The Board of Directors (the ''Board'') of the Millennium Challenge Corporation (''MCC'') will hold a meeting to discuss issues related to suspension and/or termination of Compact programs with certain countries eligible for assistance under the Millennium Challenge Act of 2003 (MCA); discuss progress on proposed and existing Compacts with certain MCA-eligible countries; discuss MCC's budget outlook for FY 2009 and 2010; discuss MCC's Threshold Program; and consider certain administrative matters. The agenda items are expected to involve the consideration of classified information and the meeting will be closed to the public. These agenda items have been substituted for the items regarding

country selection, and MCC's policy on suspension and termination which appeared in the **Federal Register** notice published Friday, February 27, 2009.

Dated: March 4, 2009.

Henry C. Pitney,

(Acting) Vice President and General Counsel, Millennium Challenge Corporation.

[FR Doc. E9–4993 Filed 3–5–09; 11:15 am]

BILLING CODE 9211–03–P

NATIONAL MEDIATION BOARD

Notice of Proposed Information Collection Requests

AGENCY: National Mediation Board.

SUMMARY: The Director, Office of Administration, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments within 30 days from the date of this publication.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Chief Information Officer, Finance and Administration Department, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, *e.g.*, new, revision extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Record keeping burden. OMB invites public comment.

Currently, the National Mediation Board is soliciting comments concerning the new collection of information in the form of Request for Arbitration Panel for Airline System Boards of Adjustment, Request for Public Law Board Member, Arbitration Services—Pay Voucher for Personal Services, Arbitration Services—Official Travel/Referee Compensation Authorization, Neutral's Report of Activity Arbitration Services—Personal Data Sheet and is interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 3, 2009.

June D. W. King,

Director, Office of Administration, National Mediation Board.

A. Request for Arbitration Panel for Airline System Boards of Adjustment

Type of Review: New Collection.

Title: Request for Arbitration Panel for Airlines System Boards of Adjustment.

Frequency: On occasion.

Affected Public: Airline Carrier and Union Officials.

Reporting and Recordkeeping Hour Burden:

Responses: Estimate about 80 annually.

Burden Hours: 20.

Abstract: Section 183 of the Railway Labor Act, 45 U.S.C., 183, provides that the parties to the labor-management disputes in the airline industry must have a procedure for the resolution of disputes involving the interpretation or application of provisions of the collective bargaining agreement. The Railway Labor Act mentions system board of adjustment or arbitration boards as the mechanism for resolution and is silent as to how the neutral arbitrator is to be selected if the parties are unable to agree on an individual. The National Mediation Board provides panels of arbitrators to help the parties in their selection of an arbitrator.

This form is necessary to assist the parties in this process. The parties invoke the process through the submission of this form. The brief information is necessary for the NMB to perform this important function.

B. Request for Public Law Board Member

Type of Review: New Collection.

Title: Request for Public Law Board Member.

Frequency: On occasion.

Affected Public: Carrier and Union Officials of railroads.

Reporting and Recordkeeping Hour Burden:

Responses: Estimate 15 annually.

Burden Hours: 3.75.

Abstract: Section 153, Second, of the Railway Labor Act, 45 U.S.C. 153, Second, governs procedures to be followed by carriers and representatives of employees in the establishment and functioning of special adjustment boards. These special adjustment boards are referred to as public law boards (board). The statute provides that within thirty (30) days from the date a written request is made by an employee representative or carrier official for the establishment of a board, an agreement establishing such board shall be made. If, however, one party fails to designate a member of the board, the party making the request may ask the NMB to designate a member on behalf of the other party. The NMB must designate the representative who, together with the other party constitutes the public board. It will be the task of these two individuals to decide on the terms of the agreement. If these individuals are unable to decide upon the terms, the Railway Labor Act provides that one of these parties may request that the NMB designate a neutral to resolve the remaining matters which are procedural issues. Pursuant to 29 C.F.R. 1207.2, requests for the NMB to appoint either representatives or neutrals must be made on printed forms which may be secured from the NMB.

This form is necessary for the NMB to fulfill its statutory responsibilities. Without this information, the NMB would not be able to assist the railroad labor and management representatives in resolving disputes, which is contrary to the intent of the Railway Labor Act.

C. Arbitration Services—Official Travel/Referee Compensation Authorization

Type of Review: New Collection.

Title: Arbitration Services—Official Travel/Referee Compensation Authorization.

Frequency: On occasion.

Affected Public: Arbitrators.

Reporting and Recordkeeping Hour Burden:

Responses: Approximately 624 annually.

Burden Hours: 156.

Abstract: Section 153, First and Second of the Railway Labor Act, 45 U.S.C. 153, First and Second, provide that the NMB shall compensate arbitrators who resolve the resolves under these sections of the Act. The arbitrator must submit a written request, in advance, for authorization to be compensated for work to be performed. The arbitrator must obtain authorization before performing work. This form is the

request and is necessary for the NMB to fulfill its financial responsibilities.

D. Arbitration Services—Pay Voucher for Personal Services

Type of Review: New Collection.
Title: Arbitration Services—Pay Voucher for Personal Services.
Frequency: On occasion.
Affected Public: Arbitrators.
Reporting and Recordkeeping Hour Burden:
Responses: Approximately 624 annually.
Burden Hours: 156.

Abstract: Section 153, First and Second of the Railway Labor Act, 45 U.S.C. 153, First and Second, provide that the NMB shall compensate arbitrators who resolve the resolves under these sections of the Act. After the work is performed, the arbitrator must submit a written request for compensation. This form is the vehicle used to request compensation and is necessary for the NMB to fulfill its financial responsibilities.

E. Neutral's Report of Activity

Type of Review: New Collection.
Title: Neutral's Report of Activity.
Frequency: On occasion.
Affected Public: Arbitrators.
Reporting and Recordkeeping Hour Burden:
Responses: Approximately 624 annually.
Burden Hours: 156.

Abstract: Section 153, First and Second of the Railway Labor Act, 45 U.S.C. 153, First and Second, provide that the parties may use an arbitrator to resolve their disputes concerning the application or interpretation of the provisions of a collective bargaining agreement. The NMB must record the decisions rendered by the arbitrators selected by the parties and compensated by the NMB. This form is used to gather that information. This brief information is necessary for the NMB to fulfill its responsibilities under the Railway labor Act.

F. Arbitration Services—Personal Data Sheet

Type of Review: New Collection.
Title: Arbitration Services—Personal Data Sheet.
Frequency: On occasion.
Affected Public: Arbitrators.
Reporting and Recordkeeping Hour Burden:
Responses: 25 annually.
Burden Hours: 25.

Abstract: Sections 183 and 153 of the Railway Labor Act, 45 U.S.C., 153 and 183, provide for the use of arbitrators in the resolution of disputes concerning the application or interpretation of provisions of a collective bargaining agreement in the airline and railroad industries. The NMB maintains a roster of arbitrators for this purpose. The NMB must have a means for interested individuals to apply for inclusion on this roster. This form is the application for inclusion on the NMB roster. The brief information that the NMB solicits is necessary to perform this responsibility under the Railway Labor Act.

Requests for copies of the proposed information collection request may be accessed from *http://www.nmb.gov* or should be addressed to Roland Watkins, Director of Arbitration Services NMB, 1301 K Street, NW., Suite 250 E, Washington, DC 20005 or addressed to the e-mail address *arb@nmb.gov* or faxed to 202–692–5086. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to June D. W. King at 202–692–5010 or via internet address *king@nmb.gov.* Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–4837 Filed 3–6–09; 8:45 am]
BILLING CODE 7550–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–302; NRC–2009–0039]

Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR–72 for an Additional 20-Year Period; Florida Power Corporation; Crytstal River Unit 3 Nuclear Generating Plant

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering an application for the renewal of operating license DPR–72, which authorizes Florida Power Corporation, to operate the Crystal River Unit 3 Nuclear Generating Plant (CR–3) at 2609 megawatts thermal. The renewed license would authorize the applicant to operate CR–3 for an additional 20 years beyond the period specified in the current license. CR–3 is located approximately 35 miles southwest of Ocala, FL and its current operating license expires on December 3, 2016.

Florida Power Corporation submitted the application dated December 16, 2008, pursuant to Title 10, Part 54, of the *Code of Federal Regulations* (10 CFR Part 54), to renew operating license DPR–72 for CR–3. A notice of receipt and availability of the license renewal application (LRA) was published in the **Federal Register** on February 4, 2009 (74 FR 6060).

The Commission's staff has determined that Florida Power Corporation has submitted sufficient information in accordance with 10 CFR Sections 2.101, 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c), to enable the staff to undertake a review of the application, and the application is therefore acceptable for docketing. The current Docket No. 50–302, for operating license DPR–72, will be retained. The determination to accept the license renewal application for docketing does not constitute a determination that a renewed license should be issued, and does not preclude the NRC staff from requesting additional information as the review proceeds.

Before issuance of the requested renewed license, the NRC will have made the findings required by the Atomic Energy Act of 1954 (the Act), as amended, and the Commission's rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review; and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB), and that any changes made to the plant's CLB will comply with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement that is a supplement to the Commission's NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants,'' dated May 1996. In considering the LRA, the Commission must find that the applicable requirements of Subpart A of 10 CFR Part 51 have been satisfied, and that matters raised under 10 CFR 2.335 have been addressed. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold public scoping

meetings. Detailed information regarding the environmental scoping meetings will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** notice, 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 for a hearing and a petition for leave to intervene with respect to the renewal of the license. Requests for a hearing or petitions for leave to intervene must be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852 and is accessible from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to the Internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail at *PDR@nrc.gov*. If a request for a hearing/petition for leave to intervene is filed within the 60-day period, 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 Panel will issue a notice of a hearing or an appropriate order. In the event that no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR Parts 51 and 54, renew the license without further notice.

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, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR Parts 51 and 54. The petition must specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) 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 requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

The Commission requests that each contention be given a separate numeric or alpha designation within one of the following groups: (1) Technical (primarily related to safety concerns); (2) environmental; or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners will be required to jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August, 2007, 72 FR 49139 (Aug. 28, 2007). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary

[1] To the extent that the application contains attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel to discuss the need for a protective order.

that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at *http://www.nrc.gov/reactors/operating/licensing/renewal.html* on the NRC's Web site. Copies of the application to renew the operating license for CR–3, is available for public inspection at the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852–2738, and at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html*, the NRC's Web site while the application is under review. The application may be accessed in ADAMS through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession Number ML090080053. As stated above, persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS may contact the NRC Public Document Room (PDR) Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *PDR@nrc.gov*.

The NRC staff has verified that a copy of the license renewal application is also available to local residents near CR–3, at the Coastal Region Library (8619 W. Crystal St., Crystal River, FL 34428–4468).

Dated at Rockville, Maryland, this 27th day of February, 2009.

For the Nuclear Regulatory Commission.

Brian E. Holian,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E9–4951 Filed 3–6–09; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Cancellation of Meeting of the Industry Trade Advisory Committee on Small and Minority Business (ITAC–11)

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of meeting cancellation.

SUMMARY: A notice was published in the **Federal Register** dated February 26, 2009, Volume 74 page 8819 and March 4,2009, Volume number 74, Notice 41, page 9438, announcing a meeting of the Industry Trade Advisory Committee on Small and Minority Business (ITAC–11), scheduled for March 9, 2009, from 9 a.m. to 3:30 p.m. The meeting was to be closed to the public from 9 a.m. to 12:30 p.m. and open to the public from 1 p.m. to 3:30 p.m. However, the meeting has been cancelled in its entirety.

FOR FURTHER INFORMATION CONTACT: Laura Hellstern, DFO for ITAC–11 at (202)482–3222, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC.

Lisa Garcia,

Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Liaison.

[FR Doc. E9–5025 Filed 3–5–09; 4:15 pm]

BILLING CODE 3190–W9–P

OFFICE OF PERSONNEL MANAGEMENT

[OMB Control No. 3206–0173; Form SF 3102]

Submission for OMB Review; Request for Extension, Without Change of a Currently Approved Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget (OMB) a request for extension, without change, of a currently approved information collection. This information collection, ''Designation of Beneficiary (FERS)'' (OMB Control No. 3206–0173; SF 3102), is used by an employee or an annuitant covered under the Federal Employees Retirement System to designate a beneficiary to receive any lump sum due in the event of his/her death.

Approximately 3,110 SF 3102 forms are completed annually. Each form takes approximately 15 minutes to complete. The annual estimated burden is 777.50 hours.

For copies of this proposal, contact Cyrus S. Benson by telephone at (202) 606–4808, by FAX (202) 606–0910 or by E-mail to *Cyrus.Benson@opm.gov*. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 30 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—

James K. Freiert, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500 and John W. Barkhamer, OPM Desk Officer, Office of Information & Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 10235, Washington, DC 20503.

For Information Regarding Administrative Coordination Contact: Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW–Room 4H28, Washington, DC 20415, (202) 606–0623.

U.S. Office of Personnel Management.

Kathie Ann Whipple,

Acting Director.

[FR Doc. E9–4917 Filed 3–6–09; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549.

Extension:

Rule 17Ac2–2, SEC File No. 270–298, OMB Control No. 3235–0337.

Form TA–2, SEC File No. 270–298, OMB Control No. 3235–0337.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

• Rule 17Ac2–2 and Form TA–2 (OMB Control No. 3235–0337; SEC File No. 270–298).

Rule 17Ac2–2 (17 CFR 240.17Ac2–2) and Form TA–2 under the Securities Exchange Act of 1934 (17 U.S.C. 78a *et seq.*) require transfer agents to file an annual report of their business activities with the Commission. The amount of time needed to comply with the requirements of Rule 17Ac2–2 and Form TA–2 varies. From the total 598 registered transfer agents, approximately 30 registrants would be required to complete only Questions 1 through 4 and the signature section of amended Form TA–2, which the Commission estimates would take each registrant about 30 minutes, for a total burden of 15 hours (30 × .5 hours). Approximately 111 registrants would be required to answer Questions 1 through 5, 10, and 11 and the signature section, which the Commission estimates would take about 1 hour and 30 minutes, for a total of 166.5 hours (111 × 1.5 hours). The remaining registrants, approximately 457, would be required to complete the entire Form TA–2, which the Commission estimates would take about 6 hours, for a total of 2,742 hours (457 × 6 hours). We estimate that the total burden would be 2,923.5 hours (15 hours + 166.5 hours + 2,742 hours).

We estimate that the total cost of reviewing and entering the information reported on the Forms TA–2 for respondents is $41.50 per hour. The Commission estimates that the total cost would be $121,325.25 annually ($41.50 × 2,923.5).

Written 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 estimates 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 60 days of this notice.

Dated: February 26, 2009.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E9–4816 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28640; 812–13543]

Forward Funds, et al.; Notice of Application

March 3, 2009.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under section 17(d) of the Investment Company Act of 1940 (''Act'') and rule 17d–1 under the Act.

SUMMARY: Applicants request an order to permit certain registered open-end investment companies in the same group of investment companies to enter into a special servicing agreement (''Special Servicing Agreement'').

Applicants: Forward Funds, on behalf of its series, Accessor Aggressive Growth Allocation Fund, Accessor Balanced Allocation Fund, Accessor Growth Fund, Accessor Growth Allocation Fund, Accessor Growth And Income Allocation Fund, Accessor High Yield Bond Fund, Accessor Income Allocation Fund, Accessor Income And Growth Allocation Fund, Accessor Intermediate Fixed-Income Fund, Accessor International Equity Fund, Accessor Mortgage Securities Fund, Accessor Short-Intermediate Fixed-Income Fund, Accessor Small To Mid Cap Fund, Accessor Strategic Alternatives Fund, Accessor U.S. Government Money Fund and Accessor Value Fund, Forward Management LLC (''Forward Management'') and each existing or future registered open-end management investment company or series thereof that is part of the same ''group of investment companies'' as Forward Funds (the ''Trust'') under Section 12(d)(1)(G)(ii) of the Act and is advised by Forward Management or any entity controlling, controlled by, or under common control with Forward Management. (such investment companies or series thereof, together with the Trust and its series, the ''Funds'').[1]

DATES: The application was filed on July 3, 2008, and amended on December 19, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the application will be

[1] All entities that currently intend to rely on the order have been named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 27, 2009, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants, 433 California Street, 11th Floor, San Francisco, CA 94104.

FOR FURTHER INFORMATION CONTACT: Bruce R. MacNeil, Senior Counsel, at (202) 551–6817, or Julia Kim Gilmer, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. The Trust is a Delaware statutory trust registered under the Act as an open-end management investment company. The Trust currently offers 34 series, 6 of which are ''Top-Tier Funds'' [2] and 10 of which are ''Underlying Funds.'' [3] The Top-Tier Funds will invest substantially all of their assets in the Underlying Funds.[4] The Top-Tier Funds and the Underlying Funds currently offer multiple classes of shares in reliance on rule 18f–3 under the Act. Forward Management, an investment adviser registered under the Investment Advisers Act of 1940, serves as investment adviser to the Funds.

2. Forward Management and the Trust propose to enter into a Special Servicing Agreement that would allow an Underlying Fund to bear the expenses of a Top-Tier Fund (other than investment management fees, rule 12b–1 fees and class-specific administrative service fees). Under the Special Servicing Agreement, each Underlying Fund will bear expenses of a Top-Tier Fund in proportion to the estimated benefits to the Underlying Fund arising from the investment in the Underlying Fund by the Top-Tier Fund (''Underlying Fund Benefits'').

3. Applicants state that the Underlying Fund Benefits are expected to result primarily from the incremental increase in assets resulting from investment in the Underlying Funds by the Top-Tier Funds and the large asset size of each shareholder account that represents an investment by a Top-Tier Fund relative to other shareholder accounts. A shareholder account that represents a Top-Tier Fund will experience fewer shareholder transactions and greater predictability of transaction activity than other shareholder accounts. As a result, the shareholder servicing costs to any Underlying Fund for servicing one account registered to a Top-Tier Fund will be significantly less than the cost to that same Underlying Fund of servicing the same pool of assets contributed by a large group of shareholders owning relatively small accounts in one or more Underlying Funds.

4. No Fund will enter into a Special Servicing Agreement unless the Special Servicing Agreement: (a) Precisely describes the services provided to the Top-Tier Funds and the amount of expenses for services charged to the Top-Tier Fund that may be paid by an Underlying Fund (''Underlying Fund Payments''); (b) provides that no affiliated person of the Top-Tier Funds, or affiliated person of such person, will receive, directly or indirectly, any portion of the Underlying Fund Payments, except for bona fide transfer agent services approved by the board of trustees (''Board'') of the Underlying Fund, including a majority of trustees who are not ''interested persons'' (within the meaning of section 2(a)(19) of the Act) (''Independent Trustees''); (c) provides that the Underlying Fund Payments may not exceed the amount of actual expenses incurred by the Top-Tier Funds; (d) provides that, in instances where transfer agent expenses are calculated based on a fixed fee per account, no Underlying Fund will reimburse transfer agent expenses of a Top-Tier Fund, including sub-accounting expenses and other out-of-pocket expenses, at a rate in excess of the average per account transfer agent expenses of the Underlying Fund, including sub-accounting expenses and other out-of-pocket expenses, expressed as a basis point charge (for purposes of calculating the Underlying Fund's average per account transfer agent expense, the Top-Tier Fund's investment in the Underlying Fund will be excluded); and (e) has been approved by the Fund's Board, including a majority of the Independent Trustees, as being in the best interests of the Fund and its shareholders and not involving overreaching on the part of any person concerned.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act provide that an affiliated person of, or a principal underwriter for, a registered investment company, or an affiliate of such person or principal underwriter, acting as principal, shall not participate in, or effect any transaction in connection with, any joint enterprise or other joint arrangement in which the registered investment company is a participant unless the Commission has issued an order approving the arrangement. Forward Management, as investment adviser, is an affiliated person of each of the Underlying Funds and Top-Tier Funds, which in turn could be deemed to be under common control of Forward Management and therefore affiliated persons of each other. The Top-Tier Funds and the Underlying Funds also may be affiliated persons by virtue of a Top-Tier Fund's ownership of more than 5% of the outstanding voting securities of an Underlying Fund. Consequently, the Special Servicing Agreement could be deemed to be a joint transaction among the Top-Tier Funds, the Underlying Funds and Forward Management.

2. Rule 17d–1 under the Act provides that, in passing upon a joint arrangement under the rule, the Commission will consider whether participation of the investment company in the joint enterprise or joint arrangement on the basis proposed is consistent with the provisions, policies, and purposes of the Act and the extent to which the participation is on a basis different from or less advantageous than that of other participants.

[2] ''Top-Tier Funds'' refers to Accessor Aggressive Growth Allocation Fund, Accessor Balanced Allocation Fund, Accessor Growth Allocation Fund, Accessor Growth and Income Allocation Fund, Accessor Income Allocation Fund and Accessor Income and Growth Allocation Fund and any other Fund that invests substantially all of its assets in the Underlying Funds (as defined below).

[3] ''Underlying Funds'' refers to Accessor Growth Fund, Accessor High Yield Bond Fund, Accessor Intermediate Fixed-Income Fund, Accessor International Equity Fund, Accessor Mortgage Securities Fund, Accessor Short-Intermediate Fixed-Income Fund, Accessor Small to Mid Cap Fund, Accessor Strategic Alternatives Fund, Accessor U.S. Government Money Fund and Accessor Value Fund and any other Fund in which a Top-Tier Fund may invest.

[4] The Top-Tier Funds will not be Underlying Funds and no Top-Tier Fund will invest in another Top-Tier Fund.

3. Applicants request an order under section 17(d) and rule 17d–1 to permit the proposed expense sharing arrangements. Applicants state that participation by the Top-Tier Funds, the Underlying Funds and Forward Management in the proposed expense sharing arrangements is consistent with the provisions, policies and purposes of the Act, and that the terms of the Special Servicing Agreement and the conditions set forth below will ensure that no participant will participate on a basis less advantageous than that of other participants.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. No Fund will enter into a Special Servicing Agreement unless the Special Servicing Agreement: (a) Precisely describes the services provided to the Top-Tier Funds and the Underlying Fund Payments; (b) provides that no affiliated person of the Top-Tier Funds, or affiliated person of such person, will receive, directly or indirectly, any portion of the Underlying Fund Payments, except for bona fide transfer agent services approved by the Board of the Underlying Fund, including a majority of the Independent Trustees; (c) provides that the Underlying Fund Payments may not exceed the amount of actual expenses incurred by the Top-Tier Funds; (d) provides that, in instances where transfer agent expenses are calculated based on a fixed fee per account, no Underlying Fund will reimburse transfer agent expenses of a Top-Tier Fund, including sub-accounting expenses and other out-of-pocket expenses, at a rate in excess of the average per account transfer agent expenses of the Underlying Fund, including sub-accounting expenses and other out-of-pocket expenses, expressed as a basis point charge (for purposes of calculating the Underlying Fund's average per account transfer agent expense, the Top-Tier Fund's investment in the Underlying Fund will be excluded); and (e) has been approved by the Fund's Board, including a majority of the Independent Trustees, as being in the best interests of the Fund and its shareholders and not involving overreaching on the part of any person concerned.

2. In approving a Special Servicing Agreement, the Board of an Underlying Fund will consider, without limitation: (a) The reasons for the Underlying Fund's entering into the Special Servicing Agreement; (b) information quantifying the Underlying Fund Benefits; (c) the extent to which investors in the Top-Tier Fund could have purchased shares of the Underlying Fund; (d) the extent to which an investment in the Top-Tier Fund represents or would represent a consolidation of accounts in the Underlying Funds, through exchanges or otherwise, or a reduction in the rate of increase in the number of accounts in the Underlying Funds; (e) the extent to which the expense ratio of the Underlying Fund was reduced following investment in the Underlying Fund by the Top-Tier Fund and the reasonably foreseeable effects of the investment by the Top-Tier Fund on the Underlying Fund's expense ratio; (f) the reasonably foreseeable effects of participation in the Special Servicing Agreement on the Underlying Fund's expense ratio; and (g) any conflicts of interest that Forward Management, any affiliated person of Forward Management, or any other affiliated person of the Underlying Fund may have relating to the Underlying Fund's participation in the Special Servicing Agreement.

3. Prior to approving a Special Servicing Agreement on behalf of an Underlying Fund, the Board of the Underlying Fund, including a majority of the Independent Trustees, will determine that: (a) The Underlying Fund Payments under the Special Servicing Agreement are expenses that the Underlying Fund would have incurred if the shareholders of the Top-Tier Fund had instead purchased shares of the Underlying Fund through the same broker-dealer or other financial intermediary; (b) the amount of the Underlying Fund Payments is less than the amount of Underlying Fund Benefits; and (c) by entering into the Special Servicing Agreement, the Underlying Fund is not engaging, directly or indirectly, in financing any activity which is primarily intended to result in the sale of shares issued by the Underlying Fund.

4. In approving a Special Servicing Agreement, the Board of a Fund will request and evaluate, and Forward Management will furnish, such information as may reasonably be necessary to evaluate the terms of the Special Servicing Agreement and the factors set forth in condition 2 above, and make the determinations set forth in conditions 1 and 3 above.

5. Approval by the Fund's Board, including a majority of the Independent Trustees, in accordance with conditions 1 through 4 above, will be required at least annually after the Fund's entering into a Special Servicing Agreement and prior to any material amendment to a Special Servicing Agreement.

6. To the extent Underlying Fund Payments are treated, in whole or in part, as a class expense of an Underlying Fund, or are used to pay a class-based expense of a Top-Tier Fund, conditions 1 through 5 above must be met with respect to each class of a Fund as well as the Fund as a whole.

7. Each Fund will maintain and preserve the Board's findings and determinations set forth in conditions 1 and 3 above, and the information and considerations on which they were based, for the duration of the Special Servicing Agreement, and for a period not less than six years thereafter, the first two years in an easily accessible place.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4875 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59486; File No. SR–NYSE–2009–16]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend NYSE Rule 17 To Address Issues Related to Vendor Liability and To Make Amendments and Conforming Changes to NYSE Rule 18

March 2, 2009.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 17, 2009, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) [4] of the Act and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 17 (''Use of Exchange Facilities'') to address issues related to vendor liability. The Exchange also seeks to make amendments and conforming changes to NYSE Rule 18 (''Compensation in Relation to Exchange System Failure''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 17 (''Use of Exchange Facilities'') to address issues related to vendor liability. Specifically, the proposed rule would require that member organizations that have trading losses due to malfunctions of third-party systems provided by the Exchange submit such losses to the Exchange's compensation fund prior to pursuing legal remedies against the vendors that provided these third-party systems.[6]

The Exchange also seeks to make amendments and conforming changes to NYSE Rule 18 (''Compensation in Relation to Exchange System Failure''). Specifically, the Exchange seeks to include in the definition of ''Exchange system failure'' the malfunction of a third-party system or technology provided by the Exchange, *i.e.*, vendor and/or subcontractor systems and to codify a net loss requirement for members or member organizations that seek compensation for losses sustained from an Exchange system failure.

The Exchange notes that parallel changes are proposed to be made to the rules of the NYSE Alternext Exchange (formerly the American Stock Exchange).[7]

Background

On July 10, 2008, the Exchange amended NYSE Rule 17 (''Rule Amendment'') to provide, among other things, that its vendors and/or its subcontractors of electronic systems, services or facilities (''third-party vendors'') would not be liable for any loss sustained by a member or member organization arising from use of the third-party vendors.[8] The amended rule further required members and member organizations to indemnify the Exchange and its vendors and/or subcontractors and set forth certain provisions that the Exchange could include in contracts connected to a member or member organization's use of any electronic systems, services or facilities provided by the third-party vendors.

The impetus behind this amendment stemmed from exchanges' increased reliance on third-party vendors to provide additional systems or services. The use of third-party vendors enables exchanges to increase their capacity to deliver faster and more efficient trading tools to market, with the ultimate beneficiaries being the investing public. In order for the Exchange to remain competitive and remove impediments to, and perfect the mechanism of, a free and open market, the Exchange relies on third-party vendor services to play a significant role in timely providing systems and tools to Exchange members that assist the Exchange in achieving its goals and remain competitive.

In recognition of the fact that Exchange-maintained systems co-exist with, and are often indistinguishable from, vendor-maintained systems that the Exchange provides access to as a conduit, the Exchange filed the Rule Amendment, implementing a vendor liability disclaimer that indemnified the Exchange and third-party vendors from any damages sustained by a member or member organization growing out of the use or enjoyment thereof by the member or member organization, as well as from any and all judgments, damages, costs, or losses of any kind (including reasonable attorneys' fees and expenses), as a result of any claim, action, or proceeding that arose out of or relates to the member or member organization's use of such electronic system, service, or facility.

After the immediately effectiveness filing, the Exchange received feedback on the rule from its members and customer constituencies. Based on that feedback, the Exchange recognized the risk presented to members and member organizations with regard to requiring members and member organizations to indemnify the Exchange vendors and its subcontractors. The Exchange therefore rescinded the vendor liability provisions of NYSE Rule 17 (in particular, paragraph (b) of the amended rule), thereby reverting the rule to its original content prior to the effectiveness of SR–NYSE–2008–55 [*sic*].[9]

The Exchange now re-proposes to amend NYSE Rule 17 and 18 to create a proposed rule that addresses issues of liability for all parties concerned.

Proposed Amendments

Currently, NYSE Rule 17 provides that the Exchange shall not be liable for any damages sustained by a member or member organization growing out of the use or enjoyment of the facilities afforded by the Exchange, except as provided in NYSE Rule 18. Currently, NYSE Rule 18 affords members and member organizations the recourse to seek compensation for losses sustained by an Exchange system failure.[10]

As noted previously, the Exchange increasingly offers member organizations access to certain systems and technologies that are supplied by third-party vendors and delivered via Exchange systems (*e.g.*, the Exchange delivers broker algorithms to brokers on the broker handheld device). These third-party products are designed to enhance the member organizations' ability to execute trades efficiently. Notably, the Exchange is acting primarily as a facilitator between the vendor and the Exchange member using the service. Use of these vendor-supplied services is not required, and Exchange members can perform their respective jobs without using these third-party vendor services. If a member wishes to use such a service, however,

[6] *See* E-mail from Jennifer D. Kim, Counsel, Office of the General Counsel, Exchange, to Michou H.M. Nguyen, Special Counsel, Division of Trading and Markets, Commission, on March 2, 2009 (''March 2nd E-mail'').

[7] *See* SR–NYSEALTR–2009–13 (filed February 17, 2009).

[8] *See* Securities Exchange Act Release No. 58137 (July 10, 2008), 73 FR 41145 (July 17, 2008) (SR–NYSE–2008–55). The amendments to NYSE Rule 17 were based on American Stock Exchange (''Amex'') Rule 60.

[9] *See* Securities Exchange Act No. 58850 (October 24, 2008), 73 FR 64998 (October 31, 2008) (SR–NYSE–2008–107).

[10] An ''Exchange system failure'' is defined by NYSE Rule 18 as ''a malfunction of the Exchange's physical equipment, devices and/or programming which results in an incorrect execution or an order or no execution of an order that was received in Exchange systems.''

the Exchange works with the vendor and the member to connect the member and to deliver the service from the vendor to the user. The Exchange also simplifies the negotiation process, in that a member does not need to separately negotiate with the vendor to receive the service. Because the services are supplied and supported by a third-party vendor, however, they are not explicitly ''systems or facilities of the Exchange.'' [11]

Currently, NYSE Rules 17 and 18 do not address the issue of a member or member organization that sustains a loss arising from the malfunction of non-core systems or technology supplied by third-party vendors for use by member organizations.[12] In light of the increased availability of third-party technology to provide additional facilities or services to the Exchange, the Exchange proposes to amend NYSE Rules 17 and 18 to address third-party vendor liability, third-party vendor system malfunction and the avenue of recourse for members and member organizations as a result of this third-party vendor system malfunction.

In connection with member or member organization use of any third-party vendors provided by the Exchange to members for the conduct of their business on the Exchange, the Exchange proposes that NYSE Rule 17 provide that the Exchange shall not be liable for any damages sustained by a member, allied member or member organization growing out of the use or enjoyment by such member, allied member or member organization of a third-party electronic system, service, or facility provided by the Exchange, except as provided in NYSE Rule 18.

The Exchange further proposes that members or member organizations that sustain a loss from the use of these third-party vendors provided by the Exchange may seek compensation from the Exchange for their losses in the same way they seek compensation for an Exchange system failure. Specifically, NYSE Rule 18 would permit members or member organizations to file a claim with the Exchange for losses caused by the third-party vendor's malfunction.

In the event that claims arising out of the use of these third-party vendor systems cannot be fully satisfied because the aggregated claims exceed the funds available for such payment as set forth in NYSE Rule 18, the aggrieved member or member organization would not be precluded from bringing a claim against the third-party vendor directly for the balance of the loss amount.

The Exchange also seeks to make a conforming amendment to NYSE Rule 18 to include in the definition of an Exchange system failure ''any malfunction of any third-party vendor provided by the Exchange that result in an incorrect execution of an order or no execution of an order that was received in Exchange systems.''

Finally, the Exchange seeks to codify its existing policy regarding the netting of losses prior to submitting claims under NYSE Rule 18. Specifically, the Exchange is codifying its understanding that if members and member organizations retain profits from a system malfunction, then they are required to net these profits against their losses from the same malfunction before submitting any claims under NYSE Rule 18.[13]

For example, a broker enters orders for Customer #1 and Customer #2. As a result of a system malfunction, Customer #1 derives a profit that would have occurred but for the malfunction and Customer #2 derives a loss. The broker passes along the gain to Customer #1, and files a claim with the Exchange with respect to Customer #2's loss. The broker would not be required to net the gain against the loss.

Brokers are required to offer profitable errors to their customers; in certain circumstances, however, customers may decline to take the error in which case the error position is retained by the brokers.[14] If Customer #1 declines to accept the profit, as is the customer's option, then the broker would retain the profit and must net is against the loss incurred on behalf of Customer #2.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change promotes just and equitable principles of trade and protects investors and the public interest because it creates a mechanism that adequately addresses issues of liability for all parties concerned.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received feedback from its constituents raising concerns about the possible risk presented to members and member organizations with regard to the provisions of NYSE Rule 17 that require members and member organizations to indemnify Exchange vendors and the subcontractors of vendors. Specifically, constituents expressed concern that the NYSE rule could have an adverse effect on their businesses in the event of a system malfunction that resulted in financial losses, since the prior rule not only limited their abilities to pursue legal action against the vendors, but also required the member organizations themselves to indemnify vendors for losses. They noted in addition that, as filed, the prior rule did not permit member organizations to seek compensation through the NYSE's Rule 18 process for losses caused by vendors and therefore felt that the limitation on liability was unduly burdensome. This rule proposal is submitted in light of

[11] Exchange services that are outsourced to third-party vendors but that are part of the sore functionality of NYSE systems are considered ''systems and facilities of the Exchange'' even though they are not physically provided by the Exchange. By contrast, additional services provided to members and member organizations by a third-party vendor that aren ot part of the core functionality of the NYSE's systems and not required to function as a member or member organization are not considered ''systems and facilities of the Exchange.'' As a result, any malfunction of those additional services would constitute a third-party vendor system malfunction, not an Exchange malfunction.

[12] The third-party vendors directly provide their services to the member or member organization. Therefore, the customers are aware that they are using an Exchange system, which is provided directly by the Exchange, or a third-party vendor system, that also has direct contact with the customer.

[13] Related system malfunctions that occur repeatedly over the course of the trading day will constitute one system malfunction for purposes of determining the aggregation of customer claims resulting from that system malfunction. Distinct and separate malfunctions that originate from different system failures are considered unrelated malfunctions and are treated as separate system malfunctions.

A member organization that sustains such loss is required to give oral notice by the market opening on the next business day following the system failure and written notice by the end of the third business day following the system failure (T+3).

[14] Customers may decline to take the gains for varied reasons. For example, if the cost to the customer of processing the error is greater than the amount of the error, the customer will likely tell the broker to keep the error.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

these comments received in response to NYSE's filing, SR–NYSE–2008–55.[17]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act.[18] The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest.[19]

The Exchange believes that the instant filing is non-controversial. The Commission has approved a third-party vendor liability provision that was filed by the American Stock Exchange which required members and member organizations to indemnify the Exchange and its vendors and/or subcontractors and provided that such vendor and its subcontractors shall not be liable to the member or member organization for any damages sustained by a member or member organization from use of these third-party vendor systems.[20] The Exchange submits that its proposed rule change is less expansive that Amex Rule 60—AEMI and affords a member or member organization the ability to recover from a loss sustained by use of a third-party vendor system. The proposed rule change offers its members and member organizations two layers of recourse in the event of a third-party vendor system malfunction, *i.e.*, filing a claim pursuant to NYSE Rule 18 and then filing a claim directly against the third-party vendor for any remaining balance of the loss amount. Therefore, the Exchange submits that this proposed rule filing, in light of the more restrictive vendor liability disclaimer rules previously approved by the Commission, is non-controversial.

The Exchange proposes this rule amendment in light of feedback from its member and customer constituencies. Accordingly, the Exchange submits that this proposed amendment is non-controversial and reflects the public interest.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2009–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2009–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–16 and should be submitted on or before March 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4874 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

[17] *See* March 2nd E-mail, *supra* note 6.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement. 17 CFR 240.19b–4(f)(6)(iii).

[20] Amex Rule 60—AEMI (''Vendor Liability Disclaimer''). AEMI (''Auction & Electronic Market Integration'') System was Amex's Hybrid Market Structure for equities and exchange-traded funds prior to the merger with NYSE.

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59491; File No. SR–NYSE–2009–20]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Extending a Temporary Equity Transaction Fee for Shares Executed on the NYSE MatchPoint SM System, Effective March 1, 2009 Until April 30, 2009

March 3, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 26, 2009, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend a temporary equity transaction fee for shares executed on the NYSE MatchPoint SM (''NYSE MatchPoint'' or ''MatchPoint'') system, effective March 1, 2009 until April 30, 2009. The Exchange will charge each member organization using the MatchPoint system a per share fee scaled to the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

average daily volume of shares it executes on the MatchPoint system.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 7, 2009, the Exchange filed with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to adopt a temporary equity transaction fee for shares executed on the NYSE MatchPoint[SM] system, effective until February 28, 2009 (the ''January filing'').[4] Through this filing, the Exchange proposes to extend this equity transaction fee to be effective March 1, 2009 until April 30, 2009.

Prior to the January filing, the equity transaction fee was $.0015 per share executed on the MatchPoint system. In the January filing, the Exchange proposed to adopt a scaled fee for MatchPoint users based on the average daily volume of shares executed during a calendar month through the MatchPoint system as follows:

Average daily volume of shares executed	rate
50,000 shares or less	$.0015 per share
Over 50,000 to 499,999 ...	$.0010 per share
500,000 and greater	$.0005 per share

The Exchange believes that the extension of the fee schedule until April 30, 2009 will continue to reward those who have been using the MatchPoint system for share execution, and will provide a continued incentive for new participants in MatchPoint.

It is intended that the MatchPoint fee will revert to the equity transaction fee of $.0015 per share beginning May 1, 2009.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'')[5] for the proposed rule change is the requirement under Section 6(b)(4) that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes the fees are reasonable in that they carry forward a reduction in fees that the January filing established, and are equitable in that they are available to all members who access the MatchPoint system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(2) of Rule 19b–4[7] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2009–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-NYSE–2009–20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–20 and should be submitted on or before March 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4876 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

[4] *See* Securities Exchange Act Release No. 59229 (January 12, 2009) 74 FR 3119 (January 16, 2009), approving SR–NYSE–2009–01[*sic*].

[5] 15 U.S.C. 78a.

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59480; File No. SR–NYSEALTR–2009–21]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext US LLC Adopting New Rule 6A—NYSE Alternext Equities and Amending Existing Rule 36—NYSE Alternext Equities Concerning the Use of Personal Portable or Wireless Communication Devices and the Use or Possession of Wireless Trading Devices On and Off the Exchange Trading Floor

March 2, 2009.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 2, 2009, NYSE Alternext US LLC (''NYSE Alternext'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt new Rule 6A—NYSE Alternext Equities (''Trading Floor'') and amend existing Rule 36—NYSE Alternext Equities (Communications Between Exchange and Members' Offices) concerning (i) the use of personal portable or wireless communication devices, and (ii) the use or possession of wireless trading devices on and off the Exchange Trading Floor.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule changes is to adopt new Rule 6A—NYSE Alternext Equities (''Trading Floor'') and amend existing Rule 36—NYSE Alternext Equities (Communications Between Exchange and Members' Offices) concerning (i) the use of personal portable or wireless communication devices, and (ii) the use or possession of wireless trading devices on and off the Exchange Trading Floor.

Background

As described more fully in a related rule filing,[4] NYSE Euronext acquired The Amex Membership Corporation (''AMC'') pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC, and continues to operate as a national securities exchange registered under Section 6 of the Act.[5] The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York (the ''86 Trinity Trading Systems''), to trading systems and facilities located at 11 Wall Street, New York, New York (the ''Equities Relocation'').[6] Similarly, effective March 2, 2009, the Exchange will relocate all options trading conducted on the 86 Trinity Trading Systems to trading systems and facilities located at 11 Wall Street (the ''Options Relocation'').[7]

Upon the Options Relocation, the Exchange's Options and Equities Trading Floors will be located in physically separate, adjacent rooms within the 11 Wall Street building. Access to the Trading Floors is restricted at each entrance by turnstiles and only authorized visitors, members or member firm employees are permitted to enter. Both Trading Floors will be managed and overseen by employees of the Exchange's corporate parent, NYSE Euronext.

Proposed Rule Changes

In order to accommodate the Options Relocation and the presence of the Exchange's Options Trading Floor adjacent to the Exchange's Equities Trading Floor, the Exchange proposes the following rule changes.

1. New Rule 6A—NYSE Alternext Equities (''Trading Floor'')

Under Rule 6—NYSE Alternext Equities, the term ''Floor'' is defined as having the meaning provided the term under the Act and the related rules and regulations.[8] In addition, the Exchange has issued interpretive guidance that the ''Floor'' also includes the areas outside the ''Blue Line'' (member and member organization booths adjacent to the trading Floor) and ''any area reserved primarily for members, including the members'' lounges and the members' bathrooms.'' [9]

The current definition of ''Floor'' under Rule 6—NYSE Alternext Equities would, upon the Options Relocation, include the Exchange's Options Trading Floor. This could lead to confusion under Exchange Rules when discussing the ''Floor'' and the ''Trading Floor''. The Exchange therefore proposes to adopt a new Rule 6A—NYSE Alternext Equities to define the term ''Trading Floor'' to make it clear that, within the area of the ''Floor'' of the Exchange as technically defined by Rule 6, there are distinct, restricted-access areas where equities trading is conducted by the Exchange on the one hand and options trading on the other. Under the new proposed Rule 6A—NYSE Alternext Equities, the term ''Trading Floor'' means the restricted-access physical areas designated by the Exchange for the trading of equities securities, commonly known as the ''Main Room'' and the ''Garage.'' The Exchange's Trading Floor does not include the areas where NYSE Alternext-listed options are traded, commonly known as the ''Blue Room'' and the ''Extended Blue Room''. For the

[4] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex–2008–62) (approving the Merger).

[5] 15 U.S.C. 78f.

[6] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63) (approving the Equities Relocation).

[7] *See* Securities Exchange Act Release No. 59142 (December 22, 2008), 73 FR 80494 (December 31, 2008) (SR–NYSEALTR–2008–14) (notice of filing for Options Relocation), as amended.

[8] Pursuant to the definitions of ''Floor'' in Rule 6—NYSE Alternext Equities and NYSE Rule 6, the NYSE and NYSE Alternext Equities Trading Floors overlap and thus references in the proposed rule text as well as in the 19b–4 to ''Equities Trading Floor'' by default include the NYSE Trading Floor. The NYSE has proposed corresponding rule changes for its members and member organizations. *See* SR–NYSE–2009–23 (formally submitted March 2, 2009).

[9] *See* NYSE/NYSE Alternext Information Memo 08–66 (December 22, 2008).

purposes of the Exchange's Equities Rules, as well as this filing, these areas will be referred to as the ''NYSE Alternext Options Trading Floor''.

By adopting this new Rule, the Exchange seeks to prevent any confusion that may arise under Exchange Rules and to provide a more accurate description of the physical areas of the Floor where different types of trading are actually conducted. In addition, as described below, this new Rule would also make it easier for the Exchange to define areas where certain conduct is or is not permitted by its members and member firm employees.

2. Use of Personal Portable or Wireless Communication Devices

Rule 36—NYSE Alternext Equities currently prohibits, without prior Exchange approval, members and member organizations from establishing or maintaining any telephonic or electronic communication, including the usage of any portable or wireless communication devices (*i.e.* cellular phone, wireless pager, BlackBerry™, etc.), between the Floor and any other location. Under the Rule, Floor brokers may use Exchange authorized and issued portable phones on the Floor, subject to certain restrictions (*see* Rules 36.20—.21—NYSE Alternext Equities).[10] Designated Market Makers (DMMs) may not use any portable or wireless communication devices on the Floor although they may, subject to restriction, maintain at their posts telephone lines and wired or wireless devices that are registered with the Exchange (see Rule 36.30—NYSE Alternext Equities). The use of all other portable or wireless communication devices on the Floor is prohibited.

Although it would be prohibited under the current framework of Rule 36—NYSE Alternext Equities, to eliminate any potential confusion arising from the Options Relocation, the Exchange proposes to include a provision in Rule 36.23—NYSE Alternext Equities that expressly prohibits members and member firm employees from using personal portable or wireless communications devices on the NYSE Alternext Options Trading Floor. However, those members and employees of member organizations that are also registered to trade options on the Exchange will be permitted to use personal portable or wireless communications devices while on the Exchange's Options Trading Floor in accordance with applicable Exchange Options rules and regulations, including Rule 220.

The Exchange also proposes corresponding amendments to Rules 36.20—[*sic*] and .21—NYSE Alternext Equities to provide that Floor brokers may not use an Exchange authorized and provided portable phone used to trade equities while on the Exchange Options Trading Floor, and including other technical changes.

3. Use or Possession of Wireless Trading Devices

Currently, Exchange members and member firm employees are permitted to use their Exchange approved handheld trading devices throughout the Trading Floor of the Exchange.[11] Subject to certain exceptions, pursuant to Rules 70— and 117—NYSE Alternext Equities Floor brokers are required to either cancel or transfer to another Floor broker their agency interest files if they leave the Crowd (as defined under Rule 70.30—NYSE Alternext Equities), and, unless transferred, any open orders will not be represented while the Floor broker is away from the Crowd.[12]

Upon the Options Relocation, the Exchange's Options Trading Floor will be adjacent to the Exchange's Equities Trading Floor. Thus, in order to address concerns regarding improper information sharing between the Exchange's Equities and Options Trading Floors, the Exchange proposes to adopt Rule 36.70—NYSE Alternext Equities to prohibit Exchange members and member firm employees from (i) using or possessing any wireless trading device that may be used to view or enter orders into the Exchange's Equities trading systems while on the Exchange's Options Trading Floor, and (ii) using or possessing any wireless trading device that may be used to view or enter orders into the Exchange's Options trading systems while on the Exchange's Equities Trading Floor. These prohibitions would apply to any and all wireless trading devices, including devices issued by the Exchange or NYSE, as well as devices that are proprietary to a member, member organization or other entity.[13]

These proposed amendments would not change the current regulatory framework within which members and member firm employees may use their wireless trading devices. Members and member firm employees would still be limited to using Exchange approved wireless trading devices and would still be required to cancel or transfer their agency interest files in accordance with Rules 70— and 117—NYSE Alternext Equities if they leave the Crowd/Equities Trading Floor.

2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with, and further the objectives of, Section 6(b)(5) of the Securities Exchange Act of 1934[14] (the ''Act''), in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule changes also support the principles of Section 11A(a)(1)[15] of the Act in that they seek to ensure the economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets.

The Exchange believes that the proposed rule changes will permit the Exchange's Equities permit holders and Options permit holders to, within the existing regulatory framework at the Exchange, efficiently and effectively conduct business on the respective Equities and Options Trading Floors and engage in personal communications while off the Trading Floors consistent with maintaining necessary regulatory distinctions between the two. Moreover, the proposed rule changes will impose restrictions designed to prevent inappropriate information sharing by and between members and member firm employees on the Trading Floors of the Exchange and its affiliate NYSE.

[10] All members and member firm employees who use an authorized portable phone must execute a written acknowledgement as to the usage of the phone and authorizing the Exchange to receive data and records related to incoming and outgoing calls. *See* NYSE Information Memos 08–40 (August 14, 2008) *and* 08–41 (August 14, 2008) (concerning the use of Exchange authorized and issued portable phones on the Floor, incorporated by reference in joint NYSE/NYSE Alternext Information Memo 08–66).

[11] The Exchange's Wireless Communications Plan governing the use of wireless handheld trading devices on the Equities Trading Floor is the same as the NYSE's, which was previously approved by the Commission. *See* Securities Exchange Act Release No. 36156 (August 25, 1995), 60 FR 45756 (September 1, 1995) (SR–NYSE–1995–22) *and* Securities Exchange Act Release No. 39379 (December 1, 1997), 62 FR 64615 (December 8, 1997) (SR–NYSE–1997–17).

[12] Rule 70.30—NYSE Alternext Equities defines the ''Crowd'' as ''[t]he rooms on the Exchange Floor that contain active posts/panels where Floor brokers are able to conduct business[.]'' This is, essentially, the ''Trading Floor'' as defined in proposed Rule 6A—NYSE Alternext Equities.

[13] Proposed Rule 36.70—NYSE Alternext Equities is based on the Exchange's proposed Options Rules 902(g) and (h). *See* Securities Exchange Act Release No. 59142 (December 22, 2008), 73 FR 80494 (December 31, 2008) (SR–NYSEALTR–2008–14), as amended.

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78k–1(a)(1).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder [17] because the foregoing proposed rule: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[18] The Exchange believes that this filing is non-controversial because it is consistent with its filing implementing the Options Relocation,[19] as well as the Exchange's current regulatory controls governing the use of personal portable or wireless communications devices and wireless trading devices, which were approved by the Commission. Accordingly, the Exchange believes that these rule changes are eligible for immediately effective treatment under the Commission's Streamlining Order.[20]

The Exchange has asked the Commission to waive the 30-day operative delay and designate the proposed rule change as operative upon filing so that the proposed rule changes may become effective upon filing and operative on the date of the Options Relocation, currently scheduled for March 2, 2009. The Commission hereby grants the Exchange's request.[21] The Commission believes that such action is consistent with the protection of investors and the public interest because the Exchange's proposal would clarify the Exchange's policies governing the use of personal portable or wireless communication devices as well as wireless trading devices. This clarification is necessitated by the Options Relocation.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEALTR–2009–21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEALTR–2009–21. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEALTR–2009–21 and should be submitted on or before March 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4872 Filed 3–6–09; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE Alternext has satisfied this requirement.

[19] *See* Securities Exchange Act Release No. 59142 (December 22, 2008), 73 FR 80494 (December 31, 2008) (SR–NYSEALTR–2008–14), as amended.

[20] *See* Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40143 [*sic*] (July 11, 2008) (concerning 17 CFR parts 200 and 241).

[21] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59493; File No. SR–NYSEArca–2009–18]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Listing and Trading of Bear Market Strategic Accelerated Redemption Securities® Linked to the S&P Small Cap Regional Banks Index

March 3, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 2, 2009, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. NYSE Arca filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade Bear Market Strategic Accelerated Redemption Securities® Linked to the S&P Small Cap Regional Banks Index (''Notes'') under NYSE Arca Equities Rule 5.2(j)(6). The text of the proposed rule change is available at *http://www.nyse.com,* the Exchange and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Notes[5] under NYSE Arca Equities Rule 5.2(j)(6), which includes the Exchange's listing standards for Equity Index-Linked Securities.[6] According to the Registration Statement, the Notes are Bank of America Corporation (''BAC'' or the ''issuer'') senior unsecured debt securities and are not guaranteed or insured by the Federal Deposit Insurance Corporation or secured by collateral. The Notes will rank equally with all of the issuer's other unsecured and unsubordinated debt, and any payments due on the Notes, including any repayment of principal, will be subject to the credit risk of BAC. The Notes are designed for, but not limited to, investors who anticipate that the Observation Level[7] of the S&P Small Cap Regional Banks Index (the ''Index'') on any Observation Date will be less than or equal to the Call Level. The Notes provide for an automatic call if the Observation Level of the Index on any Observation Date is less than or equal to the Call Level.

The Notes will be called at an amount equal to the $10 principal amount per unit plus the Call Premium of between 15% and 19% per annum if the closing level of the Index on any Observation Date is less than or equal to 100% of its starting value. The Notes have a maturity of approximately 18 months. There will be a one-to-one downside loss if the Notes are not called prior to maturity and the closing level of the Index increases above a Threshold Value, with up to 100% of the principal amount at risk. There are no periodic interest payments.

The Index is a capitalization weighted index. The Index is a sub-index of the S&P SmallCap 600 Index and is comprised of the regional banks included in the ''Financials'' sector of the S&P SmallCap 600 Index. Regional banks are defined as commercial banks whose businesses are derived primarily from commercial lending operations and have significant business activity in retail banking and small and medium corporate lending. Regional banks tend to operate in limited geographic regions. The Index excludes companies classified according to the Global Industry Classification Standard (''GICS'') in the Diversified Banks and Thrifts & Mortgage Banks sub-industries and also excludes investment banks classified in the Investment Banking & Brokerage Sub-Industry. The GICS methodology has been widely accepted as an industry analysis framework for investment research, portfolio management, and asset allocation. The Index was developed with a base value of 100 as of December 31, 1993. Of the companies included in the S&P SmallCap 600 Index, 41 were included in the Index as of January 15, 2009.

The Exchange is submitting this proposed rule change because the Index for the Fund does not meet all of the ''generic'' listing requirements of NYSE Arca Equities Rule 5.2(j)(6) applicable to listing of all Equity Index-Linked Securities. The Index meets all such requirements except for those set forth in Rule 5.2(j)(6)(B)(I)(1)(b)(i).[8] The Exchange represents that: (1) Except for the requirement under 5.2(j)(6)(B)(I)(1)(b)(i), the Notes currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(6); and (2) BAC is required to comply with Rule 10A–3 under the Act[9] for the initial and continued listing of the Notes. In addition, the Exchange represents that the Notes will comply with all other requirements applicable to Equity Index-Linked Securities, including, but not limited to, requirements relating to the dissemination of key information such as the Index value, rules governing the trading of equity securities, trading hours, trading halts, surveillance,[10] and Information Bulletin to ETP Holders, as set forth in Exchange rules applicable to Equity Index-Linked Securities and in prior Commission orders approving the generic listing rules applicable to the listing and trading of Equity Index-Linked Securities.[11] Detailed descriptions of the Notes, the Index (including the methodology used to determine the composition of the Index), fees, redemption procedures and payment at redemption, payment at maturity, taxes, and risk factors relating to the Notes are available in the Registration Statement.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* registration statement on Form S–3 filed with the Securities and Exchange Commission on May 5, 2006 (Registration No. 333–133852); Product Supplement No. STR–1, dated January 2, 2009 (''Product Supplement No. STR–1''); Series L Prospectus Supplement dated April 10, 2008; and Preliminary Term Sheet, subject to completion, dated January 29, 2009 (''Registration Statement'').

[6] Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities.

[7] Capitalized terms used but not defined herein have the meanings set forth in Product Supplement No. STR–1.

[8] Rule 5.2(j)(6)(B)(I)(1)(b)(i) requires that each component security in the index to which the security is linked has a minimum market value of at least $75 million, except that for each of the lowest dollar weighted component securities in the index that in the aggregate account for no more than 10% of the dollar weight of the index, the market value can be at least $50 million. The Exchange states that, as of February 20, 2009, the Index fails to meet the requirement of Rule 5.2(j)(6)(B)(I)(1)(b)(i) in that, with respect to each of the lowest dollar weighted component securities in the Index that in the aggregate account for no more than 10% of the dollar weight of the Index, two securities, accounting for a total of 0.35% of the Index weight, have a market value of less than $50 million. These two Index securities have a market value of approximately $32 million and $25 million, respectively. Index components comprising the top 90% of the Index weight have a market value of at least $75 million. In addition, 99.65% of the total Index weight is comprised of securities with a market value of at least $50 million. The average and median market capitalization of Index stocks is $406 million and $349.7 million, respectively, as of February 20, 2009.

[9] 17 CFR 240.10A–3.

[10] The Exchange may obtain information for surveillance purposes via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of ISG. For a list of the current members of ISG, *see http://www.isgportal.org.*

[11] *See, e.g.,* Securities Exchange Act Release No. 56637 (October 10, 2007), 72 FR 58704 (October 16, 2007) (SR–NYSEArca–2007–92) (order approving generic listing standards under NYSE Arca Equities Rule 5.2(j)(6)).

Act,[12] in general, and furthers the objectives of Section 6(b)(5),[13] in particular, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system. The proposed rule change will allow the listing and trading of the Notes on the Exchange, which the Exchange believes will enhance competition among market participants, to the benefit of investors and the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)[14] of the Act and subparagraph (f)(6) of Rule 19b–4[15] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii),[17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. NYSE Arca believes that the proposed rule change is non-controversial in that the Index for the Notes fail to meet the requirements set forth in NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(i) by only a small amount: Two securities accounting for a total of .35% of the Index weight have a market value of less than 50 million and the top 90% of the Index weight have a market value of $75 million. The Notes currently satisfy all of the other applicable generic listing standards under NYSE Arca Equities Rule 5.2(j)(6) and all other requirements applicable to Index-Linked Securities and, in particular, Equity Index-Linked Securities, as set forth in Exchange rules and prior Commission orders approving the generic listing rules applicable to the listing and trading of Index-Linked Securities. In addition, the Exchange believes that it has developed adequate trading rules, procedures, surveillance programs, and listing standards for the continued listing and trading of the Notes.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[18] Given that the Notes comply with all of the NYSE Arca Equities generic listing standards for Equity Index-Linked Securities (except for narrowly missing the requirement that lowest dollar weighted component securities in the Index have a market value of at least $50 million), the listing and trading of the Notes by NYSE Arca does not appear to present any novel or significant regulatory issues or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2009–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2009–18. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–18 and should be submitted on or before March 30, 2009.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled the pre-filing requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4877 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59482; File No. SR–NYSEALTR–2009–13]

Self-Regulatory Organizations; NYSE Alternext U.S. LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending NYSE Alternext Equities Rule 17 To Address Issues Related to Vendor Liability and To Make Amendments and Conforming Changes to NYSE Alternext Equities Rule 18

March 2, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 17, 2009, NYSE Alternext U.S. LLC (''Exchange'' or ''NYSE Alternext'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)[4] of the Act and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Alternext Equities Rule 17 (''Use of Exchange Facilities'') to address issues related to vendor liability. The Exchange also seeks to make amendments and conforming changes to NYSE Alternext Equities Rule 18 (''Compensation in Relation to Exchange System Failure''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*.

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Alternext Equities Rule 17 (''Use of Exchange Facilities'') to address issues related to vendor liability. Specifically, the proposed rule would require that member organizations that have trading losses due to malfunctions of third-party systems provided by the Exchange submit such losses to the Exchange's compensation fund prior to pursuing legal remedies against the third-party vendors that provided these systems.[6]

The Exchange also seeks to make amendments and conforming changes to NYSE Alternext Equities Rule 18 (''Compensation in Relation to Exchange System Failure''). Specifically, the Exchange seeks to include in the definition of ''Exchange system failure'' the malfunction of a third-party system or technology provided by the Exchange, *i.e.*, vendor and/or subcontractor systems and to codify a net loss requirement for members or member organizations that seek compensation for losses sustained from an Exchange system failure.

These amendments are proposed to conform to amendments filed by the New York Stock Exchange (''NYSE'').[7]

Background

As described more fully in a related rule filing,[8] NYSE Euronext acquired The Amex Membership Corporation (''AMC'') pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext U.S. LLC, and continues to operate as a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the ''Act'').[9] The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to trading systems and facilities located at 11 Wall Street, New York, New York (the ''Equities Relocation''). The Exchange's equity trading systems and facilities at 11 Wall Street (the ''NYSE Alternext Trading Systems'') are operated by the NYSE on behalf of the Exchange.[10]

As part of the Equities Relocation, NYSE Alternext adopted NYSE Rules 1–1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Alternext Equities Rules to govern trading on the NYSE Alternext Trading Systems.[11] The NYSE Alternext Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1–1004 and the Exchange continues to update the NYSE Alternext Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

Proposed Amendments

Currently, NYSE Alternext Equities Rule 17 provides that the Exchange shall not be liable for any damages sustained by a member or member organization growing out of the use or

[6] *See* E-mail from Jennifer D. Kim, Counsel, Office of the General Counsel, Exchange, to Michou H.M. Nguyen, Special Counsel, Division of Trading and Markets, Commission, on March 2, 2009.

[7] *See* SR–NYSE–2009–16 (to be filed on February 17, 2009).

[8] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger).

[9] 15 U.S.C. 78f.

[10] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[11] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR–NYSE–2008–106) *and* Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (together, approving the Bonds Relocation); Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10) (adopting amendments to NYSE Alternext Equities Rules to track changes to corresponding NYSE Rules); Securities Exchange Act Release No. 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR–NYSEALTR–2008–11) (adopting amendments to Rule 62—NYSE Alternext Equities to track changes to corresponding NYSE Rule 62).

enjoyment of the facilities afforded by the Exchange, except as provided in NYSE Alternext Equities Rule 18. Currently, NYSE Alternext Equities Rule 18 affords members and member organizations the recourse to seek compensation for losses sustained by an Exchange system failure.[12]

As noted previously, the Exchange increasingly offers member organizations access to certain systems and technologies that are supplied by third-party vendors and delivered via Exchange systems (*e.g.*, the Exchange delivers broker algorithms to brokers on the broker handheld device). These third-party products are designed to enhance the member organizations' ability to execute trades efficiently. Notably, the Exchange is acting primarily as a facilitator between the vendor and the Exchange member using the service. Use of these vendor-supplied services is not required, and Exchange members can perform their respective jobs without using these third-party vendor services. If a member wishes to use such a service, however, the Exchange works with the vendor and the member to connect the member and to deliver the service from the vendor to the user. The Exchange also simplifies the negotiation process, in that a member does not need to separately negotiate with the vendor to receive the service. Because the services are supplied and supported by a third-party vendor, however, they are not explicitly ''systems or facilities of the Exchange.'' [13]

Currently, NYSE Alternext Equities Rules 17 and 18 do not address the issue of a member or member organization that sustains a loss arising from the malfunction of non-core systems or technology supplied by third-party vendors for use by member organizations.[14] In light of the increased availability of third-party technology to provide additional facilities or services to the Exchange, the Exchange proposes to amend NYSE Alternext Equities Rules 17 and 18 to address third-party vendor liability, third-party vendor system malfunction and the avenue of recourse for members and member organizations as a result of this third-party vendor system malfunction.

In connection with member or member organization use of any third-party vendors provided by the Exchange to members for the conduct of their business on the Exchange, the Exchange proposes that NYSE Alternext Equities Rule 17 provide that the Exchange shall not be liable for any damages sustained by a member, allied member or member organization growing out of the use or enjoyment by such member, allied member or member organization of a third-party electronic system, service, or facility provided by the Exchange, except as provided in NYSE Alternext Equities Rule 18.

The Exchange further proposes that members or member organizations that sustain a loss from the use of these third-party vendors provided by the Exchange may seek compensation from the Exchange for their losses in the same way they seek compensation for an Exchange system failure. Specifically, NYSE Alternext Equities Rule 18 would permit members or member organizations to file a claim with the Exchange for losses caused by the third-party vendor's malfunction. These claims would be evaluated and submitted to the NYSE pursuant to the existing procedure set out in NYSE Alternext Rule 18 and NYSE Rule 18.[15]

In the event that claims arising out of the use of these third-party vendor systems cannot be fully satisfied because the aggregated claims exceed the funds available for such payment as set forth in NYSE Alternext Equities Rule 18, the aggrieved member or member organization would not be precluded from bringing a claim against the third-party vendor directly for the balance of the loss amount.

The Exchange also seeks to make a conforming amendment to NYSE Alternext Equities Rule 18 to include in the definition of an Exchange system failure ''any malfunction of any third-party vendor provided by the Exchange that results in an incorrect execution of an order or no execution of an order that was received in Exchange systems.''

Finally, the Exchange seeks to codify its existing policy regarding the netting of losses prior to submitting claims under NYSE Alternext Equities Rule 18. Specifically, the Exchange is codifying its understanding that if members and member organizations retain profits from a system malfunction, then they are required to net these profits against their losses from the same malfunction before submitting any claims under NYSE Alternext Rule 18.[16]

For example, a broker enters orders for Customer #1 and Customer #2. As a result of a system malfunction, Customer #1 derives a profit that would have occurred but for the malfunction and Customer #2 derives a loss. The broker passes along the gain to Customer #1, and files a claim with the Exchange with respect to Customer #2's loss. The broker would not be required to net the gain against the loss.

Brokers are required to offer profitable errors to their customers; in certain circumstances, however, customers may decline to take the error in which case the error position is retained by the brokers.[17] If Customer #1 declines to accept the profit, as is the customer's option, then the broker would retain the profit and must net is against the loss incurred on behalf of Customer #2.

[12] An ''Exchange system failure'' is defined by NYSE Alternext Equities Rule 18 as ''a malfunction of the Exchange's physical equipment, devices and/or programming which results in an incorrect execution or an order or no execution of an order that was received in Exchange systems.''

NYSE Rule 18, Supplemental Material .10 provides that NYSE Alternext is permitted to file claims pursuant to NYSE Rule 18. NYSE Alternext shall submit claims for payment on behalf of its members to the NYSE for compensation for valid claims. NYSE Alternext members are not permitted to file claims for payment directly to the NYSE. NYSE Alternext will submit a separate claim to the NYSE for each claim made by its members.

[13] Exchange services that are outsourced to third-party vendors but that are part of the core functionality of Exchange systems are considered ''systems and facilities of the Exchange'' even though they are not physically provided by the Exchange. By contrast, additional services provided to members and member organizations by a third-party vendor that are not part of the core functionality of the Exchange's systems and not required to function as a member or member organization are not considered ''systems and facilities'' of the Exchange. As a result, any malfunction of those additional services would constitute a third-party vendor system malfunction, not an Exchange malfunction.

[14] The third-party vendors directly provide their services to the member or member organization. Therefore, the customers are aware that they are using an Exchange system, which is provided directly by the Exchange, or a third-party vendor system, that also has direct contact with the customer.

[15] Because NYSE Alternext and NYSE share a common trading platform, NYSE Rule 18 provides a mechanism for NYSE Alternext itself to seek reimbursement from NYSE for the amounts that NYSE Alternext undertakes to pay out to NYSE Alternext members under NYSE Alternext Equities Rule 18. Under that procedure, after the NYSE Alternext Compensation Review Panel has determined the number and amount of claims that NYSE Alternext deems valid, NYSE Alternext submits to the NYSE a separate claim for each valid claim made by NYSE Alternext members or member organizations. If the combined amount of valid claims by NYSE members and NYSE Alternext exceeded the available funds in the NYSE Rule 18 compensation fund, NYSE Alternext would receive a partial payment of claims pursuant to NYSE Rule 18(c), and NYSE Alternext's obligation to compensate its members for valid claims would be reduced by a like percentage.

[16] Related system malfunctions that occur repeatedly over the course of the trading day will constitute one system malfunction for purposes of determining the aggregation of customer claims resulting from that system malfunction. Distinct and separate malfunctions that originate from different system failures are considered unrelated malfunctions and are treated as separate system malfunctions.

[17] Customers may decline to take the gains for varied reasons. For example, if the cost to the customer of processing the error is greater than the amount of the error, the customer will likely tell the broker to keep the error.

The Exchange proposes these amendments to conform the rules of NYSE Alternext regarding third-party vendor liability, third-party vendor system malfunction and the avenue of recourse for members and member organizations as a result of this third-party vendor system malfunction to the rules of its affiliated Exchange, the New York Stock Exchange LLC.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Section 6(b)(5) of the Act,[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change promotes just and equitable principles of trade and protects investors and the public interest because it creates a mechanism that adequately addresses issues of liability for all parties concerned.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act.[20] The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest.[21]

The Exchange believes that the instant filing is non-controversial. The Commission has approved a third-party vendor liability provision that was filed by the American Stock Exchange which required members and member organizations to indemnify the Exchange and its vendors and/or subcontractors and provided that such vendor and its subcontractors shall not be liable to the member or member organization for any damages sustained by a member or member organization from use of these third-party vendor systems.[22] The Exchange submits that its proposed rule change is less expansive that Amex Rule 60—AEMI and affords a member or member organization the ability to recover from a loss sustained by use of a third-party vendor system. The proposed rule change offers its members and member organizations two layers of recourse in the event of a third-party vendor system malfunction, *i.e.*, filing a claim pursuant to NYSE Alternext Equities Rule 18 and then filing a claim directly against the third-party vendor for any remaining balance of the loss amount. Therefore, the Exchange submits that this proposed rule filing, in light of the more restrictive vendor liability disclaimer rules previously approved by the Commission, is non-controversial.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEALTR–2009–13 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEALTR–2009–13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEALTR–2009–13 and should be submitted on or before March 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4873 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78s(b)(3)(A).

[21] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement. 17 CFR 240.19b–4(f)(6)(iii).

[22] Amex Rule 60—AEMI (''Vendor Liability Disclaimer''). AEMI (''Auction & Electronic Market Integration'') System was Amex's Hybrid Market Structure for equities and exchange-traded funds prior to the merger with NYSE.

[23] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11681 and #11682]

Illinois Disaster #IL–00020

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for public assistance only for the state of Illinois (FEMA–1826–DR), dated 03/02/2009.

Incident: Severe winter storm.

Incident Period: 01/26/2009 through 01/28/2009.

Effective Date: 03/02/2009.

Physical Loan Application Deadline Date: 05/01/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 12/02/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 03/02/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Alexander, Gallatin, Hardin, Johnson, Massac, Pope, Pulaski, Saline, Union.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) with Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11681B and for economic injury is 11682B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E9–4867 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11665 and # 11666]

Oklahoma Disaster Number OK–00029

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 Oklahoma (FEMA–1823–DR), dated 02/17/2009.

Incident: Severe winter storm.

Incident Period: 01/26/2009 through 01/28/2009.

Effective Date: 03/03/2009.

Physical Loan Application Deadline Date: 04/20/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 11/17/2009.

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 Oklahoma, dated 02/17/2009, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Comanche, Haskell, McIntosh, Muskogee, Okfuskee, Sequoyah.

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. E9–4871 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11675 and #11676]

Oklahoma Disaster #OK–00030

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Oklahoma (FEMA–1820–DR), dated 02/25/2009.

Incident: Severe storms and tornadoes.

Incident Period: 02/10/2009 through 02/11/2009.

Effective Date: 02/25/2009.

Physical Loan Application Deadline Date: 04/27/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 11/25/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 02/25/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Carter, Coal, Love.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) with Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11675B and for economic injury is 11676B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E9–4866 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11673 and #11674]

Oregon Disaster #OR–00028

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Oregon.

Incident: Severe Winter Storm, Flooding and Landslides.

Incident Period: 01/01/2009 through 01/04/2009.

Effective Date: 03/03/2009.

Physical Loan Application Deadline Date: 05/04/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 12/03/2009.

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: M. Mitravich, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Clackamas.

Contiguous Counties:

Oregon: Hood River, Marion, Multnomah, Wasco, Washington, Yamhill.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	7.750
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11673 B and for economic injury is 11674 0.

The States which received an EIDL Declaration # are Oregon.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: March 3, 2009.

Darryl K. Hairston,

Acting Administrator.

[FR Doc. E9–4862 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11677 and #11678]

Oregon Disaster #OR–00029

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for public assistance only for the state of Oregon (FEMA–1824–DR), dated 03/02/2009.

Incident: Severe winter storm, record and near record snow, landslides, and mudslides.

Incident Period: 12/20/2008 through 12/26/2008.

Effective Date: 03/02/2009.

Physical Loan Application Deadline Date: 05/01/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 12/02/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 03/02/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Clackamas, Clatsop, Columbia, Marion, Multnomah, Polk, Yamhill.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) with Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11677B and for economic injury is 11678B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E9–4869 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11679 and #11680]

Washington Disaster #WA–00023

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Washington (FEMA–1825–DR), dated 03/02/2009.

Incident: Severe winter storm and record and near record snow.

Incident Period: 12/12/2008 through 01/05/2009.

Effective Date: 03/02/2009.

Physical Loan Application Deadline Date: 05/01/2009.

Economic Injury (Eidl) Loan Application Deadline Date: 12/02/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 03/02/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Clallam, Clark, Columbia, Cowlitz, Garfield, Grays Harbor, Island, Jefferson, King, Klickitat, Lewis, Lincoln, Mason, Pacific, Pend Oreille, Skagit, Skamania, Snohomish, Spokane, Stevens, Thurston, Wahkiakum, Walla Walla, Whatcom.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500

	Percent
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11679B and for economic injury is 11680B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E9–4868 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Conductor and Control Cable (Aluminum); Conductor and Control Cable (Copper); Truck Trailer; All terrain vehicles (ATV's), wheeled or tracked; Snowmobiles and parts; Off-road All terrain vehicles (ATV's), wheeled or tracked; Noncurrent-Carrying Wiring Device Manufacturing, *i.e.*, dead end tees and connectors, guy strain and link assemblies, bolts, washers, turnbuckles, twisted clips, steel angle assemblies, yoke plates, compression T connectors, press dies, anchor shackles, Y clevis ball and Y clevis sockets, yoke plates, and grounding clamps.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Conductor and Control Cable (Aluminum); Conductor and Control Cable (Copper); Truck Trailer; All terrain vehicles (ATV's), wheeled or tracked; Snowmobiles and parts; Off-road All terrain vehicles (ATV's), wheeled or tracked; Noncurrent-Carrying Wiring Device Manufacturing, dead end tees and connectors, guy strain and link assemblies, bolts, washers, turnbuckles, twisted clips, steel angle assemblies, yoke plates, compression T connectors, press dies, anchor shackles, Y clevis ball and Y clevis sockets, yoke plates, and grounding clamps.

According to a request, no small business manufacturers supply these classes of products to the Federal government.

If granted, the waiver would allow otherwise qualified nonmanufacturer to supply the products of any manufacturer on a Federal contract set aside for small businesses, service-disabled veteran-owned small businesses, or participants in the SBA's 8(a) Business Development Program.

DATES: Comments and source information must be submitted by March 24, 2009.

ADDRESSES: You may submit comments and source information to Edith G. Butler, Program Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street, SW., Suite 8800, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Ms. Edith G. Butler, by telephone at (202) 619–0422; by FAX at (202) 481–1788; or by e-mail at *edith.butler@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act (Act), 15 U.S.C. 637(a)(17), and SBA's implementing regulations provide that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or participants in the SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor of the product. This requirement is commonly referred to as the Nonmanufacturer Rule. 13 CFR 121.406(b), 125.15(c). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors available to participate in the Federal market.

In order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. 13 CFR 121.1202(1). The SBA defines ''class of products'' based on a six digit coding system. The coding system is the Office of Management and Budget North American Industry Classification System (NAICS). In addition, SBA uses product service codes to identify particular products within the NAICS code to which a waiver would apply.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Conductor and Cable (Aluminum), North American Industry Classification System (NAICS) code 331319, product service code (PSC) 6145; Conductor and Control Cable (Copper), NAICS code 331422, PSC 6145; Truck Trailer Manufacturing, NAICS code 336212, PSC 2330; All Terrain Vehicles (ATV's), wheeled or tracked, Manufacturing; Snowmobiles and parts; Off-road all terrain vehicles (ATV's) and wheeled or tracked Manufacturing, NAICS code 336999, PSC 2330; and Noncurrent-Carrying Wiring Device Manufacturing, *i.e.*, dead end tees and connectors, guy strain and link assemblies, bolts, washers, turnbuckles, twisted clips, steel angle assemblies, yoke plates, compression T connectors, press dies, anchor shackles, & clevis ball and & clevis sockets, yoke plates and grounding clamps, NAICS code 335932, PSC 5975.

The public is invited to comment or provide source information to SBA on the proposed waivers of the Nonmanufacturer Rule for these classes of products within 15 days after date of publication in the **Federal Register**.

Dated: March 3, 2009.

Karen C. Hontz,

Director for Government Contracting.

[FR Doc. E9–4835 Filed 3–6–09; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Air Traffic Procedures Advisory Committee

AGENCY: Federal Aviation Administration (FAA), DOT.

SUMMARY: The FAA is issuing this notice to advise the public that a meeting of the Federal Aviation Administration Air Traffic Procedures Advisory Committee (ATPAC) will be held to review present air traffic control procedures and practices for standardization, revision, clarification, and upgrading of terminology and procedures.

DATES: The meeting will be held Tuesday, May 5, 2009, from 8 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the CGH Headquarters, 600 Maryland Ave SW., Suite 800 West, 8th Floor Training Room, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Jehlen, ATPAC Executive Director, 800 Independence Avenue, SW., Washington, DC 20591. Telephone (202) 493–4527.

SUPPLEMENTARY INFORMATION: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. 2), notice is hereby given of a meeting of the ATPAC to be held Tuesday, May 5, 2009, from 8 a.m. to 5 p.m.

The agenda for this meeting will cover a continuation of the ATPAC's review of present air traffic control procedures and practices for standardization,

revision, clarification, and upgrading of terminology and procedures. It will also include:

1. Approval of Minutes;
2. Submission and Discussion of Areas of Concern;
3. Discussion of Potential Safety Items;
4. Report from Executive Director;
5. Items of Interest; and
6. Discussion and agreement of location and dates for subsequent meetings.

Attendance is open to the interested public but limited to space available. With the approval of the Chairperson, members of the public may present oral statements at the meeting. Persons desiring to attend and persons desiring to present oral statement should notify Mr. Richard Jehlen no later than April 14, 2009. Any member of the public may present a written statement to the ATPAC at any time at the address given above.

Issued in Washington, DC, on February 18, 2009.

Richard Jehlen,

Executive Director, Air Traffic Procedures Advisory Committee.

[FR Doc. E9–4899 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0232]

Commercial Driver's License: Commonwealth of Virginia, Department of Motor Vehicles; Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; granting of application for exemption.

SUMMARY: FMCSA approves an application from the Commonwealth of Virginia Department of Motor Vehicles (Virginia DMV) for an exemption for a period of 2 years from a provision of the Agency's commercial driver's license (CDL) regulations requiring that each CDL issued by a State contain a color photograph of the driver. Virginia DMV requested that it be allowed to use a black and white, laser-engraved photograph in lieu of a color photograph. Virginia DMV believes that the issuance of CDLs with black-and-white, laser-engraved photographs would enhance the security of the credential and assist law enforcement officials with the identification of the CDL holder. FMCSA has determined that the exemption would provide for a level of safety that is equivalent to or greater than the level of safety achieved without the exemption.

DATES: This exemption is effective March 9, 2009 and expires on March 9, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations. Telephone: 202–366–4325, or E-mail: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption for a maximum of 2 years if it finds "* * * such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption * * *." The procedure for requesting an exemption is prescribed by 49 CFR part 381.

The Virginia DMV is in the project-planning phase of its transition to centralized issuance of drivers' licenses and identification cards. Virginia DMV is working towards meeting the requirements of the REAL ID Act of 2005 (Pub. L. 109–13, May 11, 2005, 119 Stat. 231, 302), and U.S. Department of Homeland Security's (DHS) implementing regulations (73 FR 5271, January 29, 2008). Under the REAL ID Act, Federal Agencies are prohibited, effective May 11, 2008, from accepting a driver's license or State-issued personal identification card for an official purpose unless the issuing State has met the requirements of the Act.

Virginia DMV Application for Exemption

Virginia DMV has applied for an exemption from 49 CFR 383.153(a)(4), which requires each CDL to contain a color photograph of the driver. Virginia DMV requested that it be allowed to use a black and white, laser-engraved photograph on Virginia-issued CDLs in lieu of a color photograph. In its application for an exemption, Virginia DMV explains in detail how the use of black and white, laser-engraved photographs on Virginia CDLs will enhance the security of the credential, in particular because the laser-engraved photograph cannot easily be altered. Virginia DMV also stated that a black and white, laser-engraved image actually enhances driver identification because, with hair and eye color absent, the image provides greater emphasis on other, less readily-altered, facial features. A copy of the Virginia DMV's application for an exemption is included in the docket referenced at the beginning of this notice.

Comments

Three comments were received to this docket. Canadian Bank Note Company, Ltd., supported the application, stating that the process proposed by Virginia DMV would provide "the most secure means of applying a photograph," and a clearer image as well. L–1 Identity Solutions (L–1) opposed the application, suggesting that Virginia DMV employ both a color and a black and white photograph on each CDL. L–1 also recommended certain color technologies it believed to be more secure than the Virginia DMV technology. The third commenter, Virginia DMV, provided additional detail about its proposed black and white, laser-engraved technology indicating that it is no less secure than other technologies.

FMCSA Decision

FMCSA has evaluated Virginia DMV's application on its merits following full consideration of the comments submitted to the docket, and has decided to grant the exemption from 49 CFR 383.153(a)(4) for a period of 2 years. FMCSA determined that the exemption would maintain a level of safety equivalent to, or greater than, the level achieved without the exemption (49 U.S.C. 31315(b)(1)).

In reaching its decision, FMCSA considered DHS's January 29, 2008, final rule implementing certain provisions of the REAL ID Act. The final rule permits State licensing agencies to use either color or black and white photographs on driver's licenses and identification cards (6 CFR 37.17(e)(2)). DHS determined through a notice-and-comment rulemaking proceeding that laser-engraved black and white photography provides a comparable if not greater level of security or deterrence to falsification. (See 73 FR 5301)

The regulation from which the Virginia DMV is exempted does not concern the qualifications of the CDL holder or his or her safety performance. Furthermore, the rule does not pertain to FMCSA's requirement that the CDL document be tamperproof or tamper resistant. (See 49 CFR 383.155.) Because the exemption is limited to the actual photograph or image of the CDL holder and the State would continue to be required to maintain compliance with all other CDL document rules, FMCSA concludes the exemption would not have an adverse impact on safety.

FMCSA's tamper-proofing rule (49 CFR 383.155) should not be construed to apply a higher standard of document security than the rules prescribed by DHS on January 29, 2008. The Agency concludes that the objections to laser-engraved black and white images raised by L–1 should be addressed to DHS, as they relate to DHS's decision in its READ ID Act rulemaking. The Agency will not attempt to resolve those concerns here.

For the reasons discussed above, FMCSA grants the Virginia DMV's application for an exemption from 49 CFR 383.153(a)(4) for a period of 2 years.

Issued on: March 2, 2009.

Rose A. McMurray,

Acting Deputy Administrator.

[FR Doc. E9–4930 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2009–0010]

Hours of Service of Drivers: Redding Air Services, Inc. and Guardian Helicopters, Inc., Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received a joint application from Redding Air Service, Inc. and Guardian Helicopters, Inc. (Redding/Guardian) requesting an exemption from certain commercial motor vehicle (CMV) driver hours-of-service (HOS) provisions of the Federal Motor Carrier Safety Regulations (FMCSRs). The exemption request is for Redding/Guardian's CMV drivers who transport jet fuel for their helicopters in support of wild-land firefighting operations. They specifically request an exemption for 20 drivers from the HOS prohibition against driving a CMV after the 70th hour of cumulative on-duty time in any 8-day period. The exemption, if granted, would enable Redding/Guardian drivers to conduct their operations—including transportation of jet fuel to and from the firefighting sites—without having to comply with the 70-hour in 8-day HOS rule. Redding/Guardian believes the exemption would ensure a level of safety equivalent to or greater than the level of safety that would be obtained absent the exemption. FMCSA requests public comment on the Redding/Guardian application for exemption.

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

ADDRESSES: You may submit comments identified by Federal Docket Management System Number [FMCSA–2009–0010] by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*, and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit *http://DocketInfo.dot.gov*.

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Bus and Truck Standards and Operations; Telephone: 202–366–4325. E-mail: *MCPSD@dot.gov*.

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (Pub. L. 105–178, 112 Stat. 107, June 9, 1998) amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from motor carrier safety regulations. Under its regulations, FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reason for denying or, in the alternative, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which the exemption is granted. The notice must also specify the effective period of the exemption (up to 2 years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

Request for Exemption

The Federal hours-of-service (HOS) regulations in 49 CFR 395.3(b)(2) prohibit a property-carrying commercial motor vehicle (CMV) driver from driving a CMV after having been on duty for 70 cumulative hours in any period of 8 consecutive days, if the employing motor carrier operates CMVs every day of the week.

Redding/Guardian's business is primarily in support of wild-land firefighting operations within the continental United States in conjunction with the U.S. Department of Interior, U.S. Forest Service and various State and County agencies. Redding is based in Redding, California, and Guardian is based in Van Nuys, California. The two

companies employ a total of 35 people; however, the requested exemption would only apply to full-time, part-time and temporary ground support truck drivers employed by Redding/Guardian—no more than 20 drivers. Together the two companies operate a total of 10 CMVs, which are the ground support vehicles.

Redding/Guardian operate a fleet of helicopters on both ''Exclusive Use'' (EU) and ''Call When Needed'' (CWN) contracts, which call for a helicopter, ground support vehicle, pilot and driver/ground support technician. The ground support vehicles carry sufficient jet fuel to support their respective helicopters, and the primary role of the technicians is to support and re-fuel the helicopters. While the driving of the ground support vehicle is each individual's secondary role, they are still subject to the FMCSRs—including the Part 395 HOS rules.

Redding/Guardian states that their EU contracts—including helicopters and ground support vehicles—frequently necessitate sitting at a base for weeks at a time and never going anywhere or even flying; however, there may be daily extensions due to high fire danger. When these extensions do occur, a ground support technician driver may be ''on-duty, not driving'' for 14 hours in a day for several consecutive days at a time, which results in reaching the 70-hour/8-day limit in as little as 5 days. According to Redding/Guardian, this includes a considerable amount of time just ''sitting around and waiting'' for a helicopter dispatch or for the helicopter to land. In addition, their CWN contract vehicles will remain away from their primary base of operation for weeks at a time, generally remaining in one location, and available for dispatch 7 days per week.

While Redding/Guardian's drivers are just waiting for a helicopter dispatch or for the helicopter to land, by being ''available'' and in ''readiness to work'' they are considered to be ''on-duty, not driving'' and therefore subject to the 70-hour in 8-day rule. The applicants note that on average, their drivers drive once every few days for less than 100 miles, and for the CWN contracts, the ground support technician may never drive the fuel vehicle more than 5 miles in a day, and that is only to and from the local hotel accommodations.

The problem arises as Redding/Guardian's drivers can basically run out of available hours in 5 days at 14 hours on duty per day—based on the 70-hour/8-day rule. They are therefore unable to legally operate a CMV on a public road until they have gained enough available hours to drive.

Redding/Guardian state that their ground-support technician-drivers are encouraged to stop driving at the onset of fatigue. They further claim that if their exemption request is granted, the CMV drivers will still not be allowed to exceed the 14-hour duty limit regulation (49 CFR 395.3(a)(2)). They reason that, based on the fact that their drivers are just ''sitting around and waiting,'' they are not becoming fatigued, which is the primary reason for the duty limits. Redding/Guardian contends that these drivers are not stressed or tired.

Redding/Guardian believes the exemption would achieve a level of safety equivalent to, or greater than, the level of safety obtained under the current 70-hour/8-day rule because they are firmly committed to their goal of zero accidents or incidents and have implemented a Comprehensive Safety Program designed to prevent accidents or injuries. Both companies also have an approved ''Safety Management System'' that includes annual reviews of safety-related issues.

A copy of the Redding/Guardian exemption application is available for review in the docket for this notice.

Request for Comments

In accordance with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA requests public comment on the Redding/Guardian application for an exemption from the ''70-hour/8-day rule'' in 49 CFR Part 395. The Agency will consider all comments received by close of business on April 8, 2009. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will consider to the extent practicable comments received in the public docket after the closing date of the comment period.

Issued On: March 3, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–4928 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket Number NHTSA–2009–0032]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: 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 OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval concerning vehicle safety features for consumer information purposes (OMB Control number 2127–0629).

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

ADDRESSES: You may submit 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, Rm. 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., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket Management Facility at 202–366–9826.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: For access to the docket to read background documents or comments received, go to the street address listed above. The Internet access to the docket will be at: *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Johanna Lowrie, U.S. Department of Transportation, NHTSA, Room W43–410, 1200 New Jersey Ave., SE., Washington, DC 20590. Ms. Lowrie's telephone number is (202) 366–5269. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it 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;

(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.* in submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

Title: Vehicle Information for the General Public.

OMB Control Number: 2127—0629.

Affected Public: Manufacturers that sell motor vehicles under 10,000 lbs. in the United States.

Abstract: NHTSA's mission is to save lives, prevent injury, and reduce motor vehicle crashes. Providing consumer information on vehicle safety is an important means of improving vehicle safety through market forces. NHTSA provides consumers with vehicle safety information such as front and side crash results, rollover propensity, and the availability of a wide array of safety features provided on each vehicle model. NHTSA also uses this safety feature information when responding to public inquiries and analyzing rulemaking petitions which ask the agency to mandate certain safety features.

The agency has attempted to coordinate and reduce the reporting burden associated with this information collection. Another information collection obtains data related to motor vehicle compliance with the agency's Federal motor vehicle safety standards. Although the consumer information collection data is distinct and unique from the compliance data, respondents to both collections are the same. Consequently, the consumer information collection is closely coordinated with the compliance collection to enable responders to assemble the data most efficiently. The burden is further made easier by sending out electronic files to the respondents in which the data is entered and electronically returned to the agency.

The consumer information collected is used on the agency's *http://www.safercar.gov* Web site, in the ''Buying a Safer Car'' and ''Buying a Safer Car for Child Passengers'' brochures, in other consumer publications, as well as for internal agency analyses and responses to consumer inquiries.

Estimated Annual Burden: 924 hours.

Number of Respondents: 21.

Comments are Invited On: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and 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.

Authority: 44 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50.

Issued on: March 3, 2009.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E9–4852 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2009–0046]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Request for public comment.

SUMMARY: 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, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections. This document describes a request for emergency clearance for a collection of information associated with product plan information to assist the agency in establishing corporate average fuel economy standards for model years 2012 through 2016 passenger cars and light trucks. The establishment of those standards is required by the Energy Policy and Conservation Act, as amended by the Energy Independence and Security Act (EISA) of 2007, Public Law 110–140.

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

ADDRESSES: Comments must refer to the docket notice number cited at the beginning of this notice, and be submitted to: Mr. Peter Feather, Fuel Economy Division Chief, Office of International Policy, Fuel Economy and Consumer Programs, at (202) 366–0846, facsimile (202) 493–2290, electronic mail: *peter.feather@dot.gov.* For legal issues, call Ms. Dorothy Nakama, Office of the Chief Counsel at (202) 366–2992.

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 the request for collection that is the subject of this notice may be obtained from Mr. Peter Feather at (202) 366–0846, facsimile (202) 493–2290, electronic mail: *peter.feather@dot.gov* or Ms. Dorothy Nakama at (202) 366–2992.

The mailing address for both officials is: NHTSA, 1200 New Jersey Ave., SE., Washington, DC 20590.

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.

In this notice, we are soliciting public comment on the following collection of information of manufacturers' production plan data for model years 2008–2020 in connection with NHTSA's establishing of passenger car CAFE standards for model years 2012–2016 and light truck CAFE standards for model years 2012–2016. We are asking OMB for processing through emergency procedures established at 5 CFR Section 1320.13, and have asked OMB to approve or disapprove this collection within a week.

Title: 49 CFR Parts 531 and 533 Passenger Car Average Fuel Economy Standards—Model Years 2008–2020; Light Truck Average Fuel Economy Standards—Model Years 2008–2020; Production Plan Data.

OMB Control Number: None assigned.

Form Number: There are no standard forms associated with this collection of information.

Requested Expiration Date of Approval: Ninety days from approval date.

Type of Request: Emergency clearance.

Summary of the Collection of Information: In this collection of information, NHTSA is requesting updated future product plans from vehicle manufacturers, as well as production data through the recent past, including data about engines and transmissions for model year (MY) 2008 through MY 2020 passenger cars and light trucks and the assumptions underlying those plans.

NHTSA requests information for MYs 2008–2020 to aid NHTSA in developing a realistic forecast of the MY 2012–2016 vehicle market. Information regarding earlier model years may help the agency to better account for cumulative effects such as volume- and time-based reductions in costs, and also may help to reveal product mix and technology application trends during model years for which the agency is currently receiving actual corporate average fuel economy (CAFE) compliance data. Information regarding later model years helps the agency gain a better understanding of how manufacturers' plans through MY 2016 relate to their longer-term expectations regarding Energy Independence and Security Act requirements, market trends, and prospects for more advanced technologies.

NHTSA will also consider information from model years before and after MYs 2012–2016 when reviewing manufacturers' planned schedules for redesigning and freshening their products, in order to examine how manufacturers anticipate tying technology introduction to product design schedules. In addition, the agency is requesting information regarding manufacturers' estimates of the future vehicle population, and fuel economy improvements and incremental costs attributed to this notice.

Description of the Need for the Information and the Proposed Use of the Information:

NHTSA needs the information described above to assess what CAFE standards should be established for model years 2012 through 2016 passenger cars and light trucks. Without this information, NHTSA will not be able to set CAFE standards for passenger cars and light trucks at the maximum feasible level for each model year no later than 18 months before the start of the model year regulated.

Description of the Likely Respondents (Including Estimated Number and Proposed Frequency of Response to the Collection of Information):

It is estimated that this collection affects approximately 22 motor vehicle manufacturers. The information that is the subject of this collection of information is collected once, for the notice of proposed rulemaking.

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information: The estimated burden is as follows:

It is estimated that this collection affects approximately 22 vehicle manufacturers. One major manufacturer (General Motors) estimated their burden to be approximately 4,300 hours. The burden to other manufacturers was estimated using sales weights relative to General Motor's total sales (*e.g.*, if a manufacturer produces 50% as many vehicles as General Motors, their burden is estimated to be 4,300*0.5 = 2150 hours). Therefore the burden to each manufacturer depends on the number of vehicles that manufacturer produces. The total estimated burden is 16,000 hours annually.

Number of affected vehicle manufacturers—22 Manufacturers.

Annual Labor Hours for Each Manufacturer to Prepare and Submit Required Information—Variable.

Total Annual Information Collection Burden—16,000 Hours.

The monetized cost associated with this information collection is determined by multiplying the total labor hours by an appropriate labor rate. For this information collection, we believe vehicle manufacturers will use mechanical engineers to prepare and submit the data. Therefore, we are applying a labor rate of $34.76 per hour which is the median national wage for mechanical engineers. The national

median hourly rate for mechanical engineers, May 2007, according to the Bureau of Labor Statistics; *http://www.bls.gov/oes/2007/may/oes_nat.htm#b00–0000*.

Thus, the estimated monetized annual cost is 16,000 hours × $34.76 per hour = $556,160.

Authority: 44 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50.

Issued on: March 3, 2009.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E9–4936 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2009–0049]

Pipeline Safety: Request for Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.

SUMMARY: Pursuant to the Federal pipeline safety laws, PHMSA is publishing this notice of a special permit request we have received from a hazardous liquid pipeline operator, seeking relief from compliance with certain tank inspection requirements in the Federal pipeline safety regulations. This notice seeks public comments on this request, including comments on any environmental impacts. At the conclusion of the 30-day comment period, PHMSA will evaluate the request and determine whether to grant or deny a special permit.

DATES: Submit any comments regarding this special permit request by April 8, 2009.

ADDRESSES: Comments should reference the docket number for the special permit request and may be submitted in the following ways:

- *E-Gov Web Site: http://www.Regulations.gov*. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* DOT Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, submit two copies. To receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov*.

Note: Comments are posted without changes or edits to *http://www.Regulations.gov*, including any personal information provided. There is a privacy statement published on *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: *General:* Kay McIver by telephone at (202) 366–0113; or, e-mail at *kay.mciver@dot.gov*.

Technical: Steve Nanney by telephone at (713) 272–2855; or, e-mail at *steve.nanney@dot.gov*.

SUPPLEMENTARY INFORMATION: PHMSA has filed in the Federal Docket Management System (FDMS) this request for special permit we have received from a pipeline operator seeking relief from compliance with certain pipeline safety regulations along with technical analysis provided by the requester. The request has been assigned a separate docket number in the FDMS. We invite interested persons to participate by reviewing this special permit request at *http://www.Regulations.gov*, and by submitting written comments, data or other views. Please include any comments on environmental impacts granting the special permit may have.

Before acting on this special permit request, PHMSA will evaluate all comments received on or before the comment closing date. We will consider comments received after this date if it is possible to do so without incurring additional expense or delay. PHMSA will consider any comments we receive in making our decision to grant or deny a request.

PHMSA has received the following special permit request:

Docket No.	Requester	Regulation(s)	Nature of special permit
PHMSA–2009–0043	Plains Pipeline, L.P.	49 CFR 195.432 (d)	To authorize Plains Pipeline, L.P., an 18 months extension of the requirement to perform API 653 out of service (OOS) inspections on (33) thirty-three above ground storage tanks. Total BBL of 3,197,180 barrels. These tanks are located in Louisiana, Alabama, Mississippi, Oklahoma, New Mexico and Texas. The completion of inspection service is due by May 3, 2009.

Authority: 49 U.S.C. 60118(c)(1) and 49 CFR 1.53.

Issued in Washington, DC on February 27, 2009.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. E9–5011 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

Advisory Board; Notice of Meeting

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. I), notice is hereby given of a meeting of the Advisory Board of the Saint Lawrence Seaway Development Corporation (SLSDC), to be held from 2 p.m. to 3:30 p.m. (EDT) on Thursday, April 23, 2009, via conference call at the Corporation's Administration Headquarters, Suite W32–300, 1200 New Jersey Avenue, SE., Washington, DC. The agenda for this meeting will be as follows: Opening Remarks; Consideration of Minutes of Past Meeting; Quarterly Report; Old and New Business; Closing Discussion; Adjournment.

Attendance at the meeting is open to the interested public but limited to the

space available. With the approval of the Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact, not later than Friday, April 17, 2009, Anita K. Blackman, Chief of Staff, Saint Lawrence Seaway Development Corporation, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202–366–0091.

Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC, on March 2, 2009.

Collister Johnson, Jr.,

Administrator.

[FR Doc. E9–4954 Filed 3–6–09; 8:45 am]

BILLING CODE 4910–61–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

February 26, 2009.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before April 8, 2009, to be assured of consideration.

Treasury Inspector General for Tax Administration (TIGTA)

OMB Number: 1505–XXXX.

Type of Review: New information collection activity.

Title: Generic Clearance for Customer Satisfaction Surveys.

Description: The TIGTA's Office of Audit's mission is to provide independent oversight of IRS activities. Through its audit programs TIGTA promotes efficiency and effectiveness in the administration of internal revenue laws, including the prevention and detection of fraud, waste, and abuse affecting tax administration. To accomplish this, TIGTA Office of Audit at times finds it necessary to contact a limited number of taxpayers (including businesses) for various reasons, including to survey or contact taxpayers on issues such as customer service, for example, to determine the quality of service at IRS walk-in sites called TACs, telephones, during examinations (IRS audits of taxpayer tax returns), to survey or contact taxpayers to determine why certain eligible taxpayers did or did not take certain actions, and to survey or contact taxpayers to determine the accuracy of the IRS records.

Respondents: Individuals or households.

Estimated Total Reporting Burden: 2,500 hours.

Clearance Officer: Kimberly Hyatt, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, (202) 622–5913.

OMB Reviewer: OIRA Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503 *oira_submission@omb.eop.gov.*

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E9–4833 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

March 3, 2009.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Ave., NW. Washington, DC 20220.

DATES: Written comments should be received on or before April 8, 2009 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–2071.

Type of Review: Extension.

Title: TE/GE Compliance Check Questionnaires.

Description: Compliance questionnaires are an invaluable tool for obtaining supplemental information to determine the compliance of specific entities without the burden for the taxpayer or the cost to the IRS of a traditional, full-scale audit. The information collected will be used to improve the quality of data available for monitoring compliance, to correct identified instances of non-compliance and to determine where additional guidance, education or enforcement resources are most needed to prevent future non-compliance.

Respondents: Not-for-profit institutions.

Estimated Total Burden Hours: 37,500 hours.

OMB Number: 1545–2120.

Type of Review: Extension.

Title: Election Involving the Repeal of the Bonding Requirement under 42(j)(6).

Description: The Internal Revenue Service is notifying taxpayers how to make the election out of the former bond requirement of 42(j)(6) mandated by the Housing Assistance Tax Act of 2008.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 7,800 hours.

OMB Number: 1545–1959.

Type of Review: Extension.

Title: Contributions of Motor Vehicles, Boats, and Airplanes.

Form: 1098-C.

Description: Section 884 of the American Jobs Creation Act of 2004 (Pub. L. 108–357) added paragraph 12 to section 170(f) for contributions of used motor vehicles, boats, and airplanes. Section 170(f)(12) requires that a donee organization provide an acknowledgement to the donor of this type of property and is required to file the same information to the Internal Revenue Service. Form 1098–C may be used as the acknowledgement and it, or an acceptable substitute, must be filed with the IRS.

Respondents: Individuals or households.

Estimated Total Burden Hours: 1,500 hours.

OMB Number: 1545–1966.

Type of Review: Extension.

Title: TD 9263 (Final) Income Attributable to Domestic Production Activities.

Description: These regulations will provide guidance regarding the deduction for income attributable to domestic production activities under section 199 of the Internal Revenue Code. Section 199 was enacted by section 102 of the American Jobs Creation Act of 2004, and allows a deduction equal to 3 percent (for 2005 and 2006) of the lesser of the qualified production activities income of the taxpayer's or the taxpayer's taxable

income, subject to certain limits. The deduction percentage increases to 6 percent for 2007 through 2009 and to 9 percent thereafter.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 9,000 hours.

OMB Number: 1545–0074.

Type of Review: Revision.

Title: U.S. Individual Income Tax Return.

Form: 8275 R, 8275, 8283, 8818, 8815, 8820, 8821, 8822, 8824, 8826, 8843, 8846, W–5SP, W–5, 8910, 8911, 8915, 8907, 1040 X, 8874, 9465 SP, SS–8, 982, 8914, 8906, 8908, 8453, 8582–CR, Schedule H (1040), Schedule J (1040), Schedule R (1040), 1040–ES NR, 8853, 8864, 673, Schedule 2 (1040A), Schedule 3 (1040A), 1128, 8878 SP, 8860, 2106, 2106–EZ, 1040 ES–OTC, 1040 A, 2210–F, 8615, 8621–A, 8621, 8689, 8693, 8697, 8801, 8828, 8829, 8832, 8833, 8834, 8835, 8845, 9465, Schedule SE (1040), 8844, 8854, 8898, Form T (Timber), Schedule C–EZ (1040), 8840, 8889, 1040 NR–EZ, 8917, W–4V, W–7, 1045, 2210, 8863, SS–4, Schedule O (8865), 8838, 8865, Schedule P (8865), 2350 SP, 8847, 8858, 8859, 8861, 8862, Schedule K–1 (8865), 8866, 8873, 8878, Schedule M (8858), 8879–SP, 8879, 8880, 8885, 8891, 8896, 8900, 8901, W–4P, W–4S, W–4SP, W–4, W–7A, W–7SP, 4868 SP, 5695, 8888, 8919, 1040, 1040 EZ, 1040 NR , 926, 970, 972, Schedule 1 (1040 A), Schedule A & B (1040), Schedule C (1040), Schedule D (1040), Schedule D–1 (1040), Schedule E (1040), Schedule EIC (1040), Schedule F (1040), 1040–V, 1310, 2120, 2350, 2439, 2441, 2555–EZ, 2555, 2848, 3115, 3468, 3520, 3800, 3903, 4029, 4070 A, 4070, 4361, 4562, 4563, 4684, 4797, 4835, 4852, 4868, 4952, 4970, 4972, 5074, 5213, 5329, 5471, Schedule J (5471), Schedule M (5471), Schedule O (5471), Schedule A (5713), Schedule B (5713), Schedule C (5713), 5713, 5754, 5884, 6198, 6251, 8332, 8379, 8396, 8582, 8586, 8606, 8594, Schedule A (8609), 8611, 8812, 8814, 8839, 8881, 8882, 8886, 8903, 1040 V OCR–ES, 1116, 4137, 4136, 4255, 6252, 6478, 6765, 8082, 6781, 5405, 1127, 8925, 8931, 8932, 1040–ES (PR).

Description: These forms and schedules are used by individuals to report their income tax liability. IRS uses the data collected on these forms and their schedules to compute tax liability and determine that the items claimed are properly allowable. This information is also used for general statistical purposes.

Respondents: Individuals or households.

Estimated Total Burden Hours: 3,703,000,000 hours.

OMB Number: 1545–1956.

Type of Review: Extension.

Title: Rev. Proc. 2005–51, Revenue Procedure regarding I.R.C. 6707A (e) and Disclosure with the SEC.

Description: This revenue procedure provides guidance to persons who are required to disclose payment of certain penalties arising from participation in reportable transactions on forms filed with the Securities and Exchange Commission.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 430 hours.

OMB Number: 1545–1831.

Type of Review: Extension.

Title: TD 9157 (Final) Guidance Regarding the Treatment of Certain Contingent Payment Debt Instructions with one or more Payments that are Denominated in, or Determined by Reference to, a nonfunctional currency.

Description: The IRS needs the information from the holder of certain debt instruments in order to alert the agency that the computation of interest income/expense by the holder and issuer will not be consistent. The respondents will be holders of contingent payment debt instruments which require payments to be made in or by reference to foreign currency. The respondents will probably be investment banks, however, may also include others who hold these debt instruments for investments.

Respondents: Businesses or other for-profits.

Estimated Total Burden Hours: 100 hours.

OMB Number: 1545–0387.

Type of Review: Extension.

Title: Application for Filing Information Returns Magnetically/Electronically.

Form: 4419.

Description: Under section 6011(e)(2)(a) of the Internal Revenue Code, any person, including corporations, partnerships, individuals, estates and trusts, who is required to file 250 or more information returns must file such returns magnetically/electronically. Payers required to file on magnetic media or electronically must complete Form 4419 to receive authorization to file.

Respondents: State, Local, and Tribal Governments.

Estimated Total Burden Hours: 6,500 hours.

Clearance Officer: Glenn P. Kirkland, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224. (202) 622–3428.

OMB Reviewer: Shagufta Ahmed, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503. (202) 395–7873.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. E9–4834 Filed 3–6–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Blue Ribbon Panel on VA-Medical School Affiliations; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Blue Ribbon Panel on VA-Medical School Affiliations has scheduled a meeting for March 24–25, 2009, in Suite 870 at 1800 G Street, NW., Washington, DC. The sessions will begin at 8:30 a.m. each day and end at 5 p.m. on March 24 and at noon on March 25. The meeting is open to the public.

The purpose of the Panel is to advise the Secretary of Veterans Affairs, through the Under Secretary for Health, on issues related to a comprehensive philosophical framework to enhance VA's partnerships with medical schools and affiliated institutions.

The major item on the agenda for both days will include the members of the Panel discussing the content and format of their final report and recommendations to the Secretary of Veterans Affairs.

Interested persons may attend and present oral statements to the Panel. Oral presentations will be limited to five minutes or less, depending on the number of participants. Requests to address the Panel should be sent by e-mail to *Gloria.Holland@va.gov.* Interested parties may also provide written comments for review by the Panel prior to the meeting or at any time, by e-mail to *Gloria.Holland@va.gov* or by mail to Gloria J. Holland, Ph.D., Special Assistant for Policy and Planning to the Chief Academic Affiliations Officer (14), 810 Vermont Avenue, NW., Washington, DC 20420.

Dated: March 5, 2009.

By Direction of the Secretary:

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E9–5068 Filed 3–6–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Advisory Committee on Environmental Hazards; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Veterans' Advisory Committee on Environmental Hazards will be held on March 23–24, 2009, in room 630 at the Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC, from 8 a.m. to 4:30 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs on adverse health effects that may be associated with exposure to ionizing radiation, and to make recommendations on proposed standards and guidelines regarding VA benefit claims based upon exposure to ionizing radiation.

The major items on the agenda for both days will be discussions of medical and scientific papers concerning the health effects of exposure to ionizing radiation. On the basis of the discussions, the Committee may make recommendations to the Secretary concerning the relationship of certain diseases to exposure to ionizing radiation.

An open forum for oral statements from the public will be available for 30 minutes in the afternoon each day. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis and will be provided three minutes per statement.

Members of the public wishing to attend should contact Ms. Bernice Green at the Department of Veterans Affairs, Compensation and Pension Service, 810 Vermont Avenue, NW., Washington, DC 20420, by phone at (202) 461–9723, or by fax at (202) 275–1728. Individuals should submit written questions or prepared statements for the Committee's review to Ms. Green at least five days prior to the meeting. The Committee may ask those who submit material for clarification prior to its consideration.

Dated: March 3, 2009.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E9–4934 Filed 3–6–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Monday,
March 9, 2009

Part II

Department of the Treasury

31 CFR Part 103

Office of the Comptroller of the Currency

12 CFR Parts 4 and 21

Office of Thrift Supervision

12 CFR Parts 510 and 563

Confidentiality of Suspicious Activity Reports; Standards Governing the Release of a Suspicious Activity Report; Interpretive Guidances—Sharing Suspicious Activity Reports; Proposed Rules

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 21

[Docket ID OCC–2009–0004]

RIN 1557–AD17

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of the Comptroller of the Currency, Treasury (OCC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The OCC is proposing to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a suspicious activity report (SAR) to: Clarify the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction, as it applies to national banks; address the statutory prohibition on the disclosure by the government of a SAR, as that prohibition applies to the OCC's standards governing the disclosure of SARs; clarify the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR, by the OCC is ''to fulfill official duties consistent with the purposes of the BSA;'' and modify the safe harbor provision in its rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are based upon a similar proposal being contemporaneously issued by the Financial Crimes Enforcement Network (FinCEN).

DATES: Comments must be received by June 8, 2009.

ADDRESSES: Because paper mail in the Washington, DC area and received by the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title ''Confidentiality of Suspicious Activity Reports'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

Federal eRulemaking Portal—''Regulations.gov'': Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2009–0004'' to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket Number OCC–2009–0004'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this notice of proposed rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then, click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2009–0004'' to view public comments for this rulemaking action.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

FOR FURTHER INFORMATION CONTACT: James Vivenzio, Senior Counsel for BSA/AML, (202) 874–5200; Ellen Warwick, Assistant Director, Litigation, (202) 874–5280; or Patrick Tierney, Senior Attorney, Legislative and Regulatory Activities, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions, including national banks regulated by the OCC, to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[1]

SARs are used for law enforcement or regulatory purposes to combat terrorism, terrorist financing, money laundering and other financial crimes. For this reason, the BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[2] To encourage the voluntary reporting of possible violations of law and regulation, and the filing of SARs, the BSA also contains a safe harbor provision which shields financial institutions making such reports from civil liability.

FinCEN has issued rules implementing the SAR confidentiality provisions for various types of financial institutions that closely mirror the statutory language.[3] In addition, the

[1] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act), amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Public Law 102–550, Title XV, section 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1). The OCC, Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and National Credit Union Administration (NCUA), (collectively referred to as the Federal bank regulatory agencies) subsequently issued virtually identical implementing regulations on suspicious activity reporting. *See* 12 CFR 21.11 (OCC); 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS) and 12 CFR 748.1 (NCUA).

[2] 31 U.S.C. 5318(g)(2)(A)(i).

[3] *See, e.g.,* 31 CFR 103.18(e) (SAR confidentiality rule for banks); 31 CFR 103.19(e) (SAR

Federal bank regulatory agencies implemented these provisions through similar regulations that provide SARs are confidential and generally no information about or contained in a SAR may be disclosed.[4] The regulations issued by FinCEN and the Federal bank regulatory agencies also describe the applicability of the safe harbor provision to both voluntary reports of possible and known violations of law and the required filing of SARs.[5]

The USA PATRIOT Act of 2001 strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States with knowledge of a SAR, from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[6] The USA PATRIOT Act also clarified that the safe harbor shielding financial institutions from liability covers voluntary disclosures of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).''[7]

FinCEN[8] is proposing to modify its SAR rules to interpret or further interpret the provisions of the BSA that relate to the confidentiality of SARs and the safe harbor for such reporting. The OCC is proposing to amend its rules contemporaneously, based upon the proposal being issued by FinCEN, to clarify the manner in which these provisions apply to national banks and to the OCC's own standards governing the disclosure of a SAR and any information that would reveal the existence of a SAR (referred to in this preamble as ''SAR information'').

II. Overview of Proposal

The proposed amendments to the OCC's rules include key changes that would (1) clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to national banks; (2) address the statutory prohibition on the disclosure by the government of a SAR, which was added to the BSA by section 351(b) of the USA PATRIOT Act of 2001, as that prohibition applies to the OCC's standards governing the disclosure of SAR information; and (3) clarify that the exclusive standard applicable to the disclosure of SAR information by the OCC is ''to fulfill official duties consistent with the purposes of the BSA,'' in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed. In addition, the proposed amendments would modify the safe harbor provision in the OCC's SAR rules[9] to include changes made by the USA PATRIOT Act.

Furthermore, as described in section III of this **SUPPLEMENTARY INFORMATION**, FinCEN is simultaneously issuing for notice and comment proposed guidance regarding the sharing of SARs with affiliates. That proposed guidance interprets a provision of the proposed rulemaking, and, accordingly, should be read in conjunction with this notice.

In a separate rulemaking, the OCC also is simultaneously proposing to amend its information disclosure regulation set forth in 12 CFR part 4, subpart C, to clarify that the exclusive standard governing the release of SAR information is set forth in 12 CFR 21.11.[10] The OCC is issuing this proposed amendment to 12 CFR part 4, subpart C, at the same time, to make clear that the OCC will disclose SAR information only when necessary to satisfy the BSA purposes for which SARs are filed.

III. Section-by-Section Description of the Proposal

Section 21.11(b): Definition of a SAR

The primary purpose of the OCC's SAR rule is to ensure that a national bank files a SAR when it detects a known or suspected violation of a Federal law or a suspicious transaction related to a money laundering activity or a violation of the BSA. *See* 12 CFR 21.11(a). Incidental to this purpose, the OCC's SAR rule includes a section that addresses the confidentiality of SARs.

Under the current SAR rule, the term ''SAR'' means ''a Suspicious Activity Report on the form prescribed by the OCC.'' The proposed rule simply defines a ''SAR'' generically as ''a Suspicious Activity Report.'' This change would extend the confidentiality provisions of the OCC's SAR rule to all SARs, including those filed on forms prescribed by FinCEN.[11] As a consequence, a national bank that obtained a SAR, for example, from a non-bank affiliate pursuant to the provisions of this proposed rule, would be required to safeguard the confidentiality of the SAR, even if the SAR had not been filed on a form prescribed by the OCC.

Section 21.11(c): SARs Required

To clarify that a national bank must file a SAR on a form ''prescribed by the OCC,'' the OCC is proposing to add this phrase to the introductory language of the section of the OCC's SAR rule that describes the procedures for the filing of a SAR. Accordingly, the proposed rules require a national bank to file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury *on the form prescribed by the OCC* in accordance with the form's instructions, by sending a completed SAR to FinCEN in particular circumstances.[12]

Section 21.11(k): Confidentiality of SARs

The OCC is proposing to amend its rules regarding SAR confidentiality[13] by modifying the introductory sentence, and dividing the remainder of the current provision into two sections. The first section would describe the prohibition on disclosure of SAR information by national banks, and the rules of construction applicable to this prohibition. The second section would describe the prohibition on the OCC's disclosure of SAR information.

Currently, the OCC's rules prohibiting the disclosure of SARs begins with the statement that SARs are confidential. Over the years, the OCC has received numerous questions regarding the scope of the prohibition on the disclosure of a SAR in its current rules. Accordingly, the OCC is proposing to clarify the scope of SAR confidentiality by more clearly describing the information that is subject to the prohibition. Like FinCEN, the OCC believes that all of the reasons for maintaining the confidentiality of SARs are equally applicable to any information that would reveal the existence of a SAR.

The OCC, like FinCEN recognizes that in order to protect the confidentiality of

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confidentiality rule for brokers or dealers in securities).

[4] *See* 12 CFR 21.11(k) (OCC); 12 CFR 208.62(j) (FRB); 12 CFR 353.3(g) (FDIC); 12 CFR 563.180(d)(12) (OTS); and 12 CFR 748.1 (NCUA).

[5] 31 U.S.C. 5318(g)(3).

[6] *See* USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, section 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).

[7] *See* USA PATRIOT Act, section 351(a). Public Law 107–56, Title III, section 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(3).

[8] FinCEN is the agency designated by the Department of the Treasury to administer the BSA, and with which SARs must be filed. *See* 31 U.S.C. 5318; 12 CFR 21.11(c).

[9] 12 CFR 21.11(l).

[10] See elsewhere in this issue of the **Federal Register**.

[11] *See, e.g.,* 31 CFR 103.19 (FinCEN regulations requiring brokers or dealers in securities to file reports of suspicious transactions on a SAR–S–F).

[12] *Cf.* 12 CFR 21.11(c).

[13] 12 CFR 21.11(k).

a SAR, any information that would reveal the existence of a SAR (such as the draft of a SAR that has been filed) must be afforded the same protection from disclosure. The confidentiality of SARs must be maintained for a number of compelling reasons. For example, the disclosure of a SAR could result in notification to persons involved in the transaction that is being reported, and compromise any investigations being conducted in connection with the SAR. In addition, the OCC believes that even the occasional disclosure of a SAR could chill the willingness of a national bank to file SARs, and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement. If banks believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions. Banks also may be reluctant to report suspicious transactions, or may delay making such reports, for fear that the disclosure of a SAR will interfere with the bank's relationship with its customer. Further, a SAR may provide insight into how a bank uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could compromise personally identifiable information or commercially sensitive information, or damage the reputation of individuals or companies that may be named. Finally, the disclosure of a SAR for uses unrelated to the law enforcement and regulatory purposes for which SARs are intended increases the risk that bank employees or others who are involved in the preparation or filing of a SAR could become targets for retaliation by persons whose criminal conduct has been reported.

These reasons for maintaining the confidentiality of SARs also apply to any information that would reveal the existence of a SAR. Therefore, like FinCEN, the OCC is proposing to modify the general introduction in its rules to state that confidential treatment must also be afforded to ''any information that would reveal the existence of a SAR.'' The introduction also would indicate that SAR information may not be disclosed, except as authorized in the narrow circumstances that follow.

Section 21.11(k)(i): Prohibition on Disclosure by National Banks

The OCC's current rules provide that any national bank or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must (1) decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, and (2) notify the OCC.

The proposed rules more specifically address the prohibition on the disclosure of a SAR by a national bank. The rules provide that the prohibition includes ''any information that would reveal the existence of a SAR'' instead of using the phrase ''any information that would disclose that a SAR has been prepared or filed.'' The OCC, like FinCEN, believes that this phrase more clearly describes the type of information that is covered by the prohibition on the disclosure of a SAR. In addition, the proposed rules incorporate the specific reference in 31 U.S.C. 5318(g)(2)(A)(i) to a ''director, officer, employees or agent,'' in order to clarify that the prohibition on disclosure extends to those individuals in a national bank who may have access to SAR information.

Although 31 U.S.C. 5318(g)(2)(A)(i) provides that a person involved in the transaction may not be notified that the transaction has been reported, the proposed rules continue to reflect case law that has consistently concluded, in accordance with applicable regulations, that financial institutions are broadly prohibited from disclosing SAR information to any person. Accordingly, these cases have held that, in the context of discovery in connection with civil lawsuits, financial institutions are prohibited from disclosing SAR information because section 5318(g) and its implementing regulations have created an unqualified discovery and evidentiary privilege for such information that cannot be waived by financial institutions.[14] Consistent with case law and current regulation, the texts of the proposed rules do not limit the prohibition on disclosure only to the person involved in the transaction. Permitting disclosure to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is absolutely prohibited by the statute.

The proposed rules continue to provide that any national bank, or any director, officer, employee or agent of a national bank, subpoenaed or otherwise requested to disclose SAR information must decline to provide the information, citing this section of the rules and 31 U.S.C. 5318(g)(2)(A)(i), and must give notice of the request to the OCC. In addition, the proposed rules require the bank to notify the OCC of its response to the request, and require the bank to provide the same information to FinCEN. This new notification requirement was added to the proposed rules so that either or both agencies can intervene to prevent the disclosure of SAR information by a bank, if necessary.

Section 21.11(k)(1)(ii): Rules of Construction

The OCC, like FinCEN, is proposing rules of construction to address issues that have arisen over the years about the scope of the SAR disclosure prohibition, and to implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition on bank disclosure of SAR information. The introduction to these rules makes clear that the rules of construction are each qualified by the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported.

The first proposed rule of construction builds on existing language to clarify that a national bank, or any director, officer, employee or agent of a national bank may disclose SAR information to FinCEN or any Federal, state, or local law enforcement agency; or any Federal or state regulatory agency that examines the financial institution for compliance with the BSA. Although the permissibility of such disclosures may be readily apparent, the proposal contains this statement to clarify that a national bank cannot use the prohibition on bank disclosure of SAR information to withhold this information from governmental authorities that are otherwise entitled by law to receive SARs and to examine for and investigate suspicious activity.

The second proposed rule of construction provides that SAR information does not include the underlying facts, transactions, and documents upon which a SAR is based. This statement reflects case law which has recognized that, while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information, upon which a SAR is based), may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[15]

[14] *See, e.g.*, *Whitney Nat'l Bank* v. *Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[15] *See Cotton* v. *Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

This proposed rule of construction includes some examples of situations where a national bank may disclose the underlying facts, transactions, and documents upon which a SAR is based. The first example clarifies that a bank may disclose this information [16] to another financial institution, or any director, officer, employee or agent of the financial institution, for the preparation of a joint SAR.[17] The second example simply codifies a rule of construction added to the BSA by section 351 of the USA PATRIOT Act which provides that such underlying information may be disclosed in certain written employment references and termination notices.[18]

The third proposed rule of construction makes clear that the prohibition on the disclosure of SAR information by a national bank does not include the sharing by a national bank, or any director, officer, employee or agent of a bank, of SAR information within the bank's corporate organizational structure, for purposes consistent with Title II of the BSA, as determined by regulation or in guidance issued by the OCC or FinCEN. This proposed rule recognizes that a national bank may find it necessary to share SAR information to fulfill its reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring and reporting, consistent with Title II of the BSA. The term ''share'' used in this rule of construction is an acknowledgement that sharing within a corporate organization for purposes consistent with Title II of the BSA, as determined by regulation or guidance issued by the OCC or FinCEN, is distinguishable from a prohibited disclosure.

FinCEN and the Federal bank regulatory agencies have already issued joint guidance making clear that the U.S. branch or agency of a foreign bank may share a SAR with its head office, and that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). This guidance stated that the sharing of a SAR with a head office or controlling company both facilitates compliance with the applicable requirements of the BSA and enables the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[19]

Elsewhere in this issue of the **Federal Register**, FinCEN is issuing additional guidance for notice and comment that further elaborates on sharing of SAR information within a corporate organization that FinCEN considers to be ''consistent with the purposes of the BSA.'' The proposed guidance would generally permit sharing of SAR information by depository institutions with their affiliates [20] that are subject to a SAR rule.[21]

Section 21.11(k)(2): Prohibition on Disclosure by the OCC

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, and added a new provision prohibiting officers and employees of the government from disclosing a SAR to any person involved in the transaction that the transaction has been reported, except ''as necessary to fulfill the official duties of such officer or employee.'' The OCC is proposing rules to address this new section that are comparable to those being proposed by FinCEN. The proposed rules provide that the OCC will not, and no officer, employee or agent of the OCC, shall disclose SAR information, ''except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.''

As stated in section 5318(g)(2)(A)(i), which prohibits a financial institution's disclosure of a SAR, section 5318(g)(2)(A)(ii) also prohibits the government from disclosing a SAR to ''any person involved in the transaction.'' The OCC, like FinCEN, is proposing to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure by a governmental authority of SAR information to any outside party may make it likely that the information will be disclosed to a person involved in the transaction. The OCC believes that the purpose of section 5318(g)(2)(A)(ii) could be undermined unless the OCC's rules generally address the disclosure of SAR information by the OCC and its officers, employees and agents, not simply in the context of disclosure to ''any person involved in the transaction.'' Accordingly, the proposed rules would generally bar disclosures of SAR information by OCC officers, employees, or agents.

However, section 5318(g)(2)(A)(ii) also narrowly permits governmental disclosures as necessary to ''fulfill official duties,'' a phrase that is not defined in the BSA. Consistent with the rules being proposed by FinCEN, the OCC is proposing to construe this phrase in the context of the BSA, in light of the purpose for which SARs are filed. Accordingly, the proposed rules interpret ''official duties'' to mean ''official duties consistent with the purposes of Title II of the BSA,'' namely, for ''criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [22] When disclosure is necessary to fulfill official duties, the OCC will make a determination, through its internal processes, that a SAR may be disclosed to fulfill official duties consistent with the BSA. This standard would permit, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[23] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that SAR information will not be disclosed for a reason that is unrelated to the purposes

[16] Although the underlying facts, transactions, and documents upon which a SAR is based may include previously filed SARs or other information that would reveal the existence of a SAR, these materials cannot be disclosed as underlying documents.

[17] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. ''*Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs*,'' Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On May 1, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Until such time as a new SAR form is available that facilitates joint filing, institutions authorized to jointly file should follow FinCEN's guidance to use the words ''joint filing'' in the narrative of the SAR and ensure that both institutions maintain a copy of the SAR and any supporting documentation (*See, e.g.*, *http://www.fincen.gov/statutes_regs/guidance/html/guidance_faqs_sar_10042006.html*).

[18] 31 U.S.C. 5318(g)(2)(B).

[19] ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006).

[20] Under FinCEN's proposed guidance, an ''affiliate'' of a depository institution means any company under common control with, or controlled by, that depository institution.

[21] *See, e.g.*, 12 CFR 21.11 (SAR rule applicable to national banks).

[22] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[23] *See, e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States*, 353 U.S. 657, 668 (1957).

of the BSA. For example, this standard would not permit disclosure of SAR information to the media.

The proposed rules also specifically provide that ''official duties'' shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33. This statement, which corresponds to a similar provision in FinCEN's proposed rules, clearly establishes that the OCC will not disclose SAR information to a private litigant for use in a private legal proceeding, or pursuant to 12 CFR 4.33, because such a request cannot be consistent with any of the purposes enumerated in Title II of the BSA. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to ensure that the U.S. financial system will not be used for criminal activity or to support terrorism. The OCC, like FinCEN, believes that this purpose would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit for the reasons described earlier, including, that such disclosures will chill full and candid reporting by financial institutions, including national banks.

Finally, the proposed rules would apply to the OCC, in addition to its officers, employees, and agents. Comparable to a provision being proposed by FinCEN, the OCC is proposing to include the agency itself in the scope of coverage, because requests for SAR information are typically directed to the agency, rather than to individuals within the OCC with authority to respond to the request. In addition, agents are included in the proposed paragraph because agents of the OCC may have access to SAR information. Accordingly, this proposed interpretation would more comprehensively cover disclosures by the OCC, agents of the OCC, and protect the confidentiality of SAR information.

Section 21.11(l): Limitation on Liability

In 1992, the Annunzio-Wylie Act amended the BSA by providing a safe harbor for financial institutions and their employees from civil liability for the reporting of known or suspected criminal offenses or suspicious activity through the filing of a SAR.[24] FinCEN and the OCC incorporated the safe harbor provisions of the 1992 law into their SAR rules.[25] Section 351 of the USA PATRIOT Act amended section 5318(g)(3) to clarify that the scope of the safe harbor provision includes the voluntary disclosure of possible violations of law and regulations to a government agency, and to expand the scope of the limit on civil liability to include any liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' The OCC, like FinCEN, has incorporated the statutory expansion of the safe harbor by placing a cross-reference to section 5318(g)(3) in the proposed rules.

In addition, consistent with the proposed rule issued by FinCEN, this provision makes clear that the safe harbor also applies to a disclosure by a bank made jointly with another financial institution for purposes of filing a joint SAR.[26]

Conforming Amendments to 12 CFR Part 4, Subpart C

The OCC is proposing to amend its information disclosure rule set forth in 12 CFR part 4, subpart C. Among other things, the proposal clarifies that the OCC's disclosure of SAR information will be governed exclusively by the standards set forth in the proposed amendments to the OCC's SAR rule set forth in 12 CFR 21.11(k). *See* elsewhere in this issue of the **Federal Register**. The effect of these proposed amendments is that the OCC: (i) Will not release SAR information to private litigants; and (ii) will only release SAR information to other government agencies, in response to a request pursuant to 12 CFR 4.37(c) or in the exercise of its discretion as described in 12 CFR 4.36, when necessary to fulfill official duties consistent with the purposes of Title II of the BSA.

IV. Request for Comments

The OCC welcomes comments on any aspect of these proposed amendments to the SAR rules.

The OCC has timed the release of this proposal to coincide with the issuance of the proposed rules to amend the information disclosure rules set forth in 12 CFR part 4, subpart C, so that commenters can consider each proposal in commenting on the other.

V. OCC Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OCC to use plain language in all proposed and final rules published after January 1, 2000. Therefore, the OCC specifically invites your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulations clearly stated? If not, how could the regulations be more clearly stated?
- Do the proposed regulations contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulations easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the regulations easier to understand?

VI. OCC Community Bank Comment Request

The OCC invites your comments on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

VII. OCC Regulatory Analysis

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OCC has determined that the costs, if any, associated with proposed rules are *de minimis*, as they simply clarify the scope of the statutory prohibition against the disclosure by financial institutions and by the government of SAR information, and clarify the scope of the safe harbor from liability for institutions that report suspicious activities. Therefore,

[24] *See supra* note 1.

[25] *See* 31 CFR 103.18(e) and 12 CFR 21.11(l). The safe harbor regulations are also applicable to oral reports of violations. (In situations requiring immediate attention, a financial institution must immediately notify its regulator and appropriate law enforcement by telephone, in addition to filing a SAR. *See, e.g.*, 12 CFR 21.11(d).)

[26] *See supra* note 17.

pursuant to section 605(b) of the RFA, the OCC hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OCC has determined that this proposal is not a significant regulatory action under Executive Order 12866. We have concluded that the changes that would be made by this proposed rule will not have an annual effect on the economy of $100 million or more. The OCC further concludes that this proposal does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the proposed rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that it does not contain any ''collections of information'' as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 21

Crime, Currency, National banks, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

For the reasons set forth in the preamble, part 21 of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 21—MINIMUM SECURITY DEVICES AND PROCEDURES, REPORTS OF SUSPICIOUS ACTIVITIES; AND BANK SECRECY ACT COMPLIANCE PROGRAM

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

Authority: 12 U.S.C. 93a, 1818, 1881–1884, and 3401–3422; and 31 U.S.C. 5318.

2. Section 21.11 is amended by revising paragraphs (b)(3), (c) introductory text, (k) and (l) to read as follows:

§ 21.11 Suspicious Activity Report.

* * * * *

(b) * * *

(3) *SAR* means a Suspicious Activity Report.

(c) *SARs required.* A national bank shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the OCC and in accordance with the form's instructions. The bank should send the completed SAR to FinCEN in the following circumstances:

* * * * *

(k) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (k).

(1) *Prohibition on disclosure by national banks*—(i) *General rule.* No national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any national bank, and any director, officer, employee, or agent of any national bank that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(A) Director, Litigation Division, Office of the Comptroller of the Currency; and

(B) The Financial Crimes Enforcement Network (FinCEN).

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (k)(1) shall not be construed as prohibiting:

(A) The disclosure by a national bank, or any director, officer, employee or agent of a national bank of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, State, or local law enforcement agency; or any Federal or state regulatory authority that examines the bank for compliance with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures:

(*i*) To another financial institution, or any director, officer, employee or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a national bank, or any director, officer, employee, or agent of a national bank, of a SAR, or any information that would reveal the existence of a SAR, within the bank's corporate organizational structure, for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosure by the OCC.* The OCC will not, and no officer, employee or agent of the OCC, shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33.

(l) *Limitation on liability.* A national bank and any director, officer, employee or agent of a national bank that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another financial institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

Dated: January 22, 2009.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E9–4703 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 4

[Docket ID OCC–2009–0003]

RIN 1557–AD16

Standards Governing the Release of a Suspicious Activity Report

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to revise its regulations governing the release of non-public OCC information. The primary change being proposed would clarify that the OCC's decision to release a suspicious activity report (SAR) will be governed by the standards set forth in proposed amendments to the OCC's SAR regulation that are part of a separate, but simultaneous, rulemaking.

DATES: Comments must be received by June 8, 2009.

ADDRESSES: Because paper mail in the Washington, DC area and received by the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title ''SAR Release Standards'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

Federal eRulemaking Portal—''Regulations.gov'': Go to *http://www.regulations.gov*, under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2009–0003'' to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- *E-mail: regs.comments@occ.treas.gov*.
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5724.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket Number OCC–2009–0003'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this notice of proposed rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov*, under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then, click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2009–0003'' to view public comments for this rulemaking action.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

FOR FURTHER INFORMATION CONTACT: James Vivenzio, Senior Counsel for BSA/AML, (202) 874–5200; Ellen Warwick, Assistant Director, Litigation, (202) 874–5280; or Patrick Tierney, Senior Attorney, Legislative and Regulatory Activities, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Introduction

The OCC is proposing to amend its regulations set forth in 12 CFR part 4, subpart C, governing the release of non-public OCC information. First, the proposed amendments conform subpart C to amendments to the OCC's SAR confidentiality rule, 12 CFR 21.11(k), that are being proposed as part of a separate, but simultaneous, rulemaking that the OCC is conducting together with the Financial Crimes Enforcement Network (FinCEN) and is published elsewhere in this issue of the **Federal Register**. Under the standards that the OCC is proposing to incorporate into part 4, the OCC will only release a SAR, or any information that would reveal the existence of a SAR (referred to in this preamble as ''SAR information'') when ''necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act'' (BSA). The proposed standards also state that ''official duties'' does not include the disclosure of SAR information for use in a private legal proceeding or a request under § 4.33. Thus, one effect of these proposed amendments is that the OCC will not release SAR information in response to a request from a private litigant arising out of a private legal proceeding.

In addition to the clarification of the standards governing the release of SAR information, the proposed amendments to subpart C also clarify that the OCC will deny a request for non-public information made under 12 CFR 4.33, if the release is prohibited by law. Finally, the amendments include a technical correction to § 4.37 that is described in section III of this **SUPPLEMENTARY INFORMATION**.

II. Background

As described in greater detail below, this proposal amends part 4 to make subpart C consistent with the proposed amendments to the OCC's SAR regulation that implement section 351 of the USA PATRIOT Act, to ensure that the appropriate standard is applied to the OCC's disclosure of SAR information. 12 CFR part 4, subpart C, contains the OCC's standards and procedures for the release of ''non-public OCC information,'' and sets forth the restrictions on the dissemination of such information. Generally, ''non-public OCC information'' is confidential and privileged information that is the property of the OCC, and that the OCC is not required to release under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) or that the OCC has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders. Examples in subpart C of ''non-public OCC information'' currently include ''a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or

chartered by the OCC under 12 CFR 21.11.'' [1]

Subpart C generally describes procedures for requesting non-public OCC information from the OCC, such as where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OCC's denial of such a request.[2] Subpart C also authorizes the OCC to make non-public OCC information available to a supervised entity and to other persons, at the sole discretion of the Comptroller, without a request for records or testimony,[3] and sets forth the OCC's policy regarding the release of non-public OCC information to other government agencies in response to a request.[4] Subpart C also describes the conditions and limitations that the OCC may place on information it discloses under subpart C.

Although SARs fall within the definition of ''non-public OCC information,'' the release of a SAR is governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[5] SARs generally are unsubstantiated reports of possible violations of law or of suspicious activities that are used for law enforcement or regulatory purposes. The BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[6] More importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person [7] involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[8] Accordingly, it is this provision that now governs the ability of the OCC to disclose SAR information to any person.

In 1999, the OCC amended the examples in its definition of ''non-public OCC information'' to explicitly include a SAR filed by the OCC or a supervised entity, making SARs subject to the procedures for the release of non-public OCC information set forth in part 4.[9] The preamble to the final rule explained ''while the OCC has always taken the position that SARs are non-public information, the OCC was proposing this change to enhance the ability of banks and the OCC to protect SARs from being disclosed when SARs are sought by private litigants.'' [10] Later, the preamble explains that SARs were being added to the list of examples of non-public OCC information ''to protect the confidentiality of SARs further, particularly in litigation, not to make them more easily disclosable.'' [11]

The OCC is revisiting the treatment of SAR information in subpart C in light of the 2001 amendments to the BSA, added by section 351 of the USA PATRIOT Act, that specifically address governmental disclosures of SARs. Under the proposed amendments to subpart C, the OCC will decide whether to release SAR information based upon the standard in the OCC's proposed amendments to its SAR rules, 12 CFR 21.11(k), implementing section 351, rather than upon any of the factors set out in subpart C.[12] The standard in the proposed amendments to the OCC's SAR rules provides that the OCC will not, and an officer, employee or agent of the OCC, shall not, disclose SAR information except as necessary to fulfill official duties consistent with Title II of the BSA. In addition, the standard provides that ''official duties'' shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33.

The proposed SAR rules interpret ''official duties'' as ''official duties consistent with the purposes of Title II of the BSA,'' meaning, official disclosures necessary to accomplish a governmental purpose entrusted to the agency, the officer, or employee, consistent with the purposes of Title II of the BSA, namely, for ''criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [13] This standard would permit, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[14]

III. Section-by-Section Description of the Proposal

Section 4.31(b)(4) Purpose and Scope

Subpart C currently includes several standards for the release of non-public OCC information. A person seeking non-public OCC information generally must submit a request in writing to the OCC that addresses the factors set forth in § 4.33. Section 4.35 describes how the OCC will make its determination to release the information, and contains an illustrative list of possible bases for denial of a request.[15] Section 4.36(a) provides that the OCC may release information to a supervised entity or any person, even without a request, at the discretion of the Comptroller when necessary or appropriate. In addition, the scope section of subpart C makes clear that § 4.37(c) applies to requests for non-public OCC information from Federal and foreign governments and state agencies with authority to investigate violations of criminal law, and state bank regulatory agencies.[16] Section 4.37(c) states that, when not prohibited by law, the Comptroller may make non-public OCC information available to these governmental entities for their use, when necessary in the performance of their official duties.

This proposal adds a new paragraph (b)(4) to 12 CFR 4.31, the scope section of subpart C, which states that the OCC's decision to disclose records or testimony involving SAR information for purposes of 12 CFR 4.35(a)(1), 4.36(a), and 4.37(c), is governed solely by the standard in 12 CFR 21.11(k). Accordingly, the Comptroller's

[1] *See* 12 CFR 4.32(b)(vii)

[2] *See* 12 CFR 4.33–4.35.

[3] *See* 12 CFR 4.36.

[4] *See* 12 CFR 4.37(c).

[5] 31 U.S.C. 5318(g)(1).

[6] 31 U.S.C. 5318(g)(2)(A)(i).

[7] The phrase ''any person involved in the transaction'' has been construed to apply to ''any person'' because the disclosure of SAR information to any outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is expressly prohibited by the BSA. *See Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[8] *See* USA PATRIOT Act, section 351(b). Pub. L. 107–56, Title III, section 351, 115 Stat. 272, 321(2001).

[9] 64 FR 29214 (June 1, 1999).

[10] 64 FR 29215 (June 1, 1999).

[11] 64 FR 29216 (June 1, 1999).

[12] *See, e.g.,* 12 CFR 4.33.

[13] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[14] *See, e.g., Giglio* v. *United States*, 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland*, 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States*, 353 U.S. 657, 668 (1957).

[15] *See* 12 CFR 4.35(a)(2).

[16] *See* 12 CFR 4.31(b)(3).

discretion to disclose SAR information to any person or entity without a request under § 4.36, and the OCC's determination to disclose SAR information in response to a request for use in private litigation under § 4.33 or to another government agency under § 4.37, will be circumscribed by the standard in the proposed amendments to 12 CFR 21.11(k) prohibiting the disclosure of SAR information ''except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.'' In accordance with the OCC's longstanding commitment to protect the confidentiality of SARs, this proposed standard also provides that ''official duties'' does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33.

Section 4.32(b) Definition of Non-Public OCC Information

This proposal amends the definition of ''non-public OCC information'' in § 4.32(b) to remove the reference to ''a SAR filed by the OCC, a national bank, or a Federal branch or agency of a foreign bank licensed or chartered by the OCC under 12 CFR 21.11'' from the illustrative list of examples that follow the definition of ''non-public OCC information.'' SAR information would still be covered by the definition of ''non-public OCC information.'' However, the OCC is proposing to remove the reference to SARs from the illustrative list because highlighting SAR information as an example of non-public OCC information would be misleading in light of the amendments to § 4.31 described in the previous section. As described earlier, under the amendments to subpart C, SAR information would become a unique subset of non-public OCC information subject to release solely in accordance with the standards set forth in 12 CFR 21.11(k).

Notwithstanding the OCC's deletion of the specific reference to SARs as an example of ''non-public OCC information,'' SAR information would continue to be otherwise subject to the provisions of subpart C that are not superseded by the standards proposed in part 21. For example, § 4.37(d), which generally provides that the possession by a person of non-public OCC information does not constitute a waiver by the OCC of its right to control, or impose limitations on, the use and dissemination of the information, would continue to apply to SAR information.

Section 4.35(a)(2) Consideration of Requests

Section 4.35 generally describes how the OCC makes its determination to release or to withhold non-public OCC information in response to requests received under § 4.33. Section 4.35(a)(2) lists five examples of reasons for which the OCC will deny the release of non-public OCC information.

The OCC is proposing to add ''when prohibited by law'' as a sixth example of a reason for denial of requests made under § 4.33. This addition clarifies that the OCC may deny a request under § 4.33 when prohibited by law, for example, when the standard in § 21.11(k) is applicable to a request for SAR information.

Section 4.37(c) Disclosures to Government Agencies

The proposal also makes a technical correction to § 4.37(c). Section 4.37(c) describes the basis for disclosures of non-public OCC information to government agencies. The last sentence in § 4.37(c) also states that any information that is made available under this section is OCC property, and the OCC may condition its use on appropriate confidentiality protections, ''including the mechanisms identified in § 4.37.'' However, the various mechanisms that provide confidentiality protections are identified in § 4.38 of subpart C, rather than in § 4.37. Therefore, the OCC is proposing to replace the reference to ''§ 4.37'' with a reference to ''§ 4.38.''

IV. Request for Comments

The OCC welcomes comments on any aspect of these proposed amendments to the SAR rules.

The OCC has timed the release of this proposal to coincide with the issuance of the proposed rules to amend its SAR confidentiality rules set forth in 12 CFR part 21.11(k), so that commenters can consider each proposal in commenting on the other.

V. OCC Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OCC to use plain language in all proposed and final rules published after January 1, 2000. Therefore, the OCC specifically invites your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposal clearly stated? If not, how could the requirements be more clearly stated?
- Does the proposal contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format make the regulations easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the regulations easier to understand?

VI. OCC Community Bank Comment Request

The OCC invites your comments on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

VII. OCC Regulatory Analysis

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OCC has determined that the proposed amendments will not have a significant economic impact on a substantial number of small entities. The proposed changes in internal standards, which were prompted by a statutory change, will simply affect the nature of the OCC's internal deliberations regarding the agency's ability to disclose a SAR. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OCC has determined that this proposal is not a significant regulatory action under Executive Order 12866. The OCC has concluded that the proposed change in the OCC's internal

standards for determining whether a SAR should be disclosed will not have an annual effect on the economy of $100 million or more. The OCC further concludes that this proposal does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the proposed amendments in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that they do not contain any ''collections of information'' as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted for inflation) in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that these proposed amendments, which change the standards the OCC will apply when determining whether to release a SAR, will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more (adjusted for inflation) in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 4

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

Authority and Issuance

For the reasons set forth in the preamble, part 4, subpart C, of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

1. Revise the authority citation for part 4 to read as follows:

Authority: 12 U.S.C. 93a. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552; E.O. 12600 (3 CFR 1987 Comp., p. 235). Subpart C also issued under 5 U.S.C. 301, 552; 12 U.S.C. 161, 481, 482, 484(a), 1442, 1817(a)(2) and (3), 1818(u) and (v), 1820(d)(6), 1820(k), 1821(c), 1821(o), 1821(t), 1831m, 1831p–1, 1831o, 1867, 1951 *et seq.*, 2601 *et seq.*, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.*; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510. Subpart D also issued under 12 U.S.C. 1833e.

2. Add § 4.31(b)(4) to read as follows:

§ 4.31 Purpose and scope.

* * * * *

(b) * * *

(4) For purposes of §§ 4.35(a)(1), 4.36(a) and 4.37(c), the OCC's decision to disclose records or testimony involving a Suspicious Activity Report (SAR) filed pursuant to the regulations implementing 12 U.S.C. 5318(g), or any information that would reveal the existence of a SAR, is governed solely by 12 CFR 21.11(k).

* * * * *

§ 4.32 [Amended]

3. Amend § 4.32(b) by:

a. Removing paragraph (b)(1)(vii).

b. Adding the word ''and'' at the end of paragraph (b)(1)(v); and

c. Removing, at the end of paragraph (b)(1)(vi), ''; and'' and adding a period in its place;

4. Amend § 4.35(a)(2) by:

a. Removing the word ''or'' at the end of paragraph (a)(2)(iv);

b. Removing, in paragraph (a)(2)(v), the period and by adding in lieu thereof ''; or''; and

c. Adding a new paragraph (a)(2)(vi) to read as follows:

§ 4.35 Consideration of requests.

(a) * * *

(2) * * *

(vi) When prohibited by law.

* * * * *

§ 4.37 [Amended]

5. In paragraph § 4.37(c), remove the reference to ''§ 4.37'' in the last sentence and add in lieu thereof ''§ 4.38.''

Dated: January 22, 2009.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E9–4700 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[Docket ID OTS–2008–0015]

RIN 1550–AC26

Confidentiality of Suspicious Activity Reports

AGENCY: The Office of Thrift Supervision, Treasury (OTS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The OTS is proposing to amend its regulations implementing the Bank Secrecy Act (BSA) governing the confidentiality of a Suspicious Activity Report (SAR) to: clarify the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction, as it applies to savings associations and service corporations; address the statutory prohibition on the disclosure by the government of a report of a suspicious transaction, as that prohibition applies to the OTS's standards governing the disclosure of SARs; clarify the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR, by the OTS is ''to fulfill official duties consistent with the purposes of the BSA''; and modify the safe harbor provision in its rules to include changes made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. These amendments are based upon a similar proposal being contemporaneously issued by the Office of Comptroller of the Currency (OCC) and the Financial Crimes Enforcement Network (FinCEN).

DATES: Comments must be received by June 8, 2009.

ADDRESSES: You may submit comments, identified by OTS–2008–0015 (''docket number'') by any of the following methods:

- *Federal eRulemaking Portal:*— ''Regulations.gov'': Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency drop-down menu, then click ''Submit.'' In the

''Docket ID'' column, select ''OTS–2008–0015'' to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

• *E-mail address: regs.comments@ots.treas.gov.* Please include OTS–2008–0015 in the subject line of the message and include your name and telephone number in the message.

• *Fax:* (202) 906–6518.

• *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, *Attention:* OTS–2008–0015.

• *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, OTS–2008–0015.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet Site at *http://www.ots.treas.gov/Supervision&Legal.Laws&Regulations,* including any personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that could be considered confidential or inappropriate for public disclosure.

• *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency drop-down menu and click ''Submit.'' In the ''Docket ID'' column, select ''[OTS–2008–0015]'' to view public comments for this rulemaking action.

• *Viewing Comments On-Site:* You may inspect comments at the OTS's Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

FOR FURTHER INFORMATION CONTACT: Louise Batdorf, Analyst, BSA and Compliance Examinations (202–906–7087); Marvin Shaw, Senior Attorney, Regulations and Legislation (202–906–6639); Margaret McPartlin, Senior Attorney, Enforcement (202–906–6831); or Noelle Kurtin, Senior Attorney, Enforcement (202–906–6739).

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions, including savings associations and service corporations regulated by the OTS, to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of federal law or a suspicious transaction related to a money laundering activity or a violation of the BSA, terrorist financing, or other criminal activity.[1]

SARs are used for law enforcement or regulatory purposes to combat terrorism, terrorist financing, money laundering and other financial crimes. For this reason, the BSA provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported. To encourage the reporting of possible violations of law and regulation, and the filing of SARs, the BSA also contains a safe harbor provision which shields financial institutions making such reports from civil liability. In 2001, the USA PATRIOT Act clarified that the safe harbor covers voluntary disclosure of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement.)'' [2]

FinCEN [3] has issued rules implementing SAR confidentiality provisions for various types of financial institutions that closely mirror the statutory language.[4] In addition, the federal bank regulatory agencies implemented these provisions through similar regulations that provide that SARs are confidential and generally no information about or contained in a SAR may be disclosed.[5] The regulations issued by FinCEN and the federal bank regulatory agencies also describe the applicability of the safe harbor provision to both voluntary reports of possible and known violations of law and regulation and the required filing of SARs.

The USA PATRIOT Act of 2001 strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[6] The USA PATRIOT Act also expanded the safe harbor provision shielding financial institutions from liability for voluntary reporting of possible violations of law and regulations, and the filing of SARs, to cover any civil liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' [7]

FinCEN is proposing to modify its SAR rule to interpret or further interpret the provisions of the BSA that relate to the confidentiality of SARs and the safe harbor for such reporting. The OTS is

[1] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act), amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Public Law 102–550, Title XV, § 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1). The OCC, Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA), (collectively referred to as the Federal bank regulatory agencies) subsequently issued virtually identical implementing regulations on suspicious activity reporting. *See* 12 CFR 21.11 (OCC); 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS) and 12 CFR 748.1 (NCUA).

[2] *See* USA PATRIOT Act, section 351(a). Pub. L. 107–56, Title III, § 351, 115 Stat. 272, 321 (2001).

[3] FinCEN is the agency designated by the Department of Treasury to administer the BSA, and with which SARS must be filed. *See* 31 U.S.C. 5318; 12 CFR 563.180(d).

[4] *See,* e.g., 31 CFR 103.18(e) (SAR confidentiality rule for banks); 31 CFR 103.19(e) (SAR confidentiality rule for brokers or dealers in securities).

[5] *See* 12 CFR 21.11(k) (OCC); 12 CFR 208.62(j) (FRB); 12 CFR 353.3(g) (FDIC); 12 CFR 563.180(d)(12) (OTS); and 12 CFR 748.1 (NCUA).

[6] *See* USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001). 31 U.S.C. 5318(g)(2).

[7] *See* USA PATRIOT Act, section 351(a). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001).

proposing to amend its rule contemporaneously, based upon the proposal being issued by FinCEN, to clarify the manner in which these provisions apply to savings associations and service corporations and the OTS's own standards governing the disclosure of a SAR and any information that would reveal the existence of a SAR (referred to in this preamble as ''SAR information'').

II. Overview of Proposal

The proposed amendments to the OTS's rule include key changes that would (1) clarify the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction, as it applies to savings associations and service corporations; (2) address the statutory prohibition on the disclosure by the government of a report of a suspicious transaction, which was added to the BSA by section 351(b) of the USA PATRIOT Act of 2001, as that prohibition applies to the OTS's standards governing the disclosure of SAR information; and (3) clarify that the exclusive standard applicable to the disclosure of SAR information by the OTS is ''to fulfill official duties consistent with the purposes of the BSA,'' in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed. In addition, the proposed amendments would modify the safe harbor provision in the OTS's SAR rules [8] to include changes made by the USA PATRIOT Act.

In addition, as described in Section III, FinCEN is issuing for notice and comment proposed guidance regarding the sharing of SARs with affiliates. FinCEN's proposed guidance interprets a provision of the proposed rulemaking, and, accordingly, should be read in conjunction with this notice.

In a separate rulemaking, the OTS also is simultaneously proposing to amend its information disclosure regulation set forth in 12 CFR 510.5, to clarify that the exclusive standard governing the release of a SAR is set forth in 12 CFR 563.180. The OTS is issuing this proposed amendment to 12 CFR part 510, at the same time, to make clear that the OTS will disclose SAR information only when necessary to satisfy the BSA purposes for which SARs are filed.

[8] 12 CFR 563.180(d)(13).

III. Section-by-Section Description of the Proposal

Section 563.180(d)(2)(iii): Definition of a SAR

The primary purpose of the OTS's SAR rule is to ensure that a savings association or service corporation files a SAR when it detects a known or suspected violation of a federal law or a suspicious transaction related to a money laundering activity or a violation of the BSA. See 12 CFR 563.180. Incidental to this purpose, the OTS's SAR rule includes a section that addresses the confidentiality of SARs.

Under the current SAR rule, the term ''SAR'' means ''a Suspicious Activity Report on the form prescribed by the OTS.'' The proposed rule simply defines a ''SAR'' generically as ''a Suspicious Activity Report.'' This change would extend the confidentiality provisions of the OTS's SAR rule to all SARs, including those filed on forms prescribed by FinCEN.[9] As a consequence, a savings association or service corporation that obtained a SAR, for example, from a non-bank affiliate pursuant to the provisions of this proposed rule, would be required to safeguard the confidentiality of the SAR, even if the SAR had not been filed on a form prescribed by the OTS.

Section 563.180(d)(3): SARs Required

To clarify that a savings association or service corporation must file a SAR on a form ''prescribed by the OTS,'' the OTS is proposing to add this phrase to the introductory language of the section of the OTS's SAR rule that describes the procedures for filing of a SAR. Accordingly, the proposed rules require a savings association or service corporation to file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury *on the form prescribed by the OTS* in accordance with the form's instructions, by sending a completed SAR to FinCEN.

Section 563.180(d)(12): Confidentiality of SARs

The OTS is proposing to amend its rules regarding SAR confidentiality [10] by modifying the introductory sentence, and dividing the remainder of the current provision into two sections. The first section would describe the prohibition on disclosure of SAR information by savings associations and service corporations, and the rules of construction applicable to this prohibition. The second section would describe the prohibition on the OTS's disclosure of SAR information.

Currently, the OTS's rules prohibiting the disclosure of SARs begins with the statement that SARs are confidential. Over the years, the OTS has received numerous questions regarding the scope of the prohibition on the disclosure of a SAR in the OTS's current rules. Accordingly, the OTS is proposing to clarify the scope of SAR confidentiality by more clearly describing the information that is subject to the prohibition. Like FinCEN, the OTS believes that all of the reasons for maintaining the confidentiality of SARs are equally applicable to any information that would reveal the existence of a SAR.

The OTS believes that the confidentiality of a SAR cannot be maintained unless any information that would reveal the existence of a SAR (such as the draft of a SAR that has been filed) is protected from disclosure. The confidentiality of SARs must be maintained for a number of compelling reasons. For example, the disclosure of a SAR could result in notification to persons involved in the transaction that is being reported, and compromise any investigations being conducted in connection with the SAR. In addition, even the occasional disclosure of a SAR could chill the willingness of a savings association or service corporation to file SARs, and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement. If a savings association or service corporation believes that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions. Savings associations and service corporations also may be reluctant to report suspicious transactions, or may delay making such reports, for fear that the disclosure of a SAR will interfere with its relationship with its customer. Further, a SAR may provide insight into how a savings association or service corporation uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could harm the personal privacy interests of individuals and reputational interests of companies that may be named. Finally, the disclosure of a SAR for uses unrelated to the law enforcement and regulatory purposes for which SARs are intended increases the risk that savings associations' or service corporations' employees or others who

[9] *See, e.g.,* 31 CFR 103.19 (FinCEN regulations requiring brokers or dealers in securities to file reports of suspicious transactions on a SAR–S–F).

[10] 12 CFR 563.180(d)(12).

are involved in the preparation or filing of a SAR could become targets for retaliation by persons whose criminal conduct has been reported.

These reasons for maintaining the confidentiality of SARs also apply to any information that would reveal the existence of a SAR. Therefore, like FinCEN, the OTS is proposing to modify the general introduction in its rules to state that confidential treatment must also be afforded to ''any information that would reveal the existence of a SAR.'' The introduction also would indicate that SAR information may not be disclosed, except as authorized in the narrow circumstances that follow.

Section 563.180(d): Prohibition on Disclosure by Savings Associations

The OTS's current rules provide that any institution or person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must (1) decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, and (2) notify the OTS.

The proposed rules more specifically address the prohibition on the disclosure of a SAR by a savings association or service corporation. The rules provide that the prohibition includes ''any information that would reveal the existence of a SAR'' instead of using the phrase ''any information that would disclose that a SAR has been prepared or filed.'' The OTS, like FinCEN and the OCC, believes that this phrase more clearly describes the type of information that is covered by the prohibition on the disclosure of a SAR. In addition, the proposed rules incorporate the specific reference in 31 U.S.C. 5318(g)(2)(A)(i) to ''directors, officers, employees and agents,'' in order to clarify that the prohibition on disclosure extends to those individuals in a savings association or service corporation who may have access to SAR information.

Although 31 U.S.C. 5318(g)(2)(A)(i) states that a ''person involved in the transaction may not be notified that the transaction has been reported,'' the proposed rules continue to reflect case law that has consistently concluded in accordance with applicable regulations, that financial institutions are broadly prohibited from disclosing a SAR or information that would reveal existence of a SAR to any person. Accordingly, these cases have held that, in the context of discovery in connection with civil lawsuits, financial institutions are prohibited from disclosing a SAR or information that would reveal the existence of a SAR, because section 5318(g) and its implementing regulations have created an unqualified discovery and evidentiary privilege for such information that cannot be waived by financial institutions.[11] Consistent with case law and current regulation, the texts of the proposed rules do not limit the prohibitions on disclosure only to the person involved in the transaction. Permitting disclosure to any outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is absolutely prohibited by the statute.

The proposed rules continue to provide that any savings association, or any director, officer, employee or agent of a savings association, subpoenaed or otherwise requested to disclose SAR information must decline to provide the information, citing this section of the rules and 31 U.S.C. 5318(g)(2)(A)(i), and must give notice of the request to the OTS. In addition, the proposed rules require the savings association or service corporation to notify the OTS of its response to the request, and require the savings association or service corporation, to provide the same information to FinCEN. This new notification requirement was added to the proposed rules so that either or both agencies can intervene to prevent the disclosure of SAR information by a savings association or service corporation, if necessary.

Section 563.180(d)(12)(ii): Rules of Construction

The OTS, like FinCEN and the OCC, is proposing rules of construction to address issues that have arisen over the years about the scope of the SAR disclosure prohibition, and to implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition on disclosure of SAR information by a savings association or service corporation. The introduction to these rules makes clear that the rules of construction are each qualified by the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported.

The first proposed rule of construction states that a savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation may disclose SAR information to FinCEN or any Federal, state, or local law enforcement agency; or any federal or state regulatory agency that examines the financial institution for compliance with the BSA. Although the permissibility of such disclosures may be readily apparent, the proposal contains this statement to clarify that a savings association or service corporation cannot use the prohibition on disclosure of SAR information to withhold this information from governmental authorities that are otherwise entitled by law to receive SARs and to examine for and investigate suspicious activity.

The second proposed rule of construction provides that SAR information does not include the underlying facts, transactions, and documents upon which a SAR is based. This statement reflects case law which has recognized that, while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information, upon which a SAR is based), may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[12]

This proposed rule of construction includes some illustrative examples of situations where a savings association or service corporation may disclose the underlying facts, transactions, and documents upon which a SAR is based. The first example clarifies that a savings association or service corporation may disclose this information[13] to another financial institution, or any director, officer, employee or agent of the financial institution, for the preparation of a joint SAR.[14] The second example

[11] *See Whitney Nat'l Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.,* 235 F.Supp. 2d 809, 815 (N.D. Ill. 2002).

[12] *See Cotton* v. *Private Bank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

[13] The underlying facts, transactions, and documents upon which a SAR is based do not include previously filed SARs that were not jointly filed.

[14] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. ''*Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs,*'' Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On April 26, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Although joint filing of SARs by depository institutions is not permitted at this time, this proposal would amend the agencies' regulations to enable depository institutions to make disclosures

simply codifies a rule of construction added to the BSA by section 351 of the USA PATRIOT Act which provides that such underlying information may be disclosed in certain written employment references and termination notices.[15]

The third proposed rule of construction makes clear that the prohibition on the disclosure of SAR information by a savings association or service corporation does not include the sharing by a savings association or service corporation, or any director, officer, employee or agent of such a financial institution, of SAR information within the institution's corporate organizational structure, for purposes consistent with Title II of the BSA, as determined by regulation or in published guidance. This proposed rule recognizes that a savings association or service corporation may find it necessary to share SAR information to fulfill its reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring and reporting, consistent with Title II of the BSA.

FinCEN and the Federal bank regulatory agencies have already issued joint guidance making clear that the U.S. branch or agency of a foreign bank may share a SAR with its head office, and that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). This guidance stated that the sharing of a SAR with a head office or controlling company both facilitates compliance with the applicable requirements of the BSA and enables the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[16] Concurrent with this proposed rulemaking, FinCEN is issuing additional guidance for notice and comment that further elaborates on sharing of SAR information within a corporate organization that FinCEN considers to be ''consistent with the purposes of the BSA.'' FinCEN has indicated that the proposed guidance would generally permit sharing of SAR information by depository institutions with their affiliates [17] that are subject to a SAR.[18] Consistent with the BSA and the proposed rules of construction, the proposed guidance also states that a financial institution may not share SAR information if the institution has reason to believe that the SAR may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

Section 563.180(d)(12): Prohibition on Disclosure by the OTS

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, and added a new provision prohibiting officers and employees of the government from disclosing a SAR except ''as necessary to fulfill the official duties of such officer or employee.'' The OTS is proposing rules to address this new section that are comparable to those being proposed by the OCC and FinCEN. The proposed rules provide that the OTS will not, and no officer, employee or agent of the OTS, shall disclose SAR information, ''except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.''

As stated in section 5318(g)(2)(A)(i), which prohibits a financial institution's disclosure of a SAR, section 5318(g)(2)(A)(ii) also prohibits the government from disclosing a SAR to ''any person involved in the transaction.'' The OTS, like the OCC and FinCEN, is proposing to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure by a governmental authority of SAR information to any outside party may make it likely that the information will be disclosed to a person involved in the transaction. Accordingly, the section of the rules that address the disclosure of SAR information by the OTS and its officers, employees and agents is broad, and does not simply prohibit disclosure to ''any person involved in the transaction.''

Section 5318(g)(2)(A)(ii) narrowly permits governmental disclosures as necessary to ''fulfill official duties,'' a phrase that is not defined in the BSA. Consistent with the rules being proposed by FinCEN and the OCC, the OTS is proposing to construe this phrase in the context of the BSA, in light of the purpose for which SARs are filed. Accordingly, the proposed rules interpret ''official duties'' to mean ''official duties consistent with the purposes of Title II of the BSA,'' namely, for ''criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [19] This standard would permit, for example, disclosures responsive to a grand jury subpoena; a request from an appropriate federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittee; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[20] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that SAR information will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit disclosure of SAR information to the media.

The proposed rules also specifically provide that ''official duties'' shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of unpublished information under 12 CFR 510.3. This statement, which corresponds to a similar provision in FinCEN's proposed rules, clearly establishes that the OTS will not disclose SAR information to a private litigant for use in a private legal proceeding, or pursuant to 12 CFR 510.3, because such a request cannot be consistent with any of the purposes enumerated in Title II of the BSA. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to ensure that the U.S. financial system will not be used for criminal activity or to support terrorism. The OTS, like FinCEN, believes that this purpose would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit for the reasons described earlier, including, that such disclosures will chill full and candid reporting by financial institutions, including savings associations.

Finally, the proposed rules would apply to the OTS, in addition to its officers, employees, and agents. Comparable to a provision being proposed by FinCEN and the OCC, the OTS is proposing to include the agency itself in the scope of coverage, because

necessary to effectuate joint SAR filings, in the event that the revised SAR form becomes effective.

[15] 31 U.S.C. 5318(b)(2)(B).

[16] ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006).

[17] Under the proposed guidance, an ''affiliate'' of a depository institution means any company under common control with, or controlled by, that depository institution.

[18] *See, e.g.,* 12 CFR 21.11 (SAR rule applicable to national banks).

[19] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[20] See, *e.g.*, *Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

requests for SAR information are typically directed to the agency, rather than to individuals within the OTS with authority to respond to the request. In addition, agents are included in the proposed paragraph because agents of the OTS may have access to SAR information. Accordingly, this proposed interpretation would more comprehensively cover disclosures by the OTS, agents of the OTS, and protect the confidentiality of SAR information.

Section 563.180(d)(13): Safe Harbor/ Limitation on Liability

In 1992, the Annunzio-Wylie Act amended the BSA by providing a safe harbor for financial institutions and their employees from civil liability for the reporting of known or suspected criminal offenses or suspicious activity through the filing of a SAR.[21] FinCEN, the OCC, and the OTS incorporated the safe harbor provisions of the 1992 law into their SAR rules.[22] In Section 351 of the USA PATRIOT Act, Congress amended section 5318(g)(3) to clarify the scope of the safe harbor provision to include the voluntary disclosure of possible violations of law and regulations to a government agency, and to expand the scope of the limit on liability to include any liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' The OTS has more closely tracked the statutory language in the proposed rule, particularly by stating that the safe harbor applies to ''disclosures'' (and not ''reports'' as in some previous rulemakings) made by institutions. The OTS, like FinCEN and the OCC, has incorporated the statutory expansion of the safe harbor by placing a cross-reference to section 5318(g)(3) in the proposed rules.

Additionally, to comport with the authorization to jointly file SARs, like FinCEN, the OTS is clarifying that the safe harbor also applies to ''a disclosure made jointly with another institution.'' This concept exists currently in those SAR rules where joint filing had been explicitly referenced, but has been revised to track more closely the statutory language. It has also been inserted for the sake of consistency into those SAR rules where it had been absent previously, clarifying that all parties to a joint filing, and not simply the party that provides the form to the OTS or FinCEN, fall within the scope of the safe harbor.

Conforming Amendments to 12 CFR Part 510

The OTS is proposing to amend its release of unpublished OTS information rule set forth in 12 CFR part 510. Among other things, the proposal clarifies that the OTS's disclosure of SAR information will be governed exclusively by the standards set forth in the proposed amendments to the OTS's SAR rule set forth in 12 CFR 563.180. The effect of these proposed amendments is that the OTS: (i) Will not release SAR information to private litigants; and (ii) will only release SAR information to other government agencies, in response to a request or in the exercise of its discretion, when necessary to fulfill official duties consistent with the purposes of Title II of the BSA.

IV. Request for Comments

The OTS welcomes comments on any aspect of these proposed amendments to the SAR rules.

The OTS has timed the release of this proposal to coincide with the issuance of the proposed rule to amend the information disclosure rules set forth in 12 CFR part 510, so that commenters can consider each proposal in commenting on the other.

V. OTS Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OTS to use plain language in all proposed and final rules published after January 1, 2000. Therefore, the OTS specifically invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulations clearly stated? If not, how could the regulations be more clearly stated?
- Do the proposed regulations contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulations easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the regulations easier to understand?

VI. OTS Regulatory Analysis

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OTS has determined that the proposed rules do not impose any economic costs as they simply clarify the scope of the statutory prohibition against the disclosure by financial institutions and by the government of SAR information. Therefore, pursuant to Section 605(b) of the RFA, the OTS hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OTS has determined that this proposal is not a significant regulatory action under Executive Order 12866. We have concluded that the changes that would be made by this proposed rule will not have an annual effect on the economy of $100 million or more. The OTS further concludes that this proposal does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

The OTS has reviewed the proposed rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and has determined that it does not contain any ''collections of information'' as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. The current inflation-adjusted expenditure threshold is $133 million. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires

[21] See footnote 1.

[22] See 31 CFR 103.18(e) (FinCEN), 12 CFR 21.11(l) (OCC), 12 CFR 563.180(d)(13) (OTS). The safe harbor regulations are also applicable to oral reports of violations. In situations requiring immediate attention, a financial institution must immediately notify its regulator and appropriate law enforcement by telephone, in addition to filing a SAR. See, *e.g.*, 12 CFR 563.180(d)(13).

an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OTS has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $133 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 563

Crime, Currency, Savings associations, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

For the reasons set forth in the preamble, part 563 of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 563—SAVINGS ASSOCIATIONS—OPERATIONS

1. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462a, 1463, 1464, 1467a, 1468, 1817, 1828, 3806; 31 U.S.C 5318;

2. Section 563.180 is amended by revising paragraphs (d)(2)(iii), (d)(3) introductory text, (d)(12), and (d)(13) to read as follows:

§ 563.180 Suspicious Activity Reports and Other Reports and Statements.

* * * * *

(d) * * *

(2) * * *

(iii) *SAR* means a Suspicious Activity Report.

(3) *SARs required.* A savings association or service corporation shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the OTS and in accordance with the form's instructions, by sending a completed SAR to FinCEN in the following circumstances:

* * * * *

(12) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (d)(12).

(i) *Prohibition on disclosure by savings associations*—(A) *General rule.* No savings association or Service Corporation, and no director, officer, employee, or agent of a savings association or service corporation, shall disclose a SAR or any information that would reveal the existence of a SAR. Any savings association or service corporation, and any director, officer, employee, or agent of any savings association or service corporation that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(*1*) Deputy Chief Counsel, Litigation Division, Office of Thrift Supervision; and

(*2*) The Financial Crimes Enforcement Network (FinCEN).

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, subparagraph (k)(1) shall not be construed as prohibiting:

(A) The disclosure by a savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency; or any Federal or state regulatory authority that examines the savings association for compliance with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures:

(*i*) To another financial institution, or any director, officer, employee or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a savings association, or any director, officer, employee, or agent of a savings association, of a SAR, or any information that would reveal the existence of a SAR, within the savings association's corporate organizational structure, for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in published guidance.

(iii) *Prohibition on disclosure by OTS.* Neither OTS (nor any officer, employee or agent of OTS) shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.

(13) *Limitation on liability.* A savings association or service corporation and any director, officer, employee or agent of a savings association or service corporation that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

* * * * *

Dated: November 18, 2008.

By the Office of Thrift Supervision.

John M. Reich,

Director.

Editorial Note: This document was received in the Office of the Federal Register on February 27, 2009.

[FR Doc. E9–4701 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 510

[Docket ID OTS–2008–0018]

RIN 1550–AC28

Standards Governing the Release of a Suspicious Activity Report

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) is proposing to revise its regulations governing the release of unpublished OTS information. The primary change being proposed would clarify that the OTS's decision to release a Suspicious Activity Report (SAR) will be governed by the standards set forth in proposed amendments to the OTS's SAR regulation that are part of a separate, but simultaneous, rulemaking.

DATES: Comments must be received by June 8, 2009.

ADDRESSES: You may submit comments, identified by OTS–2008–0018 by any of the following methods:

- *Federal Rulemaking Portal:*— ''Regulations.gov'': Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Office of Thrift

Supervision'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OTS–2008–0018'' to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

• *E-mail address: regs.comments@ots.treas.gov.* Please include OTS–2008–0018 in the subject line of the message and include your name and telephone number in the message.

• *Fax:* (202) 906–6518.

• *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: OTS–2008–0018.

• *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, OTS–2008–0010.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet Site at *http://www.ots.treas.gov/Supervision&Legal.Laws&Regulations,* including any personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that could be considered confidential or inappropriate for public disclosure.

• *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency drop-down menu and click ''Submit.'' In the ''Docket ID'' column, select ''OTS–2008–0018'' to view public comments for this rulemaking action.

• *Viewing Comments On-Site:* You may inspect comments at the Public Reading Room, 1700 G Street, NW by appointment. To make an appointment call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

FOR FURTHER INFORMATION CONTACT: Marvin Shaw, Senior Attorney, Regulations and Legislation (202–906–6639); Dirk Roberts, Deputy General Counsel, Litigation (202–906–7631), Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Office of Thrift Supervision (OTS) is proposing to amend its regulations set forth in 12 CFR part 510, governing the release of unpublished OTS information. First, the proposed amendments would conform section 510.5 to amendments to the OTS's SAR confidentiality rule, 12 CFR 563.180, that are being proposed as part of a separate, but simultaneous, rulemaking that the OTS is conducting. Under the standards that the OTS is proposing to incorporate into section 510.5, the OTS would only release a SAR, or any information that would reveal the existence of a SAR (referred to in this preamble as ''SAR information''), when ''necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA).''

The effect of these proposed amendments is that the OTS would not release SAR information in response to a request from a private litigant arising out of a civil lawsuit or administrative proceeding to which the OTS is not a party. The Director also would not disclose SAR information to any other person or entity, and the OTS would not release SAR information in response to a request by another government agency, except to fulfill official duties in light of the purposes of the BSA.

In addition to the clarification of the standards governing the release of SAR information, the proposed amendments to section 510.5 clarify that the OTS would deny a request for non-public information made under 12 CFR section 510.5(d), if the release is prohibited by law.

II. Background

This proposal would amend part 510 to make it consistent with the proposed amendments to OTS's SAR regulation that implements section 351 of the USA PATRIOT Act, thus ensuring that the appropriate standard is applied to OTS's disclosure of SAR information. Section 510.5 sets forth OTS's standards and procedures for the release of ''unpublished OTS information,'' and sets forth the restrictions on the dissemination of such information. Generally, ''unpublished OTS information'' is confidential and privileged information that is the property of the OTS, and that the OTS is not required to release under the Freedom of Information Act (5 U.S.C. 552 et seq.) or that the OTS has not yet published or made available pursuant to 12 U.S.C. 1818(u), the statute requiring publication of certain enforcement orders.

Section 510.5 describes procedures for requesting unpublished OTS information from the OTS, such as, where to submit a request, the form of the request, information that must be included in any request involving an adversarial matter, and various bases for the OTS's denial of such a request.[1] Section 510.5 authorizes the OTS to make unpublished OTS information available to a supervised entity and to other persons, at the sole discretion of the Director or his or her delegate.[2] Section 510.5(d)(5) also indicates that the OTS may condition release of information that it discloses under this section.

Although a SAR may be considered ''unpublished OTS information,'' it is the OTS's position that the release of a SAR must be governed by standards set forth in the BSA. The BSA and its implementing regulations require a financial institution to file a SAR when it detects a known or suspected violation of Federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[3] The BSA also provides that a financial institution, and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[4] Most importantly, in 2001, section 351 of the USA PATRIOT Act added a new provision to the BSA prohibiting officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States from disclosing to any person[5] involved in a suspicious transaction that

[1] *See* 12 CFR 510.5.

[2] *See* 12 CFR 510.5(d).

[3] 31 U.S.C. 5318(g)(1).

[4] 31 U.S.C. 5318(g)(2)(A)(i).

[5] The phrase ''any person involved in the transaction'' has been construed to apply to ''any person'' because the disclosure of SAR information to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is absolutely prohibited by the BSA. *See Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[6] Accordingly, it is this provision that now governs the ability of the OTS to disclose SAR information to any person.

The OTS is revisiting the treatment of SAR information in section 510.5 in light of the 2001 amendments to the BSA, added by section 351 of the USA PATRIOT Act that specifically addresses governmental disclosures of SARs. Under the proposed amendments to section 510.5, the OTS will decide whether to release SAR information based upon the standard in the OTS's proposed amendments to its SAR rules, 12 CFR 563.180, implementing section 351, rather than upon the factors set out in section 510.5(d). The standard in the proposed amendments to the OTS's SAR rule provides that ''Neither OTS (nor any officer, employee or agent of OTS) shall disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill official duties consistent with Title II of the BSA.'' In addition, the standard provides that ''official duties'' shall not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.[7] The proposed SAR rules interpret ''official duties'' to mean ''official duties consistent with the purposes of Title II of the BSA,'' namely, for ''criminal, tax, regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.''[8] This standard would permit disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[9]

III. Section-by-Section Description of the Proposal

Section 510.5(a) and (b) Scope and Purpose

Section 510(b) currently includes several standards for the release of unpublished OTS information. A person seeking such information, generally must submit a request in writing to the OTS that addresses the factors set forth in section 510.5(b). Section 510.5(d) describes how the OTS will make its determination to release the information. That provision also provides that OTS will deny a request if it deems the information to be (A) not highly relevant, (B) privileged, (C) available from other sources, or (D) information that should not be disclosed for reasons that warrant restriction under the Federal Rules of Civil Procedure.[10]

This proposal adds a new paragraph (iv) to the scope section of 12 CFR 510.5, which states that this section does not apply to OTS's decision to disclose records or testimony involving a SAR filed pursuant to regulations implementing 12 U.S.C. 5318(g) or any information that would reveal the existence of a SAR. Accordingly, the OTS's decision to disclose records or testimony involving SAR information would be governed solely by the standard in 12 CFR 563.180. Paragraph (iv) makes clear that the standard in 12 CFR 563.180 would apply in place of the standards for denial set forth in 12 CFR 510.5(d)(4). Accordingly, the OTS would not release SAR information in response to any request received pursuant to section 510.5, including from a federal, state, or foreign government, and the Director would not disclose SAR information to any person, except to fulfill the OTS's official duties in light of the purposes of the BSA. Consistent with the OTS's longstanding commitment to protect the confidentiality of SARs, the proposed SAR rule also states that ''official duties'' does not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 510.5.

Section 510.5(d) Consideration of Requests

Section 510.5 generally describes how the OTS makes its determination to release or to withhold unpublished OTS information in response to requests received under section 510.5(b) and (d).[11] Section 510.5(d)(4) specifically lists four examples of reasons for which the OTS will deny the release of unpublished OTS information.

The OTS is proposing to add ''when not prohibited by law'' as a fifth reason for denial of requests made under section 510.5(d)(4). This addition would simply make the language in section 510.5(d), consistent with the standard applicable to disclosures to government entities, which includes the condition that such disclosures only be made ''when not prohibited by law.''

IV. Request for Comments

The OTS welcomes comments on any aspect of these proposed amendments to the SAR rule. The OTS has timed the release of this proposal to coincide with the issuance of the proposed rule to amend its SAR confidentiality rule set forth in 12 CFR part 563.180, so that commenters can consider each proposal in commenting on the other.

V. OTS Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the OTS to use plain language in all proposed and final rules published after January 1, 2000. Therefore, the OTS specifically invites your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposal clearly stated? If not, how could the requirements be more clearly stated?
- Does the proposal contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format make the regulations easier to understand? If so, what changes to the format would make them easier to understand?
- What else could we do to make the regulations easier to understand?

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility

[6] *See* USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001).

[7] For purposes of this provision ''official duties'' means official disclosures necessary to accomplish a governmental purpose consistent with Title II of the BSA entrusted to the agency, the officer or employee. For example, prosecutorial disclosures mandated by statute or the Constitution, such as a statement of a government witness to be called at trial, impeachment of a government witness, or material exculpatory of a criminal defendant. *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[8] 31 U.S.C. 5311 (setting forth the purposes of the BSA).

[9] *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[10] *See* 12 CFR 510.5(d)(4).

[11] As described earlier, § 510.5 does not apply to SAR information.

analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The OTS has determined that the proposed rules do not impose any economic costs as they simply clarify the scope of the statutory prohibition against the disclosure by financial institutions and by the government of SAR information. Therefore, pursuant to section 605(b) of the RFA, the OTS hereby certifies that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OTS has determined that this proposal is not a significant regulatory action under Executive Order 12866. We have concluded that the changes that would be made by the proposed amendments will not have an annual effect on the economy of $100 million or more. The OTS further concludes that this proposal does not meet any of the other standards for a significant regulatory action set forth in Executive Order 12866.

Paperwork Reduction Act

We have reviewed the proposed amendments in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that they do not contain any ''collections of information'' as defined by the PRA.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (UMRA) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OTS has determined that its proposed rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $133 million or more. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 510

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Women.

Authority and Issuance

For the reasons set forth in the preamble, part 510 of title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 510—MISCELLANEOUS ORGANIZATIONAL REGULATIONS

1. The authority citation for part 510 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464; Pub.L. 101–410, 104 Stat 890; Pub.L. 104–134, 110 Stat 1321–358.

2. Amend § 510.5 by:

a. Adding paragraph (a)(3)(iv);

b. Removing, at the end of paragraph (d)(4)(i)(C), the word ''or'';

c. Removing the period at the end of paragraph (d)(4)(i)(D) and adding in its place ''; or'' and

d. Adding paragraph (d)(4)(i)(E) as follows:

§ 510.5 Release of unpublished OTS information.

(a) * * *

(3) * * *

(iv) Requests for a Suspicious Activity Report (SAR), or any information that would reveal the existence of a SAR.

* * * * *

(d) * * *

(4) * * *

(i) * * *

(E) Information that should not be disclosed, because such disclosure is prohibited by law.

* * * * *

Dated: November 18, 2009.

By the Office of Thrift Supervision.

John M. Reich,

Director.

Editorial Note: This document was received at the Office of the Federal Register on February 27, 2009.

[FR Doc. E9–4699 Filed 3–6–09; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA99

[Docket Number: TREAS–FinCEN–2008–0022]

Financial Crimes Enforcement Network; Confidentiality of Suspicious Activity Reports

AGENCY: The Financial Crimes Enforcement Network (FinCEN), Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN''), a bureau of the Department of the Treasury (''Treasury''), is proposing to revise the regulations implementing the Bank Secrecy Act (''BSA'') regarding the confidentiality of a report of suspicious activity (''SAR'') to: Clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; address the statutory prohibition against the disclosure by the government of a SAR; clarify that the exclusive standard applicable to the disclosure of a SAR by the government is to fulfill official duties consistent with the purposes of the BSA; modify the safe harbor provision to include changes made by the Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act''); and make minor technical revisions for consistency and harmonization among the different rules. These amendments are consistent with similar proposals to be issued by some of the Federal bank regulatory agencies.[1]

DATES: Comments must be received by June 8, 2009.

ADDRESSES: You may submit comments, identified by RIN 1506–AA99 or docket number TREAS-FinCen-2008–0022,[2] by any of the following methods:

[1] The Federal bank regulatory agencies have parallel SAR requirements for their supervised entities: *See* 12 CFR 208.62 (the Board of Governors of the Federal Reserve System (''Fed'')); 12 CFR 353.3 (the Federal Deposit Insurance Corporation (''FDIC'')); 12 CFR 748.1 (the National Credit Union Administration (''NCUA'')); 12 CFR 21.11 (the Office of the Comptroller of Currency (''OCC'')) and 12 CFR 563.180 (the Office of Thrift Supervision (''OTS'')). Of these agencies the OCC and OTS are proposing corollary regulation changes contemporaneously.

[2] This single docket number is shared by three related documents (this notice of proposed rulemaking, and two related pieces of proposed guidance) published simultaneously by FinCEN in today's **Federal Register**. Accordingly, commenters may submit comments related to any of the proposals, or any combination of proposals, in a single comment letter.

• *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AA99 or docket number TREAS-FinCen-2008–0022 in the body of the text.

Inspection of comments: Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905–5034 (Not a toll free call).

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN (800) 949–2732 and select option 1.

SUPPLEMENTARY INFORMATION:

I. Background

The BSA requires financial institutions to keep certain records and make certain reports that have been determined to be useful in criminal, tax, or regulatory investigations or proceedings, and for intelligence or counter intelligence activities to protect against international terrorism. In particular, the BSA and its implementing regulations require financial institutions to file a SAR when they detect a known or suspected violation of Federal law or regulation, or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.[3]

SARs generally are unproven reports of possible violations of law or regulation, or of suspicious activities, that are used for law enforcement or regulatory purposes. The BSA provides that a financial institution and its officers, directors, employees, and agents are prohibited from notifying any person involved in a suspicious transaction that the transaction was reported.[4] FinCEN implemented this provision in its SAR regulations for each industry through an explicit prohibition that closely mirrored the statutory language. Specifically, we clarified that disclosure could not be made to the person involved in the transaction, but that the SAR could be provided to FinCEN, law enforcement, and the institution's supervisor or examining authority. In certain SAR rules, we have expressly provided for the possibility of institutions jointly filing a SAR regarding suspicious activity that occurred at multiple institutions.[5]

The USA PATRIOT Act strengthened the confidentiality of SARs by adding to the BSA a new provision that prohibits officers or employees of the Federal government or any State, local, tribal, or territorial government within the United States with knowledge of a SAR from disclosing to any person involved in a suspicious transaction that the transaction was reported, other than as necessary to fulfill the official duties of such officer or employee.[6]

To encourage the reporting of possible violations of law or regulation, and the filing of SARs, the BSA contains a safe harbor provision that shields financial institutions making such reports from civil liability. In 2001, the USA PATRIOT Act clarified that the safe harbor covers voluntary disclosure of possible violations of law and regulations to a government agency and expanded the scope of the limit on liability to cover any civil liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' [7]

II. Overview of Proposal

The proposed amendments to FinCEN's SAR rules include key changes that would (1) clarify the scope of the statutory prohibition against the disclosure by a financial institution of a SAR; (2) address the statutory prohibition against the disclosure by the government of a SAR; (3) clarify that the exclusive standard applicable to the disclosure of a SAR, or any information that would reveal the existence of a SAR by the government is ''to fulfill official duties consistent with Title II of the BSA,'' in order to ensure that SAR information is protected from inappropriate disclosures unrelated to the BSA purposes for which SARs are filed; (4) modify the safe harbor provision to include changes made by the USA PATRIOT Act; and (5) where possible, harmonize minor technical differences that exist between the confidentiality, safe harbor, and compliance provisions of our rulemakings for different industries.

In separate but contemporaneous rulemakings, some of the Federal bank regulatory agencies are proposing to amend their SAR rules to incorporate comparable provisions, and to amend their information disclosure regulations [8] to clarify that the exclusive standard governing the release of a SAR, or any information that would reveal the existence of a SAR is set forth in the confidentiality provisions of their respective SAR rules.

Additionally, elsewhere in this part, FinCEN is simultaneously issuing for notice and comment proposed guidance regarding the sharing of SARs with affiliates. This proposed guidance interprets one of the provisions of this notice of proposed rulemaking and, accordingly, should be read in conjunction with this notice.

III. Section-by-Section Analysis

A. Confidentiality of SARs

Out of recognition that ''reports with a high degree of usefulness'' were unlikely to be filed unless afforded strict confidentiality, Congress established what is often referred to as the ''non-disclosure provision'' [9] in the BSA. This provision prohibits financial institutions and officers or employees of the government with knowledge that a SAR was filed from notifying the person involved in the transaction that the transaction has been reported. Accordingly, under the section heading ''confidentiality of reports,'' FinCEN's rules currently prohibit financial institutions from disclosing that a SAR was filed to any person involved in the transaction. The SAR rules also provide that no institution may disclose a SAR in response to a subpoena or other request, except when that request comes from FinCEN or an appropriate supervisory or law enforcement agency. Over the years, FinCEN has received numerous questions regarding the scope of the prohibition against the disclosure of a SAR in its current rules. Accordingly, in this rulemaking, we are

[3] The Annunzio-Wylie Anti-Money Laundering Act of 1992 (the Annunzio-Wylie Act), amended the BSA and authorized the Secretary of the Treasury to require financial institutions to report suspicious transactions relevant to a possible violation of law or regulation. *See* Public Law 102–550, Title XV, § 1517(b), 106 Stat. 4055, 4058–9 (1992); 31 U.S.C. 5318(g)(1).

[4] *See* 31 U.S.C. 5318(g)(2).

[5] Bank Secrecy Act regulations expressly permitting the filing of a joint SAR when multiple financial transactions are involved in a common transaction or series of transactions involving suspicious activity can be found at 31 CFR 103.15(a)(3) (for mutual funds); 31 CFR 103.16(b)(3)(ii) (for insurance companies); 31 CFR 103.17(a)(3) (for futures commission merchants and introducing brokers in commodities); 31 CFR 103.19(a)(3) (for broker-dealers in securities); and 31 CFR 103.20(a)(4) (for money services businesses).

[6] *See* USA PATRIOT Act, section 351(b). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(2).

[7] *See* USA PATRIOT Act, section 351(a). Public Law 107–56, Title III, § 351, 115 Stat. 272, 321 (2001); 31 U.S.C. 5318(g)(3).

[8] Generally, these regulations are known as ''Touhy regulations,'' after the Supreme Court's decision in *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). In that case, the Supreme Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor regarding the disclosure. As such, an agency's Touhy regulations are the instructions agency employees must follow when those employees receive requests or demands to testify or otherwise disclose agency records or information.

[9] *See* 31 U.S.C. 5318(g)(2).

proposing to clarify the scope of SAR confidentiality.

FinCEN believes it is important to clarify that the statutory prohibition on notifying the person involved in the transaction that the transaction has been reported must be interpreted more broadly to prohibit disclosures to any person. SAR rules issued by the Federal bank regulatory agencies already provide that ''SARs are confidential.'' As described further in the Section-by-Section Analysis below, this view of SAR confidentiality also has been repeatedly upheld in relevant case law.

FinCEN also recognizes that in order to protect the confidentiality of a SAR, any information that would reveal the existence of a SAR must be afforded the same protection as the SAR itself. The confidentiality of SARs must be maintained for a number of compelling reasons. For example, the disclosure of a SAR could result in notification to persons involved in the transaction that is being reported and compromise any investigations being conducted in connection with the SAR. In addition, FinCEN recognizes that any disclosure of a SAR could reduce the willingness of all financial institutions to file SARs. If institutions believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions. Institutions also may be reluctant to report suspicious transactions for fear that the disclosure of a SAR will interfere with the institution's relationship with its customer. Further, a SAR may provide insight into how an institution uncovers potential criminal conduct that can be used by others to circumvent detection. The disclosure of a SAR also could compromise personally identifiable information or commercially sensitive information, or damage the reputational interests of companies that may be named. Finally, the disclosure of a SAR increases the risk that an institution's employees or others involved in the preparation and filing of SARs could become targets for retaliation by persons whose criminal conduct has been reported.

FinCEN believes that all of the reasons for maintaining the confidentiality of SARs are equally applicable to any information that would reveal the existence of a SAR. Therefore, FinCEN is proposing to modify the general introduction in our rules to state that ''[a] SAR, and any information that would reveal the existence of a SAR, are confidential.'' The introduction also indicates that neither a SAR, nor any information that would reveal the existence of a SAR, may be disclosed, except as authorized in the limited circumstances that follow.

FinCEN is also proposing to modify this introductory section by clarifying that ''for purposes of [the confidentiality provision] only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.'' By using the term ''SAR'' in each of the proposed confidentiality provisions, FinCEN is purposefully using a term broader than the existing references in those provisions to specific types of SARs. We note that our rules require institutions to comply with our filing requirements through the use of particular versions of the SAR form, *e.g.*, a SAR–SF for those in the securities and futures sector, or a SAR–MSB for money services businesses. Nevertheless, it is critical that the confidentiality provisions of our SAR rules apply with respect to any type of SAR in the filing institution's possession, which since it may result from the joint filing or sharing of a SAR with another type of financial institution in accordance with the provisions of these proposed rules, could include a type of SAR form not used by the institution.

B. Disclosure by Financial Institutions

FinCEN's current rules provide that any institution subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR must decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed, and must notify FinCEN of the request and its response to the request.

The proposed rules more specifically address the prohibition on the disclosure of a SAR by a financial institution. The rules provide that the prohibition includes ''any information that would reveal the existence of a SAR'' instead of using the phrase ''any information that would disclose that a SAR has been prepared or filed.'' FinCEN believes that this phrase more clearly describes the type of information that is covered by the prohibition against the disclosure of a SAR. In addition, the proposed rules incorporate the specific reference in 31 U.S.C. 5318(g)(2)(A)(i) to ''directors, officers, employees and agents,'' and clarify that the prohibition against disclosure extends to those individuals in a financial institution who may have access to a SAR or information that would reveal the existence of a SAR.

Although 31 U.S.C. 5318(g)(2)(A)(i) states that a person involved in the transaction may not be notified that the transaction has been reported, the proposed rules continue to reflect case law that has consistently concluded, in accordance with applicable regulations, that financial institutions are broadly prohibited from disclosing a SAR, or information that would reveal the existence of a SAR, to any person. Accordingly, these cases have held that, in the context of discovery in connection with civil lawsuits, financial institutions are prohibited from disclosing a SAR or information that would reveal the existence of a SAR because section 5318(g) and its implementing regulations have created an unqualified discovery and evidentiary privilege for such information that cannot be waived by financial institutions.[10] Consistent with case law and current regulation, the texts of the proposed rules do not limit the prohibition on disclosure only to the person involved in the transaction. Permitting disclosure to *any* outside party may make it likely that SAR information would be disclosed to a person involved in the transaction, which is prohibited by the statute.

The proposed rules continue to provide that any financial institution, or any director, officer, employee, or agent of a financial institution, that is subpoenaed or otherwise requested to disclose a SAR or information that would reveal the existence of a SAR must decline to provide the information, citing this section of the rules and 31 U.S.C. 5318(g)(2)(A)(i), and must provide notification of the request and its response thereto to FinCEN and its primary Federal regulator if that regulator has a parallel SAR requirement.

C. Rules of Construction

FinCEN is proposing rules of construction to address issues that have arisen over the years about the scope of the SAR disclosure prohibition and to implement statutory modifications to the BSA made by the USA PATRIOT Act. The proposed rules of construction primarily describe situations that are not covered by the prohibition against the disclosure of SAR information. The introduction to these rules makes clear that the rules of construction are each qualified by the statutory mandate that no person involved in any reported suspicious transaction can be notified that the transaction has been reported.

The first proposed rule of construction builds upon the existing

[10] *See, e.g., Whitney Nat'l Bank* v. *Karam,* 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Cotton* v. *Private Bank and Trust Co.,* 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

provision to clarify that a financial institution, or any director, officer, employee, or agent of a financial institution, may disclose a SAR or information that would reveal the existence of a SAR to FinCEN or any Federal, state, or local law enforcement agency or any Federal or state regulatory agency that examines the financial institution for compliance with the BSA. For the rules governing broker-dealers, futures commission merchants, and introducing brokers in commodities, such disclosure is also permissible at the request of an appropriate self-regulatory organization that is examining the institution for compliance with the SAR reporting requirement. Although the permissibility of such disclosures may be readily apparent, the proposal contains this statement to clarify that the prohibition against disclosure cannot be used to withhold this information from governmental authorities or other examining authorities that are otherwise entitled by law to receive SARs and to examine for and investigate suspicious activity.

The second proposed rule of construction provides that the phrase ''a SAR or information that would reveal the existence of a SAR'' does not include the underlying facts, transactions, and documents upon which a SAR is based. This statement reflects case law which has recognized that, while a financial institution is prohibited from producing documents in discovery that evidence the existence of a SAR, factual documents created in the ordinary course of business (for example, business records and account information upon which a SAR is based), may be discoverable in civil litigation under the Federal Rules of Civil Procedure.[11]

This proposed rule of construction includes illustrative examples of situations where the underlying facts, transactions, and documents upon which a SAR is based may be disclosed. The first example clarifies that this information [12] may be disclosed to another financial institution, or any director, officer, employee, or agent of the financial institution, for the preparation of a joint SAR. Although FinCEN had not previously prohibited any institution from jointly filing with any other institution that was subject to the suspicious activity reporting requirement, this rule of construction clarifies the authority for all institutions with a SAR requirement to jointly file SARs with any other institution with a SAR requirement.[13]

The second example, applicable only to depository institutions, broker-dealers, futures commission merchants, and introducing brokers in commodities, codifies a rule of construction added to the BSA by section 351 of the USA PATRIOT Act which provides that such underlying information may be disclosed in certain written employment references and termination notices.[14] These two examples are not intended to be an exhaustive list of all possible scenarios in which the disclosure of underlying information is permissible.

The third proposed rule of construction, applicable at this time only to depository institutions, broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities, makes clear that the prohibition against the disclosure of a SAR or information that would reveal the existence of a SAR does not include the sharing by any of these financial institutions, or any director, officer, employee, or agent of these institutions, of a SAR or information that would reveal the existence of the SAR within the institution's corporate organizational structure, for purposes that are consistent with Title II of the BSA, as determined by regulation or in guidance. This proposed rule of construction recognizes that these financial institutions may find it necessary to share a SAR or information that would reveal the existence of a SAR to fulfill reporting obligations under the BSA, and to facilitate more effective enterprise-wide BSA monitoring, reporting, and general risk-management. The term ''share'' used in this rule of construction is an acknowledgement that sharing within a corporate organization for purposes consistent with Title II of the BSA is distinguishable from a prohibited disclosure.

FinCEN and the Federal bank regulatory agencies have already issued joint guidance making clear that the U.S. branch or agency of a foreign bank may share a SAR with its head office, and that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). In consultation with the staffs of the SEC and CFTC, FinCEN also issued comparable guidance for broker-dealers, futures commission merchants, and introducing brokers in commodities permitting them to share SARs with parent entities (whether domestic or foreign). These guidance documents recognized that the sharing of a SAR with a head office, controlling company, or parent entity facilitates both the compliance with the applicable requirements of the BSA and the discharge of oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.[15]

In this same part of the **Federal Register**, FinCEN and certain Federal bank regulatory agencies today are issuing for notice and comment proposed guidance that further clarifies when a SAR can be shared with an institution's affiliates for purposes consistent with the BSA. FinCEN, in consultation with the SEC and CFTC, is also proposing for notice and comment similar guidance for the broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities industries.

D. Disclosures by Government Authorities

As previously noted, section 351 of the USA PATRIOT Act, 31 U.S.C. 5318(g)(2)(A)(ii), amended the BSA, adding a new provision prohibiting officers and employees of the government from disclosing a SAR except ''as necessary to fulfill [their] official duties.'' FinCEN is proposing a new section in the regulations that

[11] *See Cotton,* 235 F. Supp. 2d at 815.

[12] Although the underlying facts, transactions, and documents upon which a SAR is based may include previously filed SARs or other information that would reveal the existence of a SAR, these materials would not be disclosable as underlying documents.

[13] On December 21, 2006, FinCEN and the Federal bank regulatory agencies announced that the format for the SAR form for depository institutions had been revised to support a new joint filing initiative to reduce the number of duplicate SARs filed for a single suspicious transaction. *''Suspicious Activity Report (SAR) Revised to Support Joint Filings and Reduce Duplicate SARs,''* Joint Release issued by FinCEN, the FRB, the OCC, the OTS, the FDIC, and NCUA (Dec. 21, 2006). On February 17, 2006, FinCEN and the Federal bank regulatory agencies published a joint **Federal Register** notice seeking comment on proposed revisions to the SAR form. *See* 71 FR 8640. On April 26, 2007, FinCEN announced a delay in implementation of the revised SAR form until further notice. *See* 72 FR 23891. Until such time as a new SAR form is available that facilitates joint filing, institutions authorized to jointly file should follow FinCEN's guidance to use the words ''joint filing'' in the narrative of the SAR and ensure that both institutions maintain a copy of the SAR and any supporting documentation *(See, e.g., http://www.fincen.gov/statutes_regs/guidance/html/guidance_faqs_sar_10042006.html*).

[14] 31 U.S.C. 5318(g)(2)(B).

[15] *See* ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006). *http://www.fincen.gov/statutes_regs/guidance/pdf/sarsharingguidance01122006.pdf*; and ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006). *http://www.fincen.gov/statutes_regs/guidance/pdf/sarsharingguidance01202006.pdf.*

extends this prohibition against disclosure to all federal, state, local, territorial, or tribal government authorities, and any director, officer, employee, or agent of those authorities. The proposed rules track the statutory language closely by clarifying that any officer or employee of the government may not disclose a SAR or information that would reveal the existence of the SAR, ''except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.''

As stated in 5318(g)(2)(A)(i), which prohibits a financial institution's disclosure of a SAR, section 5318(g)(2)(A)(ii) also prohibits the government from disclosing a SAR to ''any person involved in the transaction.'' FinCEN is proposing to address sections 5318(g)(2)(A)(i) and (A)(ii) in a consistent manner, because disclosure to any outside party may make it likely that a SAR or any information that would reveal the existence of a SAR, will be disclosed to a person involved in the transaction. Accordingly, the section of the rules that address the disclosure of a SAR or of such information by the government and its officers, employees, and agents is broad and does not prohibit disclosure only to ''any person involved in the transaction.''

Section 5318(g)(2)(A)(ii) narrowly permits governmental disclosures ''as necessary to fulfill the official duties,'' a phrase that is not defined in the BSA. FinCEN is proposing to construe this phrase in the context of the BSA, in light of the purpose for which SARs are filed. Accordingly, the proposed rules interpret ''official duties'' to mean ''official duties consistent with the purposes of Title II of the BSA,'' namely, for ''criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [16] This standard would permit, for example, official disclosures responsive to a grand jury subpoena; a request from an appropriate Federal or State law enforcement or regulatory agency; a request from an appropriate Congressional committee or subcommittees; and prosecutorial disclosures mandated by statute or the Constitution, in connection with the statement of a government witness to be called at trial, the impeachment of a government witness, or as material exculpatory of a criminal defendant.[17] This proposed interpretation of section 5318(g)(2)(A)(ii) would ensure that a SAR or information that would reveal the existence of a SAR will not be disclosed for a reason that is unrelated to the purposes of the BSA. For example, this standard would not permit the disclosure of a SAR or information that would reveal the existence of a SAR to the media.

The proposed rules also specifically provide that ''official duties consistent with Title II of the BSA'' shall not include the disclosure of a SAR or information that would reveal the existence of a SAR in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11. The BSA exists, in part, to protect the public's interest in an effective reporting system that benefits the nation by helping to assure that the U.S. financial system will not be used for criminal activity or to support terrorism. FinCEN believes that this purpose would be undermined by the disclosure of a SAR or information that would reveal the existence of a SAR to a private litigant for use in a civil lawsuit for the reasons described earlier, including the reason that such disclosures could negatively impact full and candid reporting by financial institutions.

Finally, the proposed regulations would apply to any government authority, in addition to its officers, employees, and agents. FinCEN is proposing to include each government authority itself in the scope of coverage because requests for SARs are typically directed to the government authority, rather than to individuals within the government with authority to respond to the request. In addition, agents are included in the proposed paragraph because agents of a government authority may have access to a SAR or information that would reveal the existence of a SAR.

E. Disclosures by Self-Regulatory Organizations

Although not part of any federal, state, local, territorial, or tribal government authority, self-regulatory organizations registered with or designated by the SEC or CFTC are permitted to access SARs through FinCEN's delegation of examination authority to the SEC or CFTC, for the purpose of examining broker-dealers, futures commission merchants, and introducing brokers in commodities for compliance with their SAR requirements. Although the BSA does not explicitly address the issue of disclosures of SARs by self-regulatory organizations, FinCEN believes it was Congress's clear intent that self-regulatory organizations with access to SARs should be subject to the same confidentiality provisions as all other users of SAR data. Accordingly, in the rules governing entities which may be examined for compliance with their SAR requirements by a self-regulatory organization, FinCEN is proposing a provision regarding disclosures by self-regulatory organizations that closely follows the provision regarding government disclosures. The language differs, however, to reflect the fact that self-regulatory organizations are not governmental entities. As with the provision for financial institutions and government authorities, the provision for self-regulatory organizations would apply equally to any director, officer, employee, or agent of the self-regulatory organization.

F. Limitation on Liability

In 1992, the Annunzio-Wylie Act amended the BSA by providing a safe harbor for financial institutions and their employees from civil liability for the reporting of known or suspected criminal offenses or suspicious activity through the filing of a SAR.[18] FinCEN incorporated the safe harbor provisions of the 1992 law into its SAR rules.[19] In Section 351 of the USA PATRIOT Act, Congress amended section 5318(g)(3) to clarify that the scope of the safe harbor provision includes the voluntary disclosure of possible violations of law and regulations to a government agency, and to expand the scope of the limit on liability to include any liability which may exist ''under any contract or other legally enforceable agreement (including any arbitration agreement).'' FinCEN has more closely tracked the statutory language in the proposed rules, particularly by stating that the safe harbor applies to ''disclosures'' (and not ''reports'' as in some previous rulemakings) made by institutions.

Additionally, to comport with the authorization to jointly file SARs in the second rule of construction, FinCEN is clarifying that the safe harbor also applies to ''a disclosure made jointly with another institution.'' This concept exists currently in those SAR rules

[16] 31 U.S.C. 5311.

[17] *See, e.g.,, Giglio* v. *United States,* 405 U.S. 150, 153–54 (1972); *Brady* v. *State of Maryland,* 373 U.S. 83, 86–87 (1963); *Jencks* v. *United States,* 353 U.S. 657, 668 (1957).

[18] *See supra* footnote 2.

[19] *See, e.g.,* 31 CFR 103.18(e). The safe harbor regulations are also applicable to oral reports of violations. (In situations requiring immediate attention, a financial institution must immediately notify its regulator and appropriate law enforcement by telephone, in addition to filing a SAR.) *See e.g.,* 12 CFR 21.11(d).

where joint filing had been explicitly referenced, but has been revised to track more closely the statutory language. It has also been inserted for the sake of consistency into those SAR rules where it had been absent previously, clarifying that all parties to a joint filing, and not simply the party that provides the form to FinCEN, fall within the scope of the safe harbor.

For consistency, FinCEN also separated the provision for confidentiality of reports and limitation of liability into two separate provisions in those rules for industries which previously contained both provisions under the single heading ''confidentiality of reports; limitation of liability.''

G. Compliance

Each of FinCEN's existing SAR rules contains a provision that clarifies that Treasury, through FinCEN or its delegatee,[20] may audit a financial institution for compliance with the requirement. Some of the SAR rules list the appropriate delegatee(s) for the type of financial institution, and for certain financial institutions clarify that SARs must be provided to those delegatees within the context of an examination of compliance with the SAR requirement. The newly proposed rule of construction that authorizes the disclosure of a SAR to, among other official entities, a federal regulatory authority examining the institution for compliance with the BSA or any self-regulatory organization that examines the institution for compliance with the SAR requirement eliminates the need for what would be a duplicate provision in the compliance section. Accordingly, we have streamlined the section to provide only that (1) FinCEN or its delegatees may examine the institution for compliance with the SAR requirement; (2) that a failure to satisfy the requirements of the SAR rule may constitute a violation of the BSA or BSA regulations; and (3) for depository institutions with parallel Title 12 SAR requirements, that failure to comply with FinCEN's SAR requirement may also constitute a violation of the parallel Title 12 rules. Also, although some of FinCEN's current rules use the heading ''Examination and Enforcement'' while others use ''Compliance'' for the same provision, for consistency we have used only the heading ''Compliance'' for the same parallel provision in each of the proposed rules.

[20] *See* 31 CFR 103.56.

H. Technical Corrections and Harmonization

In addition to the changes described above in the Section-by-Section analysis, FinCEN is proposing technical corrections to harmonize each of the seven SAR rules with rules being issued by some of the Federal bank regulatory agencies. FinCEN believes that such efforts will simplify compliance with SAR reporting requirements.

IV. Proposed Location in 31 CFR Chapter X

As per the **Federal Register** Notice of November 7, 2008,[21] FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Parts 1000 to 1099 under a new 31 CFR Chapter X. As such and if finalized, the proposed changes herein would be reorganized according to the changes proposed in the Notice for Proposed Rulemaking for Chapter X. The planned reorganization will have no substantive effect on the proposed regulatory changes herein. The proposed regulatory changes of this specific NPRM would be renumbered according to the proposed Chapter X as follows:

(a) 31 CFR 103.15, Reports by mutual funds of suspicious transactions, would be moved to 31 CFR 1024.320.

(b) 31 CFR 103.16, Reports by insurance companies of suspicious transactions, would be moved to 31 CFR 1025.320.

(c) 31 CFR 103.17, Reports by futures commission merchants and introducing brokers in commodities of suspicious transactions, would be moved to 31 CFR 1026.320.

(d) 31 CFR 103.18, Reports by banks of suspicious transactions, would be moved to 31 CFR 1020.320.

(e) 31 CFR 103.19, Reports by brokers or dealers in securities, would be moved to 31 CFR 1023.320.

(f) 31 CFR 103.20, Reports by money services businesses in securities, would be moved to 31 CFR 1022.320.

(g) 31 CFR 103.21, Reports by casinos of suspicious transactions, would be moved to 31 CFR 1021.320.

V. Request for Comments

FinCEN welcomes comments on any aspect of these proposed amendments to the SAR rules. FinCEN has timed the release of the notice of proposed rulemaking to coincide with the following related items: (1) A notice of, and request for comment on, proposed guidance regarding the sharing of SARs with affiliates; (2) parallel amendments proposed by certain Federal bank regulatory agencies to their own respective SAR confidentiality regulations; and (3) proposed rules by certain Federal bank regulatory agencies to amend the information disclosure rules. Commenters are encouraged to consider each proposal when commenting on the others.

While FinCEN welcomes comment on any part of the proposed rules, we specifically solicit comment on the following areas:

- Should any of the proposed provisions which would apply only to a limited segment of SAR filers be applicable to additional types of financial institutions? For example, should sharing within an institution's corporate organizational structure for purposes consistent with Title II of the BSA be limited only to banks, broker-dealers, futures commission merchants, and introducing brokers in commodities?
- Are any of the terms or provisions that were used for consistency across financial institutions inappropriate for any one type of financial institution based on its specific characteristics?
- Have any important provisions from the existing regulations been unintentionally or inappropriately eliminated or confused by the proposed new regulations?
- Are any of the provisions or terms used in the rules or this preamble unclear in their meaning, application, or scope?
- If finalized, how would these proposed rules impact compliance costs and practices?
- What additional or alternative methods could be used to strengthen the confidentiality of SARs?
- Should additional parts of the SAR rules be harmonized? If so, please describe the benefit of such revisions.

VI. Regulatory Matters

A. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), FinCEN certifies that these proposed regulation revisions will not have a significant economic impact on a substantial number of small entities. The proposals in this notice of proposed rulemaking would affect only the disclosure provisions of the current rules relating to the reporting of suspicious activity by financial institutions, and would not change any requirement to file or maintain a report. In the context of disclosure, the proposals clarify, rather than add to,

[21] ''Transfer and Reorganization of Bank Secrecy Act Regulations,'' 73 FR 66414. *See, http://www.fincen.gov/statutes_regs/frn/pdf/frnChapt_X_NPRM-Final.pdf.*

existing regulatory provisions regarding the confidentiality of suspicious activity reports. FinCEN therefore expects little or no economic impact to result from these proposals. Accordingly, a regulatory flexibility analysis is not required.

B. Paperwork Reduction Act Notices

We have reviewed the proposed rules in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320, Appendix A.1) (PRA) and have determined that it does not contain any ''collections of information'' as defined by the PRA.

C. Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

D. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. The current inflation-adjusted expenditure threshold is $133 million. If a budgetary impact statement is required, § 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

FinCEN has determined that the proposed rules will not result in expenditures by State, local, and tribal governments, or by the private sector, of $133 million or more in any one year. Accordingly, this proposal is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (government agencies), Crime, Currency, Investigations, Law enforcement, Reporting and recordkeeping requirements, Security measures.

Authority and Issuance

For the reasons set forth in the preamble, 31 CFR Part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314 Public Law 107–56, 115 Stat. 307.

2. Section 103.15 is amended by:

a. Revising paragraphs (d) and (e);

b. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h); and

c. Adding new paragraph (f).

§ 103.15 Reports by mutual funds of suspicious transactions.

* * * * *

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by mutual funds*—(i) *General rule.* No mutual fund, and no director, officer, employee, or agent of any mutual fund, shall disclose a SAR or any information that would reveal the existence of a SAR. Any mutual fund, and any director, officer, employee, or agent of any mutual fund that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting:

(A) The disclosure by a mutual fund, or any director, officer, employee, or agent of a mutual fund of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, or any Federal regulatory authority that examines the mutual fund for compliance with its SAR reporting requirements; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(B) The sharing by a mutual fund, or any director, officer, employee, or agent of the mutual fund, of a SAR, or any information that would reveal the existence of a SAR, within the mutual fund's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(e) *Limitation on liability.* A mutual fund, and any director, officer, employee, or agent of any mutual fund, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Mutual funds shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

3. Section 103.16 is amended by:

a. Revising paragraph (f);

b. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j);

c. Adding new paragraph (g); and

d. Revising newly designated paragraph (h).

§ 103.16 Reports by insurance companies of suspicious transactions.

* * * * *

(f) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (f). For purposes of this paragraph (f) only, a SAR shall include any suspicious

activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by insurance companies*—(i) *General rule.* No insurance company, and no director, officer, employee, or agent of any insurance company, shall disclose a SAR or any information that would reveal the existence of a SAR. Any insurance company, and any director, officer, employee, or agent of any insurance company that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (f)(1) shall not be construed as prohibiting the disclosure by an insurance company, or any director, officer, employee, or agent of an insurance company of:

(A) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, or any Federal or state regulatory authority that examines the insurance company for compliance with the Bank Secrecy Act; or

(B) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(g) *Limitation on liability.* An insurance company, and any director, officer, employee, or agent of any insurance company, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(h) *Compliance.* Insurance companies shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

4. Section 103.17 is amended by revising paragraphs (e), (f), and (g) to read as follows:

§ 103.17 Reports by futures commission merchants and introducing brokers in commodities of suspicious transactions.

* * * * *

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by futures commission merchants and introducing brokers in commodities*—(i) *General rule.* No futures commission merchant (''FCM'') or introducing broker in commodities (''IB–C''), and no director, officer, employee, or agent of any FCM or IB–C, shall disclose a SAR or any information that would reveal the existence of a SAR. Any FCM or IB–C, and any director, officer, employee, or agent of any FCM or IB–C that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by an FCM or IB–C, or any director, officer, employee, or agent of an FCM or IB–C of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, any Federal regulatory authority that examines the FCM or IB–C for compliance with the BSA, or any self-regulatory organization examining the FCM or IB–C for compliance with the requirements of this section; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, disclosures:

(*i*) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by an FCM or IB–C, or any director, officer, employee, or agent of the FCM or IB–C, of a SAR, or any information that would reveal the existence of a SAR, within the FCM's or IB–C's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(3) *Prohibition on disclosures by Self-Regulatory Organizations.* Any self-regulatory organization registered with or designated by the Commodity Futures Trading Commission, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding.

(f) *Limitation on liability.* An FCM or IB–C, and any director, officer, employee, or agent of any FCM or IB–C, that makes a voluntary disclosure of any possible violation of law or

regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* FCMs or IB–Cs shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

5. Section 103.18 is amended by revising paragraphs (e) and (f), and adding paragraph (g), to read as follows:

§ 103.18 Reports by banks of suspicious transactions.

* * * * *

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by banks*—(i) *General rule.* No bank, and no director, officer, employee, or agent of any bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any bank, and any director, officer, employee, or agent of any bank that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN and its primary Federal regulator of any such request and the response thereto.

(ii) *Rules of Construction.*

Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by a bank, or any director, officer, employee, or agent of a bank of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, or any Federal or state regulatory authority that examines the bank for compliance with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, disclosures:

(*i*) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a bank, or any director, officer, employee, or agent of the bank, of a SAR, or any information that would reveal the existence of a SAR, within the bank's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, state, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(f) *Limitation on liability.* A bank, and any director, officer, employee, or agent of any bank, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* Banks shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part. Such failure may also violate provisions of Title 12 of the Code of Federal Regulations.

6. Section 103.19 is amended by revising paragraphs (e), (f), and (g) to read as follows:

§ 103.19 Reports by brokers or dealers in securities of suspicious transactions.

* * * * *

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by brokers or dealers in securities*—(i) *General rule.* No broker-dealer, and no director, officer, employee, or agent of any broker-dealer, shall disclose a SAR or any information that would reveal the existence of a SAR. Any broker-dealer, and any director, officer, employee, or agent of any broker-dealer that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting:

(A) The disclosure by a broker-dealer, or any director, officer, employee, or agent of a broker-dealer of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, any Federal regulatory authority that examines the broker-dealer for compliance with the BSA, or any self-regulatory organization examining the broker-dealer for compliance with the requirements of this section; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, disclosures:

(*i*) To another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a broker-dealer, or any director, officer, employee, or agent of the broker-dealer, of a SAR, or any information that would reveal the existence of a SAR, within the broker-dealer's corporate organizational structure for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal

government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(3) *Prohibition on disclosures by Self-Regulatory Organizations.* Any self-regulatory organization registered with the Securities and Exchange Commission, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding.

(f) *Limitation on liability.* A broker-dealer, and any director, officer, employee, or agent of any broker-dealer, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* Broker-dealers shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

7. Section 103.20 is amended by:

a. Revising paragraph (d);

b. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g);

c. Adding new paragraph (e); and

d. Revising newly designated paragraph (f).

§ 103.20 Reports by money services businesses of suspicious transactions.

* * * * *

(d) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (d). For purposes of this paragraph (d) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by money services businesses*—(i) *General rule.* No money services business, and no director, officer, employee, or agent of any money services business, shall disclose a SAR or any information that would reveal the existence of a SAR. Any money services business, and any director, officer, employee, or agent of any money services business that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (d)(1) shall not be construed as prohibiting the disclosure by a money services business, or any director, officer, employee, or agent of a money services business of:

(A) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, or any Federal or State regulatory authority that examines the money services business for compliance with the BSA; or

(B) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(e) *Limitation on liability.* A money services business, and any director, officer, employee, or agent of any money services business, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(f) *Compliance.* Money services businesses shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

8. Section 103.21 is amended by:

a. Revising paragraph (e);

b. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h);

c. Adding new paragraph (f); and

d. Revising newly designated paragraph (g).

§ 103.21 Reports by casinos of suspicious transactions.

* * * * *

(e) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (e). For purposes of this paragraph (e) only, a SAR shall include any suspicious activity report filed with FinCEN pursuant to any regulation in this part.

(1) *Prohibition on disclosures by casinos*—(i) *General rule.* No casino, and no director, officer, employee, or agent of any casino, shall disclose a SAR or any information that would reveal the existence of a SAR. Any casino, and any director, officer, employee, or agent of any casino that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify FinCEN of any such request and the response thereto.

(ii) *Rules of Construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (e)(1) shall not be construed as prohibiting the disclosure by a casino, or any director, officer, employee, or agent of a casino of:

(A) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or any Federal, state, or local law enforcement agency, or any Federal or state regulatory authority that examines the casino for compliance with the BSA; or

(B) The underlying facts, transactions, and documents upon which a SAR is based, including disclosures to another financial institution, or any director, officer, employee, or agent of a financial institution, for the preparation of a joint SAR.

(2) *Prohibition on disclosures by government authorities.* A Federal, State, local, territorial, or tribal government authority, or any director, officer, employee, or agent of any of the foregoing, shall not disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA). For purposes of this section, official duties shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of non-public information or in response to a request for use in a private legal proceeding, including a request under 31 CFR 1.11.

(f) *Limitation on liability.* A casino, and any director, officer, employee, or agent of any casino, that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(g) *Compliance.* Casinos shall be examined by FinCEN or its delegatees for compliance with this section. Failure to satisfy the requirements of this section may be a violation of the Bank Secrecy Act and of this part.

* * * * *

Dated: February 27, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E9–4697 Filed 3–6–09; 8:45 am]

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

[Docket Number: TREAS–FinCen–2008–0022]

Interpretive Guidance—Sharing Suspicious Activity Reports by Depository Institutions With Certain U.S. Affiliates

AGENCY: Financial Crimes Enforcement Network, Department of the Treasury.

ACTION: Proposed guidance.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN'') of the Department of the Treasury, after consulting with the staffs of the Board of Governors of the Federal Reserve System (''FRB''), the Federal Deposit Insurance Corporation (''FDIC''), the National Credit Union Administration (''NCUA''), the Office of the Comptroller of the Currency (''OCC''), and the Office of Thrift Supervision (''OTS'') (hereinafter, the ''Federal Banking Agencies''), is issuing for comment this proposed interpretive guidance. Published elsewhere in this part of the **Federal Register** are proposed rules clarifying the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction set forth in the Bank Secrecy Act (''BSA''). The proposed rules include a provision which states that the prohibition does not apply when a bank shares a suspicious activity report (''SAR''), or any information that would reveal the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or guidance. The proposed guidance interprets this provision to permit a bank to share a SAR with its affiliates that also are subject to SAR rules.

DATES: Written comments on the proposed guidance may be submitted on or before June 8, 2009.

ADDRESSES: You may submit comments, identified by docket number TREAS–FinCen–2008–0022,[1] by any of the following methods:

- *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regcomments@fincen.treas.gov.* Include docket number TREAS–FinCen–2008–0022 in the subject line of the message.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include docket number TREAS–FinCen–2008–0022 in the body of the text.

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

FinCEN, through its authority under the BSA as delegated by the Secretary of the Treasury, may require financial institutions to keep records and file reports that FinCEN determines have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings, or for intelligence or counterintelligence activities to protect against international terrorism. Within this framework, FinCEN may require financial institutions to file SARs and has issued rules implementing that specific authority with respect to certain types of financial institutions.[2] The Federal Banking Agencies have issued comparable rules for financial institutions subject to their jurisdiction.[3] The SAR rules issued by FinCEN and those issued by the Federal Banking Agencies currently include a section implementing the statutory prohibition on the disclosure by a financial institution of a SAR that is set forth in the BSA.[4]

Sharing Within the Corporate Organizational Structure

In January 2006, FinCEN and all the Federal Banking Agencies other than the NCUA issued joint guidance concluding that, subject to certain exceptions or qualifications, a U.S. branch or agency of a foreign bank may share a SAR with its head office outside the United States, and a U.S. bank or savings association may disclose a SAR to its controlling company, no matter where the entity or party is located.[5] FinCEN also issued guidance in consultation with the staffs of the Securities and Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC'') determining that, subject to certain exceptions or qualifications, a securities broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entities,

[1] This single docket number is shared by three related documents (a notice of proposed rulemaking, and this and another piece of proposed guidance related to that notice of proposed rulemaking) published simultaneously by FinCEN in today's **Federal Register**. Accordingly, commenters may submit comments related to any of the proposals, or any combination of proposals, in a single comment letter.

[2] *See* 31 CFR 103.15 to 103.21.

[3] *See* 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 748.1 (NCUA); 12 CFR 21.11 (OCC); and 12 CFR 563.180 (OTS).

[4] 31 U.S.C. 5318(g)(2)(A)(i).

[5] ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006).

both domestic and foreign.[6] Moreover, guidance issued by FinCEN in consultation with the SEC in October 2006, stated that a U.S. mutual fund may share a SAR with the investment adviser that controls the fund, whether domestic or foreign, so that the investment adviser could implement enterprise-wide risk management and compliance functions over all of the mutual funds that it controls[7] and improve its identification and reporting of suspicious activity.[8] Nothing in the proposed guidance for sharing with affiliates supersedes any of the guidance mentioned in the preceding paragraph.

These guidance documents reflected a recognition by FinCEN, the FDIC, the FRB, the OCC, the OTS, the SEC, and the CFTC (referred to collectively in the proposed guidance as the ''Federal regulators'') that a head office, controlling entity or party, or parent entity of a depository institution, broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities has oversight responsibilities with respect to enterprise-wide risk management. These responsibilities include a valid need to review compliance by U.S.-based depository institutions, broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities with legal requirements to identify and report suspicious activity.

The guidance documents regarding the sharing of SARs with head offices, controlling companies or parties, and parent entities (referred to here as the ''2006 Guidance'') expressly noted that the sharing of a SAR with a non-U.S. entity raises concerns about the ability of the foreign entity to protect the SAR in light of possible requests for disclosure abroad that may be subject to foreign law. The 2006 Guidance on sharing SARs with head offices and controlling companies also provides that the recipient may not disclose further any Suspicious Activity Report, or the fact that such a report has been filed; however, the recipient may disclose without permission underlying information. The 2006 Guidance also stated that FinCEN and the Federal regulators were considering whether a financial institution may share a SAR with other entities within the financial institution's corporate organization located inside the United States and those located abroad, and instructed financial institutions not to share SARs with such entities until further guidance was issued.

Proposed Regulatory Changes

In proposed regulations issued today, FinCEN is proposing to revise its regulations implementing the BSA regarding the confidentiality of a SAR to clarify, among other things, the scope of the statutory prohibition against the disclosure by a financial institution of a SAR. These proposed rules include a provision clarifying that the statutory prohibition does not apply to sharing by a depository institution, or any director, officer, employee, or agent of the depository institution, of a SAR, or any information that would reveal the existence of a SAR, within the depository institution's corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or in guidance, provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported.

II. Proposed Guidance

This proposed guidance interprets the general statement in the proposed SAR confidentiality rules[9] that a bank may share a SAR, or information that reveals the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA. First, the proposed guidance acknowledges that the 2006 Guidance regarding depository institutions continues to be applicable. It explains that sharing of a SAR or information that reveals the existence of a SAR by a depository institution with its head office or its controlling company, whether domestic or foreign, promotes compliance with the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of the depository institution's compliance with applicable laws and regulations.

Next, the proposed guidance explains that FinCEN has concluded that the proposed regulations may be interpreted to permit a depository institution that has filed a SAR to share the SAR, or any information that would reveal the existence of the SAR, with an affiliate[10] that is subject to a SAR regulation[11] issued by FinCEN or the Federal Banking Agencies.

FinCEN has concluded that such sharing within a corporate organization is consistent with two important purposes of the BSA: Promoting efforts to detect and report money laundering and terrorist financing by financial institutions that are subject to the BSA, and ensuring the confidentiality of a SAR or any information that would reveal the existence of a SAR. The sharing by a depository institution of a SAR, or any information that would reveal the existence of a SAR, can facilitate the identification of suspicious transactions taking place through the depository institution's affiliates that are also subject to SAR reporting requirements. Although the sharing of information underlying the filing of a SAR has never been prohibited under the BSA, it is understood that the sharing of a SAR itself pursuant to this proposed guidance may entail greater efficiencies.[12]

Moreover, the proposed SAR confidentiality rules provide that a ''SAR, and any information that would reveal the existence of a SAR, are confidential.''[13] Accordingly, affiliates subject to a SAR rule are prohibited from disclosing any SAR or information that a SAR was filed, including both SARs they have filed, and any SARs they have received that have been filed by others. In addition, because the guidance applies only to the sharing of a SAR by the depository institution ''that has filed'' the SAR, the guidance includes a statement clarifying that it is not permissible for an affiliate that has received such a SAR from a depository institution to share that SAR, or any

[6] ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006).

[7] ''Control'' for purposes of the October 2006 Guidance is defined in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)) to mean ''the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.'' A mutual fund typically is organized and operated by an investment adviser that controls the fund. By contrast, an investment adviser that performs limited functions in managing a mutual fund's securities portfolio (also known as a ''subadviser'') would not typically control the fund and therefore would be outside the scope of the guidance.

[8] FIN–2006–G013, ''Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds'' (October 4, 2006).

[9] The proposed guidance interprets a provision in the proposed SAR regulations. The final guidance issued will be modified to correspond to any changes made in the final SAR regulations.

[10] For the purposes of this proposed guidance, an ''affiliate'' is effectively defined as a company under common control with, or a subsidiary of, the depository institution. ''Affiliate'' does not include holding companies because sharing with these entities is already addressed in the 2006 Guidance.

[11] *See* 31 CFR 103.15 to 103.21. *See also*, 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 748.1 (NCUA); 12 CFR 21.11 (OCC); and 12 CFR 563.180 (OTS).

[12] For example, the sharing of a SAR eliminates the need to create a separate summary document which, if shared, might inadvertently reveal the existence of a SAR itself.

[13] *See* the Notice of Proposed Rulemaking published elsewhere in today's **Federal Register**.

information that would reveal the existence of that SAR with another affiliate, even if that affiliate is subject to a SAR rule. The guidance also states that a depository institution, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls. Given the above restrictions, FinCEN is satisfied that the sharing permitted by this guidance is consistent with the BSA objective to ensure that suspicious activity reporting remains confidential.

FinCEN has declined to permit sharing with affiliates that are not subject to a SAR rule, whether domestic or foreign.[14] At this time, it is not apparent that such sharing would be consistent with the purposes of the BSA, to promote efforts to detect and report money laundering and terrorist financing by financial institutions that are subject to rules implementing the BSA, and to ensure the confidentiality of a SAR or any information that would reveal the existence of a SAR.

Finally, this proposed guidance is intended only to remove unnecessary obstacles to detecting and reporting suspicious activity. It should not be read to impose new BSA requirements or to suggest that sharing with affiliates is compulsory.

III. Request for Comment

FinCEN invites comments on all aspects of the guidance. We solicit comment on whether this proposed guidance would achieve the intended effect of promoting compliance with the BSA. We also request comment on whether the proposed guidance will be beneficial, whether it raises any ambiguities, and whether it will result in any negative consequences. In addition, we specifically invite comment on the following:

- Whether the definition of affiliate is appropriate;
- Whether the scope of the guidance should be expanded to permit sharing with other affiliates *within the United States.* Commenters suggesting that the scope of the guidance be expanded should address how additional sharing would be consistent with the purposes of Title II of the BSA;
- Whether the scope of the guidance should be expanded to permit sharing with other affiliates *outside of the United States*, including with foreign branches of U.S. banks. Commenters suggesting that the scope of the guidance be expanded should address how additional sharing outside of the U.S. would be consistent with the purposes of Title II of the BSA. In particular, commenters should explain how a foreign affiliate might protect a SAR in light of a possible request for disclosure abroad that may be subject to foreign law;
- Whether similar provisions to allow sharing with certain affiliates should be permitted among all financial institutions subject to a SAR rule;
- Whether financial institutions, other than depository institutions, securities broker-dealers, mutual funds, futures commission merchants, or introducing brokers in commodities subject to a SAR rule, should be permitted to share a SAR, or any information that would reveal the existence of a SAR, with parent entities and/or affiliates; and
- Whether and how a depository institution can store and provide access to SARs in an electronic system in a way that prevents the SARs from being subject to disclosure laws or obligations of foreign jurisdictions.

Proposed Interpretive Guidance [15]

Sharing Suspicious Activity Reports by Depository Institutions With Certain U.S. Affiliates [1]

The Financial Crimes Enforcement Network (''FinCEN''), after consulting with the staffs of the Board of Governors of the Federal Reserve System (''FRB''), the Federal Deposit Insurance Corporation (''FDIC''), the National Credit Union Administration (''NCUA''), the Office of the Comptroller of the Currency (''OCC''), and the Office of Thrift Supervision (''OTS'') (hereinafter, the ''Federal Banking Agencies''), is issuing this guidance to confirm that under the Bank Secrecy Act (''BSA'') and its implementing regulations, a depository institution subject to FinCEN regulations (''depository institution'') that has filed a Suspicious Activity Report (''SAR'') may share the SAR, or any information that would reveal the existence of the SAR, with certain affiliates. This guidance does not address the applicability of any other Federal or state laws.

The BSA prohibits the filer of a SAR from notifying any person involved in a suspicious transaction that the activity has been reported.[2] Regulations issued by FinCEN [3] construe this confidentiality provision as generally prohibiting a depository institution from disclosing a SAR, or any information that would reveal the existence of a SAR.

However, the regulations make clear that, provided no person involved in the transaction is notified that the transaction has been reported, the prohibition does not include disclosures to (1) FinCEN; (2) any Federal, state, or local law enforcement agency; or (3) any Federal or state regulatory agency that examines the depository institution for compliance with the BSA. The regulations also provide that the prohibition does not apply to: (i) The disclosure of the underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures related to filing a joint SAR and in connection with certain employment references or termination notices; and (ii) the sharing of a SAR, or any information that would reveal the existence of a SAR, within a depository institution's corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or in guidance.[4]

In previously issued guidance (''January 2006 Guidance''), FinCEN, the OCC, the OTS, the FRB, and the FDIC determined that a U.S. branch or agency of a foreign bank may share a SAR with its head office.[5] The January 2006 Guidance also stipulated that a U.S. bank or savings association may share a SAR with its controlling company (whether domestic or foreign). The January 2006 Guidance continues to be applicable and comports with the SAR regulations referenced above.[6] The

[14] A footnote in the proposed guidance makes clear that foreign branches of U.S. banks generally are regarded as foreign banks for purposes of the BSA and, therefore, would be ''affiliates'' that are not subject to a SAR regulation. Accordingly, a U.S. bank that has filed a SAR may not share the SAR, or any information that would reveal the existence of the SAR, with its foreign branches.

[15] For purposes of the guidance text below, all citations to Title 31 SAR regulations are references to the amended regulations we anticipate promulgating as discussed in the above section, *Proposed Regulatory Changes.*

[1] For purposes of this guidance, ''affiliate'' of a depository institution means any company under common control with, or controlled by, that depository institution. ''Under common control'' means that another company (1) directly or indirectly or acting through one or more other persons owns, controls, or has the power to vote 25 percent or more of any class of the voting securities of the company and the depository institution; or (2) controls in any manner the election of a majority of the directors or trustees of the company and the depository institution. ''Controlled by'' means that the depository institution (1) directly or indirectly has the power to vote 25 percent or more of any class of the voting securities of the company; or (2) controls in any manner the election of a majority of the directors or trustees of the company. See, *e.g.*, 12 U.S.C. 1841(a)(2).

[2] *See* 31 U.S.C. 5318(g)(2).

[3] *See* 31 CFR 103.18(e).

[4] *See* the Notice of Proposed Rulemaking published elsewhere in today's **Federal Register**.

[5] Interagency Guidance, ''Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006).

[6] *See* supra note 5.

sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR, with a head office or controlling company (including overseas) promotes compliance with the applicable requirements of the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of a depository institution's compliance with applicable laws and regulations.

The January 2006 Guidance deferred taking a position on whether a depository institution is permitted to share a SAR with affiliates and directed institutions not to share with such affiliates. FinCEN has now concluded that a depository institution that has filed a SAR may share the SAR, or any information that would reveal the existence of the SAR, with an affiliate, as defined herein, provided the affiliate is subject to a SAR regulation.[7] The sharing of SARs with such affiliates facilitates the identification of suspicious transactions taking place through the depository institution's affiliates that are subject to a SAR rule. Therefore, such sharing within the depository institution's corporate organizational structure is consistent with the purposes of Title II of the BSA.[8]

It is not consistent with the purposes of Title II of the BSA for an affiliate that has received a SAR from a depository institution that has filed the SAR to further share that SAR, or any information that would reveal the existence of that SAR with an affiliate of its own, even if that affiliate is subject to a SAR rule.

As is the case with sharing SARs with head offices and controlling companies, there may be circumstances under which a depository institution, its affiliate, or both entities would be liable for direct or indirect disclosure by the affiliate of a SAR or any information that would reveal the existence of a SAR. Therefore, the depository institution, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls.

Consistent with the BSA and the implementing regulations issued by FinCEN and the Federal Banking Agencies, a SAR, or any information that would reveal the existence of a SAR, must not be disclosed, even under this guidance, if the depository institution has reason to believe it may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

Dated: February 27, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E9–4693 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–02–P

[7] *See* 31 CFR 103.15 to 103.21. *See also*, 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 748.1 (NCUA); 12 CFR 21.11 (OCC); and 12 CFR 563.180 (OTS).

[8] Because foreign branches of U.S. banks are regarded as foreign banks for purposes of the BSA, under this guidance, they are ''affiliates'' that are not subject to a SAR regulation. Accordingly, a U.S. bank that has filed a SAR may not share the SAR, or any information that would reveal the existence of the SAR, with its foreign branches.

DEPARTMENT OF THE TREASURY

31 CFR Part 103

[Docket Number: TREAS–FinCen–2008–0022]

Interpretive Guidance—Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities With Certain U.S. Affiliates

AGENCY: Financial Crimes Enforcement Network, Department of the Treasury.

ACTION: Proposed guidance.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN'') of the Department of the Treasury, after consulting with staffs of the U.S. Securities and Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC''), is issuing for comment this proposed interpretive guidance. Published elsewhere in this part of the **Federal Register** are proposed rules clarifying the scope of the statutory prohibition on the disclosure by a financial institution of a report of a suspicious transaction set forth in the Bank Secrecy Act (''BSA''). The proposed rules include a provision which states that the prohibition does not apply when a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities shares a suspicious activity report (''SAR''), or any information that would reveal the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA, as determined by regulation or guidance. The proposed guidance interprets this provision to permit a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities to share a SAR with its affiliates that are also subject to SAR rules.

DATES: Written comments on the proposed guidance may be submitted on or before June 8, 2009.

ADDRESSES: You may submit comments, identified by docket number TREAS–FinCen–2008–0022,[1] by any of the following methods:

- *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regcomments@fincen.treas.gov.* Include docket number TREAS–FinCen–2008–0022 in the subject line of the message.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include docket number TREAS–FinCen–2008–0022 in the body of the text.

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

FinCEN, through its authority under the BSA as delegated by the Secretary of the Treasury, may require financial institutions to keep records and file reports that FinCEN determines have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or for intelligence or counterintelligence activities to protect against international terrorism. Within this framework, FinCEN may require financial institutions to file SARs and has issued rules implementing that specific authority with respect to certain types of financial institutions.[2]

Sharing Within the Corporate Organizational Structure

In January 2006, FinCEN, after consulting with the staffs of the Securities Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC''), determined that, subject to certain exceptions or qualifications, a securities broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entities, both domestic and foreign.[3] Moreover, guidance issued by

[1] This single docket number is shared by three related documents (a notice of proposed rulemaking, and this and another piece of proposed guidance related to that notice of proposed rulemaking) published simultaneously by FinCEN in today's **Federal Register**. Accordingly, commenters may submit comments related to any of the proposals, or any combination of proposals, in a single comment letter.

[2] *See* 31 CFR 103.15 to 103.21.

[3] ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures

Continued

FinCEN in consultation with the SEC in October 2006 stated that a U.S. mutual fund may share a SAR with the investment adviser that controls the fund, whether domestic or foreign, so that the investment adviser could implement enterprise-wide risk management and compliance functions over all of the mutual funds that it controls [4] and improve its identification and reporting of suspicious activity.[5] FinCEN also issued joint guidance with the Board of Governors of the Federal Reserve System (''FRB''), the Federal Deposit Insurance Corporation (''FDIC''), the Office of the Comptroller of the Currency (''OCC''), and the Office of Thrift Supervision (''OTS''), concluding that, subject to certain exceptions or qualifications, a U.S. branch or agency of a foreign bank may share a SAR with its head office outside the United States, and a U.S. bank or savings association may disclose a SAR to its controlling company, no matter where the entity or party is located.[6] Nothing in the proposed guidance for sharing with affiliates supersedes any of the guidance mentioned in the preceding paragraph, or the adopting release for the mutual fund SAR rule.[7]

These guidance documents reflected a recognition by FinCEN, the FDIC, the FRB, the OCC, the OTS, the SEC, and the CFTC (referred to collectively in the proposed guidance as the ''Federal regulators'') that a head office, controlling entity or party, or parent entity of a depository institution, broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities, has oversight responsibilities with respect to enterprise-wide risk management. These responsibilities include a valid need to review compliance by U.S.-based depository institutions, broker-dealers, mutual funds, futures commission merchants, and introducing brokers with legal requirements to identify and report suspicious activity.

The guidance documents regarding the sharing of SARs with head offices, controlling companies or parties, and parent entities (referred to here as the ''2006 Guidance'') expressly noted that the sharing of a SAR with a non-U.S. entity raises concerns about the ability of the foreign entity to protect the SAR in light of possible requests for disclosure abroad that may be subject to foreign law. The 2006 Guidance also provides that the recipient may not disclose further any SAR, or the fact that such a report has been filed; however, the recipient may disclose without permission underlying information. The 2006 Guidance also stated that FinCEN and the other Federal regulators were considering whether a financial institution may share a SAR with other entities within the financial institution's corporate organization located inside the United States and those located abroad, and instructed financial institutions not to share SARs with such entities until further guidance was issued.

Proposed Regulatory Changes

In proposed regulations issued today, FinCEN is proposing to revise the regulations implementing the BSA regarding the confidentiality of a SAR to clarify, among other things, the scope of the statutory prohibition against the disclosure by a financial institution of a SAR. These rules include a provision clarifying that the statutory prohibition does not apply to sharing by a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, or any director, officer, employee, or agent thereof, of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for purposes consistent with Title II of the BSA, as determined by regulation or in guidance, provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported.

II. Proposed Guidance

This proposed guidance interprets the general statement in the proposed SAR confidentiality rules [8] that a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, or any director, officer, employee, or agent thereof, may share a SAR, or information that reveals the existence of a SAR, within its corporate organizational structure for purposes consistent with Title II of the BSA. First, the proposed guidance acknowledges that the 2006 Guidance regarding securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities continues to be applicable. It explains that sharing of a SAR or information that reveals the existence of a SAR by a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities with its head office or its controlling company, whether domestic or foreign, promotes compliance with the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of the securities broker-dealer's, mutual fund's, futures commission merchant's, and introducing broker in commodities' compliance with applicable laws and regulations.

Next, the guidance explains that FinCEN also has concluded that the proposed regulations may be interpreted to permit a securities broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities that has filed a SAR to share the SAR, or any information that would reveal the existence of the SAR, with an affiliate [9] that is subject to a SAR regulation.[10]

FinCEN has concluded that such sharing within a corporate organization is consistent with two important purposes of the BSA: promoting efforts to detect and report money laundering and terrorist financing by financial institutions that are subject to the BSA,

Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006).

[4] ''Control'' for the purposes of the October 2006 Guidance is defined in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)) to mean ''the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.'' A mutual fund typically is organized and operated by an investment adviser that controls the fund. By contrast, an investment adviser that performs limited functions in managing a mutual fund's securities portfolio (also known as a ''subadviser'') would not typically control the fund and therefore would be outside the scope of the guidance.

[5] FIN–2006–G013, ''Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds'' (October 4, 2006).

[6] ''Interagency Guidance on Sharing Suspicious Activity Reports with Head Offices and Controlling Companies'' (January 20, 2006).

[7] Specifically, we note that in both the mutual fund SAR rule adopting release (71 FR 26213) and the October 2006 guidance, FinCEN acknowledged the role of transfer agents and other service providers in the suspicious activity monitoring, detection, and reporting obligations of mutual funds. These service providers may be unaffiliated or affiliated with the mutual funds. The October 2006 guidance and adopting release clarified that a mutual fund may contractually delegate its SAR functions to such an agent, although the mutual fund remains responsible for assuring compliance with the rule, and therefore must monitor actively the performance of its reporting obligations.

[8] The proposed guidance interprets a provision in the proposed SAR regulations. The final guidance issued will be modified to correspond to any changes made in the final SAR regulations.

[9] For the purposes of this proposed guidance, an ''affiliate'' is effectively defined as a company under common control with, or a subsidiary of, the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities. ''Affiliate'' does not include holding companies because sharing with these entities is already addressed in the 2006 Guidance.

[10] *See* 31 CFR 103.15 to 103.21. *See also,* 12 CFR 208.62 (FRB); 12 CFR 353.3 (FDIC); 12 CFR 748.1 (NCUA); 12 CFR 21.11 (OCC); and 12 CFR 563.180 (OTS).

and ensuring the confidentiality of a SAR or any information that would reveal the existence of a SAR. The sharing by a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities of a SAR, or any information that would reveal the existence of a SAR, can facilitate the identification of suspicious transactions taking place through the securities broker-dealer's, mutual fund's, futures commission merchant's, or introducing broker in commodities' affiliates that are also subject to SAR reporting requirements. Although the sharing of information underlying the filing of a SAR has never been prohibited under the BSA, it is understood that the sharing of a SAR itself pursuant to this proposed guidance may entail greater efficiencies.[11]

Moreover, the proposed SAR confidentiality rules provide that a ''SAR, and any information that would reveal the existence of a SAR, are confidential.'' [12] Accordingly, affiliates subject to a SAR rule are prohibited from disclosing any SAR or information that a SAR was filed, including both SARs they have filed, and any SARs they have received that have been filed by others. In addition, because the guidance applies only to the sharing of a SAR by the securities broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities ''that has filed'' the SAR, the guidance includes a statement clarifying that it is not permissible for an affiliate that has received such a SAR to share that SAR, or any information that would reveal the existence of that SAR with another affiliate, even if that affiliate is an affiliate subject to a SAR rule. The guidance also states that a broker-dealer in securities, mutual fund, futures commission merchant, and introducing broker in commodities, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls. Given the above restrictions, FinCEN is satisfied that the sharing permitted by this guidance is consistent with the BSA objective to ensure that suspicious activity reporting remains confidential.

FinCEN has declined to permit sharing with affiliates that are not subject to a SAR rule, whether domestic or foreign.[13] At this time, it is not apparent that such sharing would be consistent with the purposes of the BSA, to promote efforts to detect and report money laundering and terrorist financing by financial institutions that are subject to rules implementing the BSA, and to ensure the confidentiality of a SAR or any information that would reveal the existence of a SAR.

Finally, this proposed guidance is intended only to remove unnecessary obstacles to detecting and reporting suspicious activity. It should not be read to impose new BSA requirements or to suggest that sharing with affiliates is compulsory.

III. Request for Comment

FinCEN invites comments on all aspects of the proposed guidance. FinCEN solicits comment on whether this proposed guidance would achieve the intended effect of promoting compliance with the BSA. We also request comment on whether the proposed guidance will be beneficial, whether it raises any ambiguities, and whether it will result in any negative consequences. In addition, we specifically invite comment on the following:

- Whether the definition of ''affiliate'' is appropriate?
- Whether the scope of the guidance should be expanded to permit sharing with other affiliates *within the United States.* Commenters suggesting that the scope of the guidance be expanded should address how additional sharing would be consistent with the purposes of Title II of the BSA;
- Whether the scope of the guidance clearly limits sharing with affiliates to only those affiliates within the United States based on the application of FinCEN's SAR rules or whether further clarification is needed to ensure that SARs are shared only in a domestic context;
- Whether the scope of the guidance should be expanded to permit sharing with other affiliates *outside of the United States.* Commenters suggesting that the scope of the guidance be expanded should address how additional sharing outside the U.S. would be consistent with the purposes of Title II of the BSA. In particular, commenters should explain how a foreign affiliate might protect a SAR in light of a possible request for disclosure abroad that may be subject to foreign law;
- Whether similar provisions to allow sharing with certain affiliates should be permitted among all financial institutions subject to a SAR rule; and
- Whether financial institutions, other than depository institutions, securities broker-dealers, mutual funds, futures commission merchants, or introducing broker in commodities, subject to a SAR rule should be permitted to share a SAR, or any information that would reveal the existence of a SAR, with parent entities and/or affiliates; and

Whether and how a securities broker-dealer, mutual fund, futures commission merchant, and introducing broker in commodities can store and provide access to SARs in an electronic system in a way that prevents the SARs from being subject to disclosure laws or obligations of foreign jurisdictions.

Proposed Interpretive Guidance [14]

Sharing Suspicious Activity Reports by Securities Broker-Dealers, Mutual Funds, Futures Commission Merchants, and Introducing Brokers in Commodities With Certain U.S. Affiliates [1]

The Financial Crimes Enforcement Network (''FinCEN''), after consulting with staff of the U.S. Securities and Exchange Commission (''SEC'') and the Commodity Futures Trading Commission (''CFTC''), is issuing this guidance to confirm that under the Bank Secrecy Act (''BSA'') and its implementing regulations, securities broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities that have filed a Suspicious Activity Report (''SAR'') may share the SAR, or any information that would reveal the existence of the SAR, with certain affiliates. This guidance does not address the applicability of any other Federal or state laws.

[11] For example, the sharing of a SAR eliminates the need to create a separate summary document which, if shared, might inadvertently reveal the existence of a SAR itself.

[12] *See* the Notice of Proposed Rulemaking published elsewhere in today's **Federal Register**.

[13] FinCEN does not intend this guidance to permit the sharing of SARs with affiliates where such sharing would subject the SARs to the laws of a foreign jurisdiction, and elsewhere in this notice seeks specific comment on whether as drafted, the guidance meets that purpose based on present industry practices.

[14] For purposes of the guidance text below, all citations to Title 31 SAR regulations are references to the amended regulations we anticipate promulgating as discussed in the above section, *Proposed Regulatory Changes.*

[1] For purposes of this guidance, ''affiliate'' of a person means any company under common control with, or controlled by, such person. ''Control'' of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company. Any person who does not own more than 25 percent of the voting securities of any company will be presumed not to control the company.

The BSA prohibits the filer of a SAR from notifying any person involved in a suspicious transaction that the activity has been reported.[2] Regulations issued by FinCEN [3] construe this confidentiality provision as generally prohibiting a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities from disclosing a SAR, or any information that would reveal the existence of a SAR.

However, the regulations make clear that, provided no person involved in the transaction is notified that the transaction has been reported, the prohibition does not include disclosures to (1) FinCEN; (2) any Federal, State, or local law enforcement agency; (3) any Federal or state regulatory agency that examines the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for compliance with the BSA; or (4) a self-regulatory organization for the purpose of examining the filing financial institution for compliance with its SAR reporting requirements. The regulations also provide that the prohibition does not apply to: (i) The disclosure of the underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures related to filing a joint SAR and in connection with certain employment references or termination notices; and (ii) the sharing of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities for purposes consistent with Title II of the BSA, as determined by regulation or in guidance.[4]

In previously issued guidance (''January 2006 Guidance''), FinCEN, in consultation with the staffs of the SEC and the CFTC, determined that a securities broker-dealer, futures commission merchant, or introducing broker in commodities may share a SAR with its parent entity (whether domestic or foreign).[5] In October 2006, FinCEN additionally published guidance stating that a mutual fund may share SARs with an investment adviser that controls the fund, whether domestic or foreign.[6] These guidance documents continue to be applicable and comport with the SAR regulations referenced above.[7] The sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR, with a parent entity or investment adviser that controls a mutual fund (including a foreign parent entity or foreign investment adviser) promotes compliance with the applicable requirements of the BSA by enabling the parent entity or investment adviser that controls a mutual fund to discharge its oversight responsibilities with respect to enterprise-wide risk management and compliance with applicable laws and regulations.

The January 2006 Guidance deferred taking a position on whether a securities broker-dealer, futures commission merchant, or introducing broker in commodities is permitted to share a SAR with affiliates and directed institutions not to share with such affiliates. FinCEN, in consultation with SEC and CFTC staff, has now concluded that a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities that has filed a SAR may share the SAR, or any information that would reveal the existence of the SAR, with an affiliate, provided the affiliate is subject to a SAR regulation [8] issued by FinCEN, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision. The sharing of SARs with such affiliates facilitates their compliance with the identification of suspicious transactions taking place through the securities broker-dealer's, mutual fund's, futures commission merchant's, or introducing broker in commodities' affiliates that are subject to a SAR rule. Therefore, such sharing within the corporate organizational structure of a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities is consistent with the purposes of Title II of the BSA.

It is not consistent with the purposes of Title II of the BSA for an affiliate that has received a SAR from a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities to share that SAR, or any information that would reveal the existence of that SAR with an affiliate of its own, even if that affiliate is subject to a SAR rule.

As is the case with sharing SARs with parent entities, there may be circumstances under which a securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, its affiliate, or both entities would be liable for direct or indirect disclosure by the affiliate of a SAR or any information that would reveal the existence of a SAR. Therefore, the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities, as part of its internal controls, should have written confidentiality agreements in place ensuring that its affiliates protect the confidentiality of the SAR through appropriate internal controls.

Consistent with the BSA and the implementing regulations issued by FinCEN, a SAR, or any information that would reveal the existence of a SAR, must not be disclosed, even under this guidance, if the securities broker-dealer, mutual fund, futures commission merchant, or introducing broker in commodities has reason to believe it may be disclosed to any person involved in the suspicious activity that is the subject of the SAR.

Dated: February 27, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E9–4695 Filed 3–6–09; 8:45 am]

BILLING CODE 4810–02–P

[2] *See* 31 U.S.C. 5318(g)(2).

[3] *See* 31 CFR 103.15(d), 103.17(e), and 103.19(e).

[4] *See* the Notice of Proposed Rulemaking published elsewhere in today's **Federal Register**.

[5] ''Guidance on Sharing of Suspicious Activity Reports by Securities Broker-Dealers, Futures Commission Merchants, and Introducing Brokers in Commodities'' (January 20, 2006).

[6] ''Frequently Asked Questions: Suspicious Activity Reporting Requirements for Mutual Funds'' (October 4, 2006).

[7] *See* supra note 4.

[8] *See* 31 CFR 103.15 to 103.21. *See also,* 12 CFR 21.11 (Office of the Comptroller of the Currency); 12 CFR 208.62, 211.5(k), 211.24(f), 225.4(f) (Board of Governors of the Federal Reserve System); 12 CFR 353.3 (Federal Deposit Insurance Corporation); 12 CFR 563.180 (Office of Thrift Supervision); 12 CFR 748.1(c) (National Credit Union Administration).

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