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Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 300

RIN 3206–AL18

Time-in-Grade Eliminated

AGENCY: Office of Personnel Management.

ACTION: Final rule; withdrawal.

SUMMARY: The Office of Personnel Management (OPM) is withdrawing the final rule, titled Time-in-Grade Elimination, published in the **Federal Register** on November 7, 2008. After carefully considering all of the comments OPM has determined that it would be more productive to consider the merits of the time-in-grade issue as part of a more comprehensive review of pay, performance, and staffing issues than to regulate this particular issue in piecemeal fashion.

DATES: Effective August 11, 2009, the final rule published November 7, 2008, at 73 FR 66157, extended March 9, 2009, at 74 FR 9951, and further extended May 18, 2009, at 74 FR 23109, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Ms. Janice Warren by telephone (202) 606–0960; by FAX (202) 606–2329; by TTY (202) 418–3134; or by e-mail *janice.warren@opm.gov*.

SUPPLEMENTARY INFORMATION: On November 7, 2008 the U.S. Office of Personnel Management (OPM) published in the **Federal Register** (73 FR 66157) a final rule eliminating the Time-in-Grade restriction on advancement to competitive service positions in the General schedule. This rule had an effective date of March 9, 2009.

On March 9, 2009 the U.S. Office of Personnel Management (OPM) published a final rule in the **Federal Register** (74 FR 9951) extending the March 9, 2009, effective date until May 18, 2009, and opening a new public comment period. OPM provided this comment period to allow interested parties to submit views on issues of law and policy raised by the final rule published on November 7, 2008.

On May 11, 2009, OPM published in the **Federal Register** (74 FR 21771) a notice proposing to revoke the final rule and proposing to further extend its effective date to August 16, 2009, with a request for public comments on the merits of revoking, retaining, or amending OPM's November 7, 2008 final rule and on the merits of extending the effective date of the final rule pending the completion of the rulemaking proceeding. On May 18, 2008, OPM published a final rule (74 FR 23109) extending the effective date of the final rule to August 16, 2009, and responding to public comments on the proposal to extend the final date of the regulation.

The following is a discussion of the comments OPM received during the two public comment periods raised in connection with the merits of the final rule published on November 7, 2008.

Comments From the March 9, 2009 Federal Register Notice

OPM received 43 comments on issues of law and policy raised by the final rule. These comments were provided by 37 individuals, three employee organizations, and three federal agencies.

OPM received 11 comments from individuals who generally supported retaining TIG rules.

We received 8 comments from individuals who generally supported elimination of TIG rules.

One individual supported TIG elimination on the basis that employees would still need one-year specialized experience in order to be promoted.

Two individuals commented that the time-in-grade regulation is a bad rule because it discriminates against highly-qualified, highly-capable and highly-productive candidates on the basis of an arbitrary time period.

Another individual, who generally supports TIG elimination, expressed concern over the possibility of abuse by hiring managers if the final rule were to go into effect. This person also questioned how TIG elimination would protect against grade-leaping by employees.

Another individual expressed similar concern. This person noted that although TIG elimination will provide some flexibility to agency managers, the commenter was concerned that elimination of this rule may encourage managers to abuse the system by promoting their favorite employees. This responder suggested the need for creation of a subjective factor to assist management with assessing performance and promotions.

One individual commented that TIG elimination will allow the Federal government to retain competent, capable and qualified employees. This individual also suggested that TIG removal will eliminate the possibilities of abuse and the 'good old boy' promotions.

Another individual commented that the elimination of time-in-grade will allow status candidates the ability to apply for higher graded positions based on past experience.

One respondent believes that TIG rules should be eliminated in order for competent and dedicated workers to be promoted to positions with more responsibility than the positions these employees currently occupy.

Another commenter supported TIG elimination on the basis that qualified, productive individuals should not have to wait 52 weeks to be promoted.

One individual commented that the elimination of time-in-grade would be a win-win for the agencies.

Two employee organizations submitted similar comments expressing the following views: Successful performance in a position for one year is an extremely useful measure for determining whether to promote an individual. With respect to promotions, both managers and employees suffer from a process that is not transparent and objective and TIG elimination will only add to this lack of transparency. Both organizations questioned OPM's justification for abandoning a long-standing practice of the competitive service. TIG elimination strips managers of their defense against charges that unequal pay amounts are based on race, gender, age or some other non-merit factors. Lastly, both organizations expressed concern that TIG elimination may result in agencies appointing people, who qualify for higher grade levels (*e.g.*, General Schedule (GS) level 12), to positions at lower grade levels

(*e.g.*, GS–5), and then promoting them quickly to the higher graded position (*e.g.*, GS–12) without competition. The net effect would be these employees essential obtain the higher graded position (GS–12) quickly based on competition at the lower graded position (GS–5).

Another employee organization commented that implementing the final rule (*i.e.*, TIG elimination) would create more problems than it could solve because of the cost and time considerations needed to establish and administer a replacement process which is transparent and trustworthy and that contains a standardized waiting period that is equitable and fair.

One commenter believes that TIG ensures competence and saves the government money by preventing inexperienced employees the opportunity to receive undeserved promotions; and it is risk that needs not be taken.

One individual stated that TIG elimination would be a slap in the face to all long serving Federal employees who had been subject to these rules.

One individual commented that TIG elimination will increase the power of the self-interested manager to build an entourage rather than a competent workforce.

One individual commented that eliminating time-in-grade would cause a deficit in trained and knowledgeable managers and a short and long-term detrimental impact on agency's missions.

The same individual stated the one-year requirement is not long enough for an employee to gain the knowledge or technical skills needed for promotion and that, eliminating time-in-grade will open the flood gates to more unqualified employees being promoted.

The same person suggested TIG elimination may lead to the possibility of abuse and misuse and to experienced employees being overlooked for promotions (or even dismissed) because they lacked the wrong connections necessary to obtain a promotion.

Another individual supported TIG elimination only if OPM developed a watchdog element or a randomly select ad-hoc group which investigated promotions.

One respondent believes TIG elimination will have no net effect on an individual's chances for promotion as long as the requirement for one-year of specialized experience remains in tact. This individual questioned the logic in eliminating an objective measure (TIG) in favor of a subjective one (specialized experience).

Beyond the Scope

One agency commented that OPM should give agencies advanced notice and adequate time to implement and modify merit promotion procedures so that agencies can notify employee unions as well as provide training before the implementation date.

The same agency and a another federal agency suggested that OPM clarify whether agencies will continue to have the option of imposing agency-specific TIG requirements after the November 7, 2008 final rule becomes effective (*i.e.*, after TIG is eliminated).

One of these agencies also commented that OPM provide clear and timely policy guidance on transitioning this change.

Another agency suggested OPM provide guidance on a variety of topics in the event that TIG is eliminated. These topics include: How to credit experience, whether TIG removal applies to career ladder positions, whether employees in career ladder positions may skip grade levels, and whether there are any limitations on movement within career ladder positions.

Two employee organizations noted that seniority is a widely accepted explanation by the courts and other federal agencies to justify the difference in pay for equally qualified employees.

The same two entities suggested OPM consult with stakeholders and provide sufficient training and objective measures for a fair and transparent process before eliminating time-in-grade.

One individual submitted a statement describing his personal experience with time-in-grade requirements, but not commenting on the rule.

Another individual commending the administration for proposing to eliminate time-in-grade, however this comment was made in reference to a demonstration project authority which is not subject to time-in-grade restrictions.

Comments From the May 11, 2009 Federal Register Notice

OPM received comments from 154 individuals, 3 employee organizations, and 2 federal agencies on the merits of retaining, revoking, or amending the final rule.

Retaining Time-in-Grade

OPM received 33 comments on retaining the time-in-grade regulation. These comments were provided by thirty two individuals and one national employee organization.

The national employee organization suggested that eliminating time-in-grade will cause low employee morale and lead to confusion. This entity commented that the time-in-grade regulation provides a tool for eligibility that eliminates capriciousness, favoritism, prejudice or bias.

Sixteen individuals commented generally that time-in-grade should be retained.

One individual suggested TIG elimination will stress agencies' budgets and place added burdens on supervisors to promote employees sooner than otherwise would be the case.

Seven individuals commented on the need for a mechanism to ensure fair recruitment and placement. These respondents indicated that TIG elimination would provide management with a tool to use favoritism to select or promote employees based on personal choices.

One individual commented that TIG elimination may result in increased litigation for the Equal Employment Opportunity Commission, federal agencies, and employee unions.

One individual commented the elimination of time-in-grade would put a huge burden on human resources, and that keeping time-in-grade restrictions would eliminate rapid advancements.

One individual suggested that elimination of time-in-grade will lead to disproportionate control on the part of employees regarding their opportunities for promotion.

One individual commented that elimination of time-in-grade would result in a popularity contest, and therefore abuse by management, to determine which employees receive promotions.

One individual commented that TIG elimination would cause continued recruitment of inexperienced people and provide management an opportunity to promote their favorite high performer.

One individual suggested that TIG elimination would lead to imbalances within an agency's workforce (due to increased promotions) and that TIG removal would only benefit newly hired employees.

One individual suggested that TIG elimination will lead to and justify abuses by management.

One individual commented that TIG elimination would erode Federal employee's faith in their human resources promotion policy.

Revoking Time-in-Grade

OPM received 107 comments on the merits of revoking the time-in-grade regulation. These comments were provided by 106 individuals, and 1 federal agency.

Sixty-seven individuals commented generally that TIG should be revoked.

One agency commented that the elimination of time-in-grade will allow the federal government to compete with private industry, decrease stagnation of talent, enhance succession planning efforts, and free-up management to become mentors.

Four individuals commented that employees should be rewarded (promoted) based on performance, and that the passage of time has nothing to do with an individual's contribution to his or her agency.

Four individuals commented that time-in-grade is an arbitrary and outdated time period. These individuals also believed that favoritism in promotions currently exists and that TIG removal would give managers additional flexibility to promote their staff without any additional impropriety.

Five individuals commented that time-in-grade holds back young professionals, and causes qualified individuals to leave Federal service.

One individual questioned whether a 52-week period was necessary in order to determine an individual's readiness for promotion. This individual believed that because of TIG, agencies run the risk of losing good people.

Four individuals commented that TIG elimination (or modification) is needed to improve agency mission readiness and reduce overtime cost associated with maintaining a daily workforce.

Two individuals commented that time-in-grade is a form of discrimination.

Three individuals commented that TIG penalizes hard working employees who perform well in their jobs.

One individual commented that TIG elimination would remove protectionist language which favors entrenched federal employees.

One individual commented that the time-in-grade regulation serves as a recruitment disincentive which may cause Federal agencies to miss out on hiring skilled talent. This individual also stated that TIG creates unnecessary human capital cost.

One individual suggested that TIG punishes loyal Federal employees at the expense of recent hires from the private sector.

One individual commented that the elimination of time-in-grade would afford greater flexibility for the federal managers.

Another individual questioned the ethics of applying a TIG standard to hard working employees.

One individual stated that the current time-in-grade rules limit opportunities and incentives for internal employees, veterans, and applicants with educational qualifications.

Two individuals commented that the federal government needs to modernize the promotion processes in order to attract and retain talent; and that talented federal employees should be able to move up the grade scale at a quicker pace than the rules currently allow.

One individual believes that TIG elimination would contribute to a smarter more productive Federal workforce.

One individual believes the existence of TIG results in applicants having to accept lower-graded positions than those for which they are otherwise qualified.

One individual commented that TIG elimination would place all employees on a leveled playing field with respect to promotions.

Another individual suggested that TIG elimination would contribute to greater diversity among the Federal workforce.

Three individuals commented that TIG negatively impacts underpaid employees.

One person believes TIG rules encourage mediocrity among federal employees. This individual suggested that TIG provides a disincentive against hard work because the standards for promotion are the same for hard-working and non-hardworking employees.

One Individual commented that the TIG rules unfairly penalize employees with previous work experience who may otherwise be promoted on the basis of that experience in the absence of the 52-week requirement.

One person commented that TIG elimination makes good business sense and may support the notion that the best worker gets hired (promoted).

Amending Time-in-Grade

OPM received 9 comments on the merits of amending the time-in-grade regulation. These comments were provided by six individuals and two employee organizations.

One employee organization suggested OPM revise the time-in-grade regulation to allow for filling positions at the ''target grade'' for individuals that are fully qualified.

Another national employee organization suggested that OPM consider a TIG exclusion for positions directly tied to ensuring public safety.

One individual suggested that OPM develop a formula to ensure employees could get promoted after 52 weeks of Federal service.

One individual suggested OPM amend the TIG rules to allow for temporary promotion.

One individual suggested OPM conduct an overhaul of the TIG rules to better meet the needs of agencies and employee. This individual also believes the current system will induce increased numbers of federal government employees to migrate to jobs in private industry.

Two individuals suggested TIG needs to be re-evaluated and modified so that employees of the government will not be penalized for accepting lower graded positions.

One individual commented that OPM need to eliminate time-in-grade for GS–13, 14 and 15 grade levels.

Another individual suggested that OPM consider whether a 1-year TIG period provides enough time for managers to determine an employee's readiness for promotion.

Beyond the Scope

OPM received 6 comments which were beyond the scope of the merits of TIG retention, revocation, or amendment. These comments were provided by five individuals and one federal agency.

The agency suggested that OPM provide agencies with advanced notification prior to implementing TIG elimination. This notification is necessary so that agencies will have adequate time to modify merit promotion procedures, notify employee unions, and provide training before the implementation date.

The same agency commented that OPM needs to clarify, if TIG is eliminated, whether an agency will still have the option to impose a TIG requirement at its discretion.

The same agency also commented that OPM provide clear and timely policy guidance on transitioning to TIG elimination.

Two individual commented that it is detrimental that the government promote internally.

One individual objected to extending and applying TIG requirements for employees covered under the National Security Personnel System.

One individual suggested OPM revise the qualification requirement for TIG.

One individual commented on the pay-for-performance system and the importance of funding and involving Federal supervisors.

OPM carefully considered the comments we received during each of these comment periods, which reflected a variety of views. As a result, we have decided to withdraw the elimination of time-in-grade regulation that was

published in the **Federal Register** on November 7, 2008. After carefully considering all of the comments, OPM has determined that it would be more productive to consider the merits of the time-in-grade issue as part of a more comprehensive review of pay, performance, and staffing issue that OPM and the Administration are conducting in various contexts than to regulate one isolated issue in a piecemeal fashion.

This means that the TIG rules remain in effect.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–19174 Filed 8–10–09; 8:45 am]

BILLING CODE 6325–39–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AI60

[NRC–2009–0132]

List of Approved Spent Fuel Storage Casks: HI–STORM 100 Revision 6, Confirmation of Effective Date

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule: Confirmation of effective date.

SUMMARY: The Nuclear Regulatory Commission (NRC) is confirming the effective date of August 17, 2009, for the direct final rule that was published in the **Federal Register** on June 2, 2009 (74 FR 26285). This direct final rule amended the NRC's spent fuel storage regulations in 10 CFR 72.214 to revise the HI–STORM 100 dry cask storage system listing to include Amendment No. 6 to Certificate of Compliance (CoC) Number 1014.

DATES: *Effective Date:* The effective date of August 17, 2009, is confirmed for this direct final rule.

ADDRESSES: Documents related to this rulemaking, including any comments received, may be examined at the NRC Public Document Room, Room O–1F23, 11555 Rockville Pike, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415–6219, e-mail *Jayne.McCausland@nrc.gov*.

SUPPLEMENTARY INFORMATION: On June 2, 2009 (74 FR 26285), the NRC published a direct final rule amending its regulations at 10 CFR 72.214 to include Amendment No. 6 to CoC Number 1014. Amendment No. 6 modifies the CoC to add instrument tube tie rods used for pressurized water reactor 15x15 and 17x17 fuel lattices, for both intact and damaged fuel assemblies, to the approved contents of the multipurpose canister (MPC)–24, MPC–24E, MPC–24EF, MPC–32, and MPC–32F models; and to correct legacy editorial issues in Appendices A and B Technical Specifications. In the direct final rule, NRC stated that if no significant adverse comments were received, the direct final rule would become final on August 17, 2009. The NRC did not receive any comments on the direct final rule. Therefore, this rule will become effective as scheduled.

Dated at Rockville, Maryland, this 5th day of August 2009.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration.

[FR Doc. E9–19213 Filed 8–10–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2009–0162]

RIN 3150–AI62

List of Approved Spent Fuel Storage Casks: Standardized NUHOMS® System Revision 10, Confirmation of Effective Date

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule: Confirmation of effective date.

SUMMARY: The Nuclear Regulatory Commission (NRC) is confirming the effective date of August 24, 2009, for the direct final rule that was published in the **Federal Register** on June 10, 2009 (74 FR 27423). This direct final rule amended the NRC's spent fuel storage regulations at 10 CFR 72.214 to revise the Standardized NUHOMS® System listing to include Amendment Number 10 to Certificate of Compliance (CoC) Number 1004.

DATES: *Effective Date:* The effective date of August 24, 2009, is confirmed for this direct final rule.

ADDRESSES: Documents related to this rulemaking, including any comments received, may be examined at the NRC Public Document Room, Room O–1F23, 11555 Rockville Pike, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415–6219, e-mail *Jayne.McCausland@nrc.gov*.

SUPPLEMENTARY INFORMATION: On June 10, 2009 (74 FR 27423), the NRC published a direct final rule amending its regulations at 10 CFR 72.214 to include Amendment No. 10 to CoC Number 1004. Amendment No. 10 modifies the CoC to add two new dry shielded canisters (DSCs) designated the NUHOMS® –61BTH DSC and the NUHOMS® –32PTH1 DSC, add an alternate high-seismic option of the horizontal storage module (HSM) for storing the 32PTH1 DSC, allow storage of Westinghouse 15x15 partial length shield assemblies in the NUHOMS® –24PTH DSC, allow storage of control components in the NUHOMS® –32PT DSC, and add a new Technical Specification, which applies to Independent Spent Fuel Storage Installation sites located in a coastal marine environment, that any load bearing carbon steel component which is part of the HSM must contain at least 0.20 percent copper as an alloy addition. In the direct final rule, NRC stated that if no significant adverse comments were received, the direct final rule would become final on August 24, 2009. The NRC did not receive any comments on the direct final rule. Therefore, this rule will become effective as scheduled.

Dated at Rockville, Maryland, this 5th day of August 2009.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration.

[FR Doc. E9–19214 Filed 8–10–09; 8:45 am]

BILLING CODE 7590–01–P

FARM CREDIT ADMINISTRATION

12 CFR Parts 619, 620, and 621

RIN 3052–AC35

Definitions; Disclosure to Shareholders; Accounting and Reporting Requirements; Disclosure and Accounting Requirements; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Final rule; notice of effective date.

SUMMARY: The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), issued a final rule under parts 619, 620, and 621 on June 17, 2009, amending FCA's regulations related to disclosure and reporting practices of Farm Credit System institutions. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is August 5, 2009.

DATES: *Effective Date:* Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR parts 619, 620, and 621 published on June 17, 2009 (74 FR 28597), is effective August 5, 2009.

FOR FURTHER INFORMATION CONTACT: Thomas R. Risdal, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4498, TTY (703) 883–4434, or Robert Taylor, Attorney, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4020.

(12 U.S.C. 2252(a)(9) and (10))

Dated: August 5, 2009.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E9–19122 Filed 8–10–09; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0683; Directorate Identifier 2009–NM–129–AD; Amendment 39–15991; AD 2009–17–01]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Model G–IV, GIV–X, and GV–SP Series Airplanes and Model GV Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Gulfstream Model G–IV, GIV–X, GV–SP series airplanes and Model GV airplanes. This AD requires, for certain airplanes, a one-time inspection for sealant applied to the exterior of the auxiliary power unit (APU) enclosure (firewall), and, for airplanes with the subject sealant and certain other airplanes, a revision of the airplane flight manual to prohibit operation of the APU during certain ground and flight operations. This AD results from notification from the airplane manufacturer that an improper, flammable sealant was used on the interior and exterior of the APU enclosure (firewall). We are issuing this AD to prevent this flammable sealant from igniting the exterior surfaces of the APU enclosure (firewall) under certain anomalous conditions such as an APU failure/APU compartment fire, which could result in propagation of an uncontained fire to other critical areas of the airplane.

DATES: This AD is effective August 26, 2009.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of August 26, 2009.

We must receive comments on this AD by October 13, 2009.

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

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

For service information identified in this AD, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, Georgia 31402–2206; telephone 800–810–4853; fax 912–965–3520; e-mail *pubs@gulfstream.com;* Internet *http://www.gulfstream.com/product_support/technical_pubs/pubs/index.htm.*

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Sanford Proveaux, Aerospace Engineer, Propulsion and Services Branch, ACE–118A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349; telephone (770) 703–6049; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Discussion

The manufacturer has notified us that an improper, flammable sealant (GMS 4107) was used on interior angles formed by sheet intersections and titanium sheet mating surfaces of the auxiliary power unit (APU) enclosure (firewall). This flammable sealant was also used to coat rivet heads on the interior and exterior surfaces of the APU enclosure (firewall). In some places the sealant was used by design, and in other places it was used in error. This sealant could ignite the exterior surfaces of the APU enclosure (firewall) under certain anomalous conditions such as an APU failure/APU compartment fire. This condition, if not corrected, could result in propagation of an uncontained fire to other critical areas of the airplane.

Relevant Service Information

We reviewed the Gulfstream alert customer bulletins listed in the following table. The alert customer bulletins for Model G–IV series airplanes and Model GV airplanes describe procedures for a one-time inspection of the APU enclosure (firewall) for overcoat application of the flammable sealant on rivets or fillet seals on panel joints. For Model GIV–X and GV–SP series airplanes, and airplanes with flammable sealant found during the inspection, the alert customer bulletins describe revising the applicable airplane flight manual (AFM) and reporting compliance to Gulfstream.

TABLE—APPLICABLE GULFSTREAM ALERT CUSTOMER BULLETINS

For model—	Use—	Which includes—	To the—
G–IV (G300) series airplanes.	Gulfstream G300 Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G300 AFM.
G–IV (G400) series airplanes.	Gulfstream G400 Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G400 AFM.
G–IV series airplanes ...	Gulfstream IV Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G–IV AFM.
GIV–X (G350) series airplanes.	Gulfstream G350 Alert Customer Bulletin 8A, dated June 30, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G350 AFM.
GIV–X (G450) series airplanes.	Gulfstream G450 Alert Customer Bulletin 8A, dated June 30, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G450 AFM.
GV airplanes	Gulfstream V Alert Customer Bulletin 29A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream GV AFM Supplement GV–2009–03, Revision 1, dated June 25, 2009.	Gulfstream GV AFM.
GV–SP (G500) series airplanes.	Gulfstream G500 Alert Customer Bulletin 9A, dated June 30, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G500 AFM.
GV–SP (G550) series airplanes.	Gulfstream G550 Alert Customer Bulletin 9A, dated June 30, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G550 AFM.

FAA's Determination and Requirements of This AD

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs. This AD requires accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the AD and the Service Information.''

Differences Between the AD and the Service Information

Although the Gulfstream alert customer bulletins specified in the table titled ''Table 1—Applicable alert customer bulletins including airplane flight manual (AFM) supplements, and AFMs'' of this AD specify to submit information to the manufacturer, this AD does not include such a requirement.

Although certain Gulfstream alert customer bulletins specified in the table titled ''Table 1—Applicable alert customer bulletins including airplane flight manual (AFM) supplements, and AFMs'' of this AD specify only to ''inspect'' for flammable sealant on the APU enclosure (firewall), we have determined that the procedures in those Gulfstream alert customer bulletins should be described as a ''general visual inspection.'' Note 1 has been included in this AD to define this type of inspection.

Clarification of Statement in Gulfstream Alert Customer Bulletins

The Gulfstream alert customer bulletins specified in the table titled ''Table 1—Applicable alert customer bulletins including airplane flight manual (AFM) supplements, and AFMs'' of this AD include a statement in the Accomplishment Instructions to inform operators to contact Gulfstream ''if technical assistance is required'' in accomplishing the actions specified in the alert customer bulletins. We have included Note 2 in this AD to clarify that any deviation from the instructions provided in the applicable alert customer bulletin must be approved as an alternative method of compliance under the provisions of paragraph (l) of this AD.

Interim Action

We consider this AD interim action. If final action is later identified, we might consider further rulemaking then.

FAA's Justification and Determination of the Effective Date

The use of flammable sealant in the construction of the primary APU enclosure (firewall) compromises the integrity of the enclosure (firewall). If an APU fire occurs, the flammable sealant can ignite the exterior of the APU enclosure (firewall). This area is very confined and surrounded by primary airframe structure that carries the empennage loads. Primary flight controls for pitch and yaw are routed through the area adjacent to the APU enclosure (firewall). Because of our requirement to promote safe flight of civil aircraft and thus the critical need to assure the structural integrity and proper functioning of the APU enclosure (firewall), and the short compliance time involved with this action, this AD must be issued immediately.

Because an unsafe condition exists that requires the immediate adoption of this AD, we find that notice and opportunity for prior public comment hereon are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0683; Directorate Identifier 2009–NM–129–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We

will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2009–17–01 Gulfstream Aerospace Corporation: Amendment 39–15991. Docket No. FAA–2009–0683; Directorate Identifier 2009–NM–129–AD.

Effective Date

(a) This airworthiness directive (AD) is effective August 26, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the Gulfstream airplanes identified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD, certificated in any category.

(1) Model G–IV series airplanes, having serial numbers (S/Ns) 1000 and subsequent.

(2) Model GIV–X series airplanes, having S/Ns 4001 through 4146 inclusive, and S/Ns 4148 through 4150 inclusive.

(3) Model GV airplanes, having S/Ns 501 and subsequent.

(4) Model GV–SP series airplanes, having S/Ns 5001 through 5204 inclusive, S/Ns 5206 through 5217 inclusive, and S/N 5219.

Subject

(d) Air Transport Association (ATA) of America Codes 53: Fuselage, and 49: Airborne Auxiliary Power.

Unsafe Condition

(e) This AD results from notification from the airplane manufacturer that an improper, flammable sealant was used on the interior and exterior of the auxiliary power unit (APU) enclosure (firewall). The Federal Aviation Administration is issuing this AD to prevent this flammable sealant from igniting the exterior surfaces of the APU enclosure (firewall) under certain anomalous conditions such as an APU failure/APU compartment fire, which could result in propagation of an uncontained fire to other critical areas of the airplane.

Compliance

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

Inspection for Flammable Sealant

(g) For Model G–IV series airplanes identified in paragraph (c)(1) of this AD, and Model GV airplanes identified in paragraph (c)(3) of this AD: Within 21 days after the effective date of this AD, except as provided by paragraph (k) of this AD, perform a general visual inspection of the exterior of the APU enclosure (firewall) to detect overcoat application of sealant on rivets or fillet seals on panel joints, in accordance with the Accomplishment Instructions of the applicable Gulfstream alert customer bulletin specified in Table 1 of this AD.

TABLE 1—APPLICABLE ALERT CUSTOMER BULLETINS INCLUDING AIRPLANE FLIGHT MANUAL (AFM) SUPPLEMENTS, AND AFMS

For model—	Use—	Which includes—	To the—
G–IV (G300) series airplanes.	Gulfstream G300 Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G300 AFM.
G–IV (G400) series airplanes.	Gulfstream G400 Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G400 AFM.
G–IV series airplanes ...	Gulfstream IV Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G–IV AFM.
GIV–X (G350) series airplanes.	Gulfstream G350 Alert Customer Bulletin 8A, dated June 30, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G350 AFM.
GIV–X (G450) series airplanes.	Gulfstream G450 Alert Customer Bulletin 8A, dated June 30, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G450 AFM.
GV airplanes	Gulfstream V Alert Customer Bulletin 29A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream GV AFM Supplement GV–2009–03, Revision 1, dated June 25, 2009.	Gulfstream GV AFM.

TABLE 1—APPLICABLE ALERT CUSTOMER BULLETINS INCLUDING AIRPLANE FLIGHT MANUAL (AFM) SUPPLEMENTS, AND AFMS—Continued

For model—	Use—	Which includes—	To the—
GV–SP (G500) series airplanes.	Gulfstream G500 Alert Customer Bulletin 9A, dated June 30, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G500 AFM.
GV–SP (G550) series airplanes.	Gulfstream G550 Alert Customer Bulletin 9A, dated June 30, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G550 AFM.

(1) If no exterior sealant is found applied during the inspection done in accordance with paragraph (g) of this AD: No further action is required by this paragraph.

(2) If exterior sealant is found applied during the inspection done in accordance with paragraph (g) of this AD: Do the actions specified in paragraph (h) of this AD.

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

Note 2: A statement in the Accomplishment Instructions of the applicable Gulfstream alert customer bulletins specified in Table 1 of this AD instructs operators to contact Gulfstream if technical assistance is needed in accomplishing the alert customer bulletin. However, any deviation from the instructions provided in the applicable alert customer bulletin must be approved as an alternative method of compliance under paragraph (l) of this AD.

Revision of the AFM

(h) For Model GIV–X series airplanes identified in paragraph (c)(2) of this AD, Model GV–SP series airplanes identified in paragraph (c)(4) of this AD, and Model G–IV series airplanes and Model GV airplanes with flammable sealant on the exterior of the APU enclosure (firewall) identified during the inspection required by paragraph (g) of this AD: At the applicable time specified in paragraph (h)(1) or (h)(2) of this AD, revise the Limitations Section of the applicable Gulfstream AFM specified in Table 1 of this AD to include the information in the applicable Gulfstream AFM supplement specified in Table 1 of this AD. These AFM supplements introduce limitations on the use of the APU during certain ground and flight operations.

Note 3: This AFM revision may be done by inserting a copy of the applicable AFM supplement into the applicable AFM specified in Table 1 of this AD. When the supplement has been included in the general revisions of the AFM, the general revisions may be inserted in the AFM, provided the relevant information in the general revision is identical to that in the applicable AFM supplement specified in Table 1 of this AD.

(1) For Model G–IV series airplanes and Model GV airplanes with flammable sealant on the exterior of the APU enclosure (firewall) identified during the inspection required by paragraph (g) of this AD: Prior to further flight following the inspection done in accordance with paragraph (g) of this AD.

(2) For Model GIV–X series airplanes identified in paragraph (c)(2) of this AD, and Model GV–SP series airplanes identified in paragraph (c)(4) of this AD: Within 21 days after the effective date of this AD.

Credit for Actions Done Using Previous Service Information

(i) Inspecting for flammable sealant and revising the AFM before the effective date of this AD using the applicable alert customer bulletin and AFM supplement specified in Table 2 of this AD are acceptable for compliance with the corresponding actions specified in this AD.

TABLE 2—ACCEPTABLE ALERT CUSTOMER BULLETINS INCLUDING AFM SUPPLEMENTS

For model—	Use—	Which includes—	To the—
G–IV (G300) series airplanes.	Gulfstream G300 Alert Customer Bulletin 40, dated May 21, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, dated May 19, 2009.	Gulfstream G300 AFM.
G–IV (G400) series airplanes.	Gulfstream Alert Customer Bulletin 40, dated May 21, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, dated May 19, 2009.	Gulfstream G400 AFM.
G–IV series airplanes ...	Gulfstream Alert Customer Bulletin 40, dated May 21, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, dated May 19, 2009.	Gulfstream G–IV AFM.
GIV–X (G350) series airplanes.	Gulfstream Alert Customer Bulletin 8, dated May 21, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, dated May 19, 2009.	Gulfstream G350 AFM.
GIV–X (G450) series airplanes.	Gulfstream Alert Customer Bulletin 8, dated May 21, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, dated May 19, 2009.	Gulfstream G450 AFM.
GV airplanes	Gulfstream Alert Customer Bulletin 29, dated May 21, 2009, including Service Reply Card, Parts I and II.	Gulfstream GV AFM Supplement GV–2009–03, dated May 19, 2009.	Gulfstream GV AFM.
GV–SP (G500) series airplanes.	Gulfstream Alert Customer Bulletin 9, dated May 21, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, dated May 19, 2009.	Gulfstream G500 AFM.
GV–SP (G550) series airplanes.	Gulfstream Alert Customer Bulletin 9, dated May 21, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, dated May 19, 2009.	Gulfstream G550 AFM.

No Reporting Required

(j) Although the Gulfstream alert customer bulletins specified in Table 1 of this AD specify to submit information to the manufacturer, this AD does not include this requirement.

Parts Installation

(k) As of the effective date of this AD, no person may install an APU enclosure (firewall) that contains flammable sealant (GMS 4107) in the construction, on any airplane.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, Atlanta Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Sanford Proveaux, Aerospace Engineer, Propulsion and Services Branch, ACE–118A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349; telephone (770) 703–6049; fax (770) 703–6097.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Material Incorporated by Reference

(m) You must use the service information contained in Table 3 of this AD to do the actions required by this AD, as applicable, unless the AD specifies otherwise.

TABLE 3—MATERIAL INCORPORATED BY REFERENCE

Alert customer bulletin—	AFM supplement—	AFM—
Gulfstream G300 Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G300 AFM.
Gulfstream G400 Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G400 AFM.
Gulfstream IV Alert Customer Bulletin 40A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream G–IV/G300/G400 AFM Supplement G–IV–2009–02, Revision 1, dated June 25, 2009.	Gulfstream G–IV AFM.
Gulfstream G350 Alert Customer Bulletin 8A, dated June 30, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G350 AFM.
Gulfstream G450 Alert Customer Bulletin 8A, dated June 30, 2009, including Service Reply Card.	Gulfstream G450/G350 AFM Supplement G450–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G450 AFM.
Gulfstream V Alert Customer Bulletin 29A, dated June 30, 2009, including Service Reply Card, Parts I and II.	Gulfstream GV AFM Supplement GV–2009–03, Revision 1, dated June 25, 2009.	Gulfstream GV AFM.
Gulfstream G500 Alert Customer Bulletin 9A, dated June 30, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G500 AFM.
Gulfstream G550 Alert Customer Bulletin 9A, dated June 30, 2009, including Service Reply Card.	Gulfstream G550/G500 AFM Supplement G550–2009–03, Revision 1, dated June 25, 2009.	Gulfstream G550 AFM.

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

(2) For service information identified in this AD, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, Georgia 31402–2206; telephone 800–810–4853; fax 912–965–3520; e-mail *pubs@gulfstream.com*; Internet *http://www.gulfstream.com/product_support/technical_pubs/pubs/index.htm*.

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on July 31, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–19063 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0225; Airspace Docket No. 09–ANM–4]

Establishment of Class E Airspace; Plentywood, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action will establish Class E airspace at Plentywood, MT. Controlled airspace is necessary to accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) at Plentywood Sher-Wood Airport, Plentywood, MT. This will improve the safety of Instrument Flight Rules (IFR) aircraft executing the new RNAV GPS SIAP at Plentywood Sher-Wood Airport, Plentywood, MT.

DATES: *Effective Date:* 0901 UTC, October 22, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On May 28, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish additional controlled airspace at Plentywood, MT (74 FR 25459). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace extending upward from 700 feet above the surface at Plentywood, MT. Controlled airspace is necessary to accommodate IFR aircraft executing a new RNAV (GPS) approach procedure at Plentywood Sher-Wood Airport, Plentywood, MT.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (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 discusses 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 establishes controlled airspace at Plentywood Sher-Wood Airport, Plentywood, MT.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed 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.

* * * * *

ANM MT, E5 Plentywood, MT [New]

Plentywood Sher-Wood Airport, MT
(Lat. 48°47′19″ N., long. 104°31′23″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Plentywood Sher-Wood Airport; and that airspace extending upward from 1,200 feet above the surface of the earth bounded by a line beginning at lat. 49°00′00″ N., long. 105°02′00″ W.; to lat. 49°00′00″ N., long. 104°02′00″ W.; to lat. 48°32′35″ N., long. 104°02′00″ W.; to lat. 48°27′00″ N., long. 104°11′12″ W.; to lat. 48°40′00″ N., long. 105°02′00″ W.; thence to the point of origin.

* * * * *

Issued in Seattle, Washington, on July 31, 2009.

H. Steve Karnes,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. E9–19031 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0926; Airspace Docket No. 08–AAL–24]

RIN 2120–AA66

Establishment, Revision, and Removal of Area Navigation (RNAV) Routes; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects errors in the legal descriptions of several Area Navigation Routes listed in a final rule published in the **Federal Register** on July 6, 2009 (74 FR 31845), Airspace Docket No. 08–AAL–24, FAA Docket No. FAA–2008–0926.

DATES: *Effective Date:* 0901 UTC, August 27, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; *telephone:* (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On July 6, 2009, a final rule for Airspace Docket No. 08–AAL–24, FAA Docket No. FAA–2008–0926 was published in the **Federal Register** (74 FR 31845). This rule revised fourteen RNAV routes, as well as established new routes, in the State of Alaska. Additionally, the action removed four existing routes that were no longer required. The PDN description for T–227 published as ''NDB/DM'' is incorrect; the correct listing for PDN should be ''NDB/DME''. The ENM description for route T–228 published as ''ENM'' is incorrect; the correct name for the description is ''EHM''. In addition, the longitude coordinate listed as ROCES for route Q–48 published as 143°08′16″W., is incorrect; the correct longitude coordinate is 144°08′16″W. This action corrects those errors.

Correction to Final Rule

■ Accordingly, pursuant to the authority delegated to me, the legal descriptions for T–227, T–228, and Q48 as published in the **Federal Register** on July 6, 2009 (74 FR 31845), and incorporated by reference in 14 CFR 71.1, are corrected as follows:

§ 71.1 [Amended]

* * * * *

T–227 SYA to SCC [Corrected]

SYA	VORTAC	(Lat. 52°43′06″ N., long. 174°03′44″ E.)
JANNT	WP	(Lat. 52°04′18″ N., long. 178°15′37″ W.)
BAERE	WP	(Lat. 52°12′12″ N., long. 176°08′09″ W.)
ALEUT	Fix	(Lat. 54°14′17″ N., long. 166°32′52″ W.)
MORDI	Fix	(Lat. 54°52′50″ N., long. 165°03′15″ W.)
GENFU	Fix	(Lat. 55°23′18″ N., long. 163°06′21″ W.)
BINAL	Fix	(Lat. 55°46′00″ N., long. 161°59′56″ W.)
PDN	NDB/DME	(Lat. 56°57′15″ N., long. 158°38′51″ W.)
AMOTT	Fix	(Lat. 60°53′56″ N., long. 151°21′46″ W.)
ANC	VOR/DME	(Lat. 61°09′03″ N., long. 150°12′24″ W.)
FAI	VORTAC	(Lat. 64°48′00″ N., long. 148°00′43″ W.)
SCC	VOR/DME	(Lat. 70°11′57″ N., long. 148°24′58″W.)

* * * * * * *

T–228 EHM to ROCES [Corrected]

EHM	VOR/DME	(Lat. 62°47′05″ N., long. 164°29′15″ W.)
RUFVY	WP	(Lat. 59°56′34″ N., long. 164°02′04″ W.)
HPB	VOR/DME	(Lat. 61°30′52″ N., long. 166°08′04″ W.)
OME	VOR/DME	(Lat. 64°29′06″ N., long. 165°15′11″ W.)
HIKAX	WP	(Lat. 65°36′20″ N., long. 165°44′44″ W.)
SHH	NDB	(Lat. 66°15′29″ N., long. 166°03′09″ W.)
ECIPI	Fix	(Lat. 67°55′48″ N., long. 165°29′58″ W.)
BRW	VOR/DME	(Lat. 71°16′24″ N., long. 156°47′17″ W.)
SCC	VOR/DME	(Lat. 70°11′57″ N., long. 148°24′58″ W.)
ROCES	WP	(Lat. 70°08′34″ N., long. 144°08′16″ W.)

* * * * * * *

Q–48 BRW to ROCES [Corrected]

BRW	VOR/DME	(Lat. 71°16′24″ N., long. 156°47′17″ W.)
SCC	VOR/DME	(Lat. 70°11′57″ N., long. 148°24′58″ W.)
ROCES	WP	(Lat. 70°08′34″ N., long. 144°08′16″ W.)

* * * * *

Issued in Washington, DC, on August 3, 2009.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. E9–19037 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0229; Airspace Docket No. 09–ASO–13]

Revocation of VOR Federal Airway V–329; Alabama-Florida

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes very high frequency omnidirectional range (VOR) Federal airway V–329, which extends between Montgomery, AL and the vicinity of Crestview, FL. The route is being removed at the request of the U.S. Army because the Andalusia, AL, VOR, which forms a segment of the airway, is being decommissioned due to unreliability and coverage limitations. This action will not adversely impact National Airspace System (NAS) Operations.

DATES: *Effective Date:* 0901 UTC, October 22, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On April 6, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to revoke VOR Federal airway V–329 (74 FR 15403). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. One comment was received. The Aircraft Owners and Pilots Association recommended that the FAA consider establishing a T-route (i.e., a low-altitude area navigation route) along the same route as V–329. The FAA supports this recommendation and will consider establishing a T-route as part of the national effort to expand area navigation capabilities.

With the exception of editorial changes, this amendment is the same as that proposed in the NPRM.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by revoking VOR Federal airway V–329. The FAA is taking this action because the Andalusia VOR, which is owned and operated by the U.S. Army, is being decommissioned due to recurring outages, maintenance issues, and coverage limitations. Decommissioning of the Andalusia VOR renders V–329 unusable. As an alternative, V–115, which lies to the west of the V–329, extends between the Crestview, FL, and the Montgomery, AL, VORTAC.

VOR Federal airways are published in paragraph 6010 of FAA Order 7400.9S signed October 3, 2008 and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airway listed in this document will be subsequently deleted from the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is

so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 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.

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 the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends a portion of the en route structure to enhance the safe and efficient use of the NAS in the Southeast United States.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a and 311b. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE 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 FAA Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008 and effective October 31, 2008, is amended as follows:

Paragraph 6010 Domestic VOR Federal airways

* * * * *

V–329 [Removed]

* * * * *

Issued in Washington, DC, on July 31, 2009.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. E9–19036 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34–60448]

Delegation of Authority to Director of Division of Enforcement

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending its rules to delegate authority to the Director of the Division of Enforcement to issue formal orders of investigation. These orders designate the enforcement staff authorized to issue subpoenas in connection with investigations under the federal securities laws. This action is intended to expedite the investigative process by removing the need for enforcement staff to seek Commission approval prior to performing routine functions. The Commission is adopting this delegation for a one-year period, and at the end of the period will evaluate whether to extend the delegation (though any formal orders issued during this period will remain in effect).

DATES: *Effective Date:* August 11, 2009.

FOR FURTHER INFORMATION CONTACT: Kenneth H. Hall, 202–551–4936, Office of Chief Counsel, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6553.

SUPPLEMENTARY INFORMATION: The Commission is authorized to conduct investigations of possible violations of the federal securities laws, which provide that ''any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry.'' Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(b). *See also,* Section 19(c) of the Securities Act of 1933, 15 U.S.C. 77s(c); Section 42(b) of the Investment Company Act of 1940, 15 U.S.C. 80a–41(b); and Section 209(b) of the Investment Advisers Act of 1940, 15 U.S.C. 80b–9(b). The Commission issues formal orders of investigation that authorize specifically designated enforcement staff to exercise the Commission's statutory power to subpoena witnesses and take the other actions authorized by the relevant cited provisions. The Commission is delegating the authority to issue formal orders of investigation to the Director of the Division of Enforcement. This delegation will expedite the investigative process by reducing the time and paperwork previously associated with obtaining Commission authorization prior to issuing subpoenas.

In any case the Division Director deems appropriate, the recommendation that a formal order be issued may be submitted to the Commission for review.

Administrative Law Matters

The Commission finds, in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)(A)), that this amendment relates solely to agency organization, procedure, or practice. Accordingly, the provisions of the APA regarding notice of the proposed rulemaking and opportunities for public participation, 5 U.S.C. 553, are not applicable. For the same reason, and because this amendment does not substantively affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(3)(C), are not applicable. Additionally, the provisions of the Regulatory Flexibility Act, which apply only when notice and comment are required by the APA or other law, 5 U.S.C. 603, are not applicable. Section 23(a)(2) of the Securities Exchange Act, 15 U.S.C. 78w, requires the Commission, in adopting rules under that Act, to consider the anticompetitive effects of any rules it adopts. Because the amendment imposes no new burdens on parties in investigations, the Commission does not believe it will have any impact on competition. Finally, this amendment does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1980, as

amended. Accordingly, the amendment is effective August 11, 2009.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies).

Text of Amendment

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

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

■ 1. The authority citation for part 200, subpart A, continues to read in part as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 80a–37, 80b–11, and 7202, unless otherwise noted.

* * * * *

■ 2. Section 200.30–4 is amended by adding paragraph (a)(13) to read as follows:

§ 200.30–4 Delegation of authority to Director of Division of Enforcement.

* * * * *

(a) * * *

(13) For the period from August 11, 2009 through August 11, 2010, to order the making of private investigations pursuant to section 19(b) of the Securities Act of 1933 (15 U.S.C. 77s(b)), section 21(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(b)), section 42(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(b) and section 209(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(b)). Orders issued pursuant to this delegation during this period will continue to have effect after August 11, 2010.

* * * * *

Dated: August 5, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–19116 Filed 8–10–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 2

Use of Ozone-Depleting Substances; Epinephrine

CFR Correction

In Title 21 of the Code of Federal Regulations, parts 1 to 99, revised as of Apr. 1, 2009, on page 66, § 2.125(e)(2)(v) is reinstated as follows:

§ 2.125 Use of ozone-depleting substances in foods, drugs, devices, or cosmetics.

* * * * *

(e) * * *

(2) * * *

(v) Epinephrine.

* * * * *

[FR Doc. E9–19297 Filed 8–10–09; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 250

[Docket ID: MMS–2008–OMM–0023]

RIN 1010–AD55 (Formerly AD50)

Technical Changes to Production Measurement and Training Requirements

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: This final rule will revise the production measurement regulations to establish meter proving, meter verification/calibration, and well test requirements after hurricanes and other events beyond the control of the lessee. This rulemaking will eliminate some reporting burden on industry, and it will eliminate the need for MMS to grant waivers to the reporting requirements in certain situations. The final rule will also add new definitions providing clarity in the training regulations, which should lead to improved training of Outer Continental Shelf workers.

DATES: *Effective Date:* This rule becomes effective on September 10, 2009.

FOR FURTHER INFORMATION CONTACT: Richard Ensele, Regulations and Standards Branch, at (703) 787–1583.

SUPPLEMENTARY INFORMATION: On September 17, 2008, MMS published a Notice of Proposed Rulemaking in the **Federal Register** entitled ''Technical Changes to Production Measurement and Training Requirements'' (73 FR 53793). The comment period for that proposed rule closed on November 17, 2008. In response to the proposed rule, MMS received seven sets of comments. One entity submitted two responses. The commenters included two trade organizations (Offshore Operators Committee (OOC) and National Ocean Industries Association (NOIA)), two energy companies, one industry training company, and one individual. We have posted all of the comments received on our Web site at: *http://www.mms.gov/federalregister/PublicComments/TechnicalChangestoProductionMeasurementTraining.htm.*

We considered all of the comments we received on the proposed rule. Following is a discussion of the relevant comments MMS received:

Revisions to Subpart L—Oil and Gas Production Measurement, Surface Commingling, and Security

We received suggestions from two entities regarding the proposed revisions to subpart L. The NOIA and OOC appreciate that the proposed rule will eliminate requirements for having to obtain certain waivers following force majeure events and suggested that similar revisions be made to the testing requirements in subpart H, Oil and Gas Production Safety Systems. Since we did not propose this change to subpart H, we cannot incorporate it into this final rulemaking. We will consider this suggestion in a future rulemaking.

The OOC provided additional suggestions. The OOC suggested that language be added to each of the following four paragraphs:

1. In § 250.1202(d)(3) add ''and monthly thereafter but do not exceed 42 days between meter factor determinations.'' The OOC states this would make clear that this is not a make up proving, and the time starts over with the proving after returning to service.

2. In § 250.1202(k)(3) revise the ending to read ''* * * within 15 days after being returned to service and monthly thereafter.'' The OOC states that this should be added for clarity.

3. In § 250.1202(k)(4) revise the ending to read ''* * * within 15 days after being returned to service and quarterly thereafter.'' The OOC states that this should be added for clarity.

4. In § 250.1204(b)(1) revise the ending to read ''* * * within 15 days after being returned to service and bimonthly (or other frequency approved by the Regional Supervisor) thereafter.'' The OOC states that this should be added for clarity.

We agree with these suggestions, and will incorporate them in the final rule. Since § 250.1203(c)(1) was similarly worded, we incorporated OOC's language in the regulatory text there also.

The OOC also suggested that the force majeure waiver should be applied to the testing requirements for the master meter in § 250.1202(e)(3). We did not make this revision because we do not believe it is appropriate for a master

meter used in royalty meter provings. Only 3 percent of the sales metering locations in the Gulf of Mexico use master meters for meter proving and a departure has never been requested to the best of our knowledge. We will deal with any departure requests on these master meters on a case-by-case basis.

In addition to the changes we made in response to the NOIA and OOC's comments, in § 250.1203(c)(1), we have changed the terms ''calibrate,'' ''calibrations,'' and ''calibrated'' to ''verify/calibrate,'' ''verification/calibration,'' and ''verified/calibrated'' to be consistent with the revision of the definition promulgated on April 15, 2008 (73 FR 20171). We also added the word ''operating'' before ''allocation meters'' in § 250.1202(k)(3) and (k)(4) because it appears in the existing regulation but was inadvertently omitted from the proposed rule and added it before ''meters'' in (c)(1) for consistency. In addition, we added the phrase ''the previous month'' in § 250.1202(k)(3) and (4) after ''per meter'' in each subparagraph. This clarifies that the daily average (the volume measured by the particular meter for the month divided by the number of days in that month) is based on the previous month. In § 250.1204(b)(1), we changed the 2-month time period to 60 days. In the existing regulation, 2 months is defined parenthetically as 60 days. We also changed the word ''service'' to ''production'' to more accurately describe the function of wells.

Revisions to Subpart O—Well Control and Production Safety Training

We received comments and suggestions from four entities regarding the revisions to subpart O. The training company agreed with the proposed revisions. The OOC submitted the following general comment regarding the proposed rule:

OOC is of the opinion that the vast majority of the OCS workforce is well trained and capable of performing their specific jobs. The fact that MMS interviews, in MMS's opinion, indicated a poorer understanding of MMS regulations and the training requirements does not directly relate to the offshore workers ability to perform specific jobs on a complex. Likewise, INCs issued during audits have primarily been associated with training requirements for contractors being spelled out, recordkeeping and documentation. OOC is not aware of any INCs or incidents offshore that have been the result of lack of training. MMS testing of a very small sample of 3 employees in well control and 3 in production safety systems two years ago is also not an indicator of lack of understanding of MMS requirements given the large number of offshore workers (30,000 or more in any given day). It is OOC's opinion that the preamble discussion associated with this Subpart O revision does not accurately portray the current capability of the offshore workforce. A large portion of MMS complaints are in the area of field personnel not knowing in detail all of the training program requirements and timing that were drafted by office personnel to meet compliance needs. It would seem that it should be more important for the field personnel to know what to do and why they are doing it than to know that they have to be re-trained XX number of months apart.

Since publishing the proposed rule on September 17, 2008, MMS has developed and implemented a subpart O pilot testing program, in accordance with the current subpart O regulations (30 CFR 250.1507(c)). As part of this pilot test program, MMS developed a series of five written production tests designed to evaluate both lessee and contract personnel involved with Outer Continental Shelf (OCS) production safety operations. These tests were developed to evaluate an employee's understanding of not only basic production safety devices, such as surface and subsurface safety equipment, but additional areas of production operations, including separation, dehydration, compression, sweetening, and metering.

In recent years, MMS has been concerned that the majority of in-house and third-party-led production training schools focus their efforts primarily on surface and subsurface safety equipment testing and installation and reporting requirements, and not on other equally important aspects of offshore oil and gas production operations, including, but not limited to, separation, dehydration, compression, sweetening, and metering activities. The pilot testing program was designed in part to evaluate these other components of production operations.

From the period of November 1, 2008, through January 31, 2009, MMS conducted 31 written production tests on the OCS in both the Gulf of Mexico and Pacific Regions. Though all personnel passed these tests in accordance with MMS grading policies (*e.g.*, passing is a score greater than 70 percent; the lowest score received was a 74 percent by a lead production operator), there were problem areas identified, which validates our concern about the knowledge of the other components of production operations. The majority of the questions answered incorrectly on the 31 written production tests fall within the following five categories:

1. Equipment test intervals for temperature safety highs (TSH) on compressors and fired components;
2. Equipment test intervals for burner safety lows (BSL) and tubing plugs;
3. Wellhead components, including casing valves and casing heads;
4. Pressure relief valve settings on oil and gas separators; and
5. Lease automatic custody transfer (LACT) units.

The MMS believes that the original test results presented in the proposed rule and the results of the additional testing mentioned above indicate a lack of understanding of the regulations covering production and drilling operations safety by offshore workers. The results also indicate a lack of understanding of the training regulations by industry. Therefore, we believe the minor changes to the training regulations in this final rule are necessary to emphasize the importance of knowledge of MMS regulations and the importance of periodic training and assessment of training needs for lessees, operators, and contract personnel.

The proposed revisions consisted of adding two new definitions (contractor and periodic) to subpart O, and revising one existing definition (production safety). The following is the definition of *contractor* from the proposed rule:

Contractor means anyone performing work for the lessee. However, these requirements do not apply to contractors providing domestic services to the lessee or other contractors. Domestic services include janitorial work, food and beverage service, laundry service, housekeeping, and similar activities.

The OOC suggested that a more concise definition be used as follows:

Contractor means anyone other than an employee performing well control and production safety duties for the lessee.

The OOC stated that this definition is consistent with the definition of employee in subpart O. It also delineates between those contractors performing well control or production safety operations (required to have training by subpart O) and those contractors not performing well control or production safety operations, such as providers of domestic services, painters, inspectors, etc., and others the lessee may utilize in conducting day-to-day operations. We agree with this suggestion. Additionally, the existing regulations also use the term contract personnel, so we have added that to the definition of contractor. The revised definition is as follows:

Contractor and contract personnel mean anyone, other than an employee of the lessee, performing well control or production safety duties for the lessee.

Following is the definition of *periodic* from the proposed rule:

Periodic means occurring or recurring at regular intervals. Each lessee must specify the intervals for periodic training and periodic assessment of training needs in their training programs.

The OOC noted that the second sentence is not a definition, but is a reminder of requirements found elsewhere in subpart O. We agree with OOC that the second sentence is not a definition, but the reason for proposing this definition was to remind the lessees of those requirements for periodic training and periodic assessment of training needs. Some lessees were not conducting the periodic training and assessment requirements. We will leave the reminder in the definition.

The following is the definition of *production safety* from the proposed rule:

Production safety includes safety in production operations, as well as the installation, repair, testing, maintenance, and operation of surface or subsurface safety devices. Production operations include, but are not limited to, separation, dehydration, compression, sweetening, and metering operations.

Two commenters suggested that this definition would be difficult to apply and cause uncertainty. One of them suggested using the definition of production safety in MMS Notice to Lessees and Operators (NTL) No. 2008–N03, *Well Control and Production Safety Training.* The OOC suggested a definition of *production safety* that was consistent with the definition in the NTL. The following is the definition from NTL No. 2008–N03:

Production safety means production operations, as well as the installation, repair, testing, maintenance, or operation of surface or subsurface safety devices. Production operations include, but are not limited to, the following: separation, dehydration, compression, sweetening, and metering operations.

We agree that the proposed definition could cause uncertainty, and we also believe that the definition in the NTL can be improved for use in this final rule. Therefore, we have revised the proposed definition of *production safety* for the final rule as follows:

Production safety includes measures, practices, procedures, and equipment to ensure safe, accident-free, and pollution-free production operations, as well as installation, repair, testing, maintenance, and operation of surface and subsurface safety devices. Production operations include, but are not limited to, separation, dehydration, compression, sweetening, and metering operations.

One of the energy companies asked if it is our intent to include safety related to hazard communications, hearing conservation, water survival, etc., in this rulemaking. This definition excludes hazard communication, hearing conservation, water survival, and other similar types of safety. Most of those topics may be covered in a future rulemaking dealing with safety and environmental management issues. (*See* proposed rule published on June 17, 2009, 74 FR 28639).

Procedural Matters

Regulatory Planning and Review (Executive Order (E.O.) 12866)

This final rule is not a significant rule as determined by the Office of Management and Budget (OMB) and is not subject to review under E.O. 12866.

(1) This final rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. The revisions to the production measurement regulations will only have a small positive effect on industry in the event of a hurricane or other incident beyond the control of the lessee that results in a facility being off production for an extended period of time. The revisions to the training regulations will cause some lessees and operators to revise their training programs. We estimate that 50 of the 130 lessees and/or operators have already modified their training plans, and will not be affected by the revisions to subpart O. The remaining 80 lessees and/or operators will have to modify their training plans. Of the 80 lessees and/or operators, MMS estimates that 56 are small businesses, and that 24 are large companies. The majority of small operators have an off-the-shelf type training plan. The MMS estimates that a modification to this type of plan would cost about $500. The large companies would most likely revise their training plans in-house at a slightly lower cost than revising an off-the-shelf plan. For the purpose of estimating the total cost to industry, MMS will use the higher estimate. The total cost for revising training plans to industry would be $500 multiplied by 80 lessees/operators, which would equal $40,000. The cost to retrain the employees from the 80 companies would be about $200 per person. This is based on the price of a typical 3-day production operations safety course costing $600 per person (*i.e.*, $200 per person per day). Adding 1 day to the course would be necessary to cover the operations mentioned in the revised definition of production operations. The MMS estimates that four employees per company would need the additional day of training, so the additional cost would be $200, multiplied by four employees per company, multiplied by 80 companies, which would equal $64,000. The total cost to industry from the subpart O changes would be $40,000 plus $64,000, which would equal $104,000. Therefore, this final rule will not have a significant economic effect on industry.

(2) This final rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. No other agencies regulate oil and gas operations on the OCS.

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

(4) This final rule will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Regulatory Flexibility Act

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

The production measurement changes in this final rule will affect lessees and operators of leases in the OCS. This includes about 130 active Federal oil and gas lessees. Small lessees that operate under this rule fall under the Small Business Administration's (SBA) North American Industry Classification System (NAICS) codes 211111, Crude Petroleum and Natural Gas Extraction, and 213111, Drilling Oil and Gas Wells. For these NAICS code classifications, a small company is one with fewer than 500 employees. Based on these criteria, an estimated 70 percent of these companies are considered small. This final rule, therefore, will affect a substantial number of small entities.

The changes to subpart L will not have a significant economic effect on a substantial number of small entities because the effects would only occur if a facility is rendered out-of-service because of a hurricane or other event out of the control of the lessee. The overall effects will be very minor but positive, since the final rule temporarily relieves the lessee of specific reporting requirements related to metering and well tests.

The revised and new definitions in the training regulations in subpart O will cause some lessees and operators to revise their training plans. The MMS estimates that 80 operators will have to modify their training plans due to the changes to the definition of production operations. Of the 80 operators, MMS estimates that 56 are small businesses. This is a substantial number of small operators. The majority of small operators have off-the-shelf type training plans. The MMS estimates that a modification to this type of plan will cost about $500. The total cost to the small operators will be $500 multiplied by 56 operators, which equals $28,000. The cost to retrain the employees from the 56 companies will be about $200 per person. This is based on the price of a typical 3-day production operations safety course costing $600 per person. Adding 1 day to the course will be necessary to cover the operations mentioned in the revised definition of production operations. The MMS estimates that four employees per company will need the additional day of training, so the additional cost will be $200, multiplied by four employees per company, multiplied by 56 companies, which will equal $44,800. The total cost to small businesses due to the changes in the subpart O regulations will be $28,000 plus $44,800, which equals $72,800. Therefore, this final rule will not have a significant economic effect on a substantial number of small entities.

Comments from the public are important to us. The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small business about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the actions of MMS, call 1–888–734–3247. You may comment to the Small Business Administration without fear of retaliation. Allegations of discrimination/retaliation filed with the Small Business Administration will be investigated for appropriate action.

Small Business Regulatory Enforcement Fairness Act

This final rule is not a major rule under (5 U.S.C. 801 *et seq.*) of the Small Business Regulatory Enforcement Fairness Act. This final rule:

a. Will not have an annual effect on the economy of $100 million or more. The effects of the subpart L changes are minor, but positive, and will only occur if there were a hurricane or other event beyond the lessee's control that will cause the temporary shut-in of a facility. The effects on small business of the subpart O changes are approximately $72,800. See the analysis of these costs in the previous section of this preamble entitled ''Regulatory Flexibility Act''.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. As stated above, any effects due to the subpart L revisions will be positive for the industry and the Federal Government. The effects due to the revisions to subpart O will be minor.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The effects due to this final rule will be a result of temporary relief from reporting requirements and minor changes to training requirements, so there will be no adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The requirements will apply to all entities operating on the OCS.

Unfunded Mandates Reform Act of 1995

This final rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The final rule will not have a significant or unique effect on State, local or Tribal governments or the private sector. This final rule only applies to oil and gas operations on the OCS. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

Takings Implication Assessment (E.O. 12630)

Under the criteria in E.O. 12630, the final rule will not have significant takings implications. The final rule is not a governmental action capable of interference with constitutionally protected property rights. A Takings Implication Assessment is not required.

Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this final rule will not have federalism implications. This final rule will not substantially and directly affect the relationship between the Federal and State governments. This final rule applies only to oil and gas operations on the OCS. To the extent that State and local governments have a role in OCS activities, this final rule will not affect that role. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988)

This final rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, we have evaluated this final rule and determined that it has no substantial effects on Federally recognized Indian Tribes. There are no Indian or Tribal lands in the OCS.

Paperwork Reduction Act (PRA)

This rulemaking contains a new information collection requirement; therefore, a submission to OMB under the PRA (44 U.S.C. 3501 *et seq.*) is required. The OMB has approved the new requirement under OMB Control Number 1010–0178 (expiration date August 31, 2012, for a total of 144 burden hours). Once the rulemaking becomes effective and the one-time requirement has been achieved, we will discontinue this collection.

The title of the collection of information for the rule is ''30 CFR Part 250, Subpart O, Technical Changes to Production Measurement and Training Requirements.''

Respondents include Federal OCS oil and gas lessees and/or operators. Responses to this collection are mandatory, and the frequency of reporting once. The information collection does not include questions of a sensitive nature. The MMS will protect information according to the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and 30 CFR 250.197, ''Data and information to be made available to the public or for limited inspection.''

The collection of information required by the current 30 CFR part 250, subpart L regulations, Oil and Gas Production Measurement, Surface Commingling, and Security, is approved under OMB Control Number 1010–0051, expiration 7/31/10 (8,533 hours). The regulation will not impose any new information collection burdens for this subpart. However, it does reduce the number of general departure requests for

§ 250.1204(b)(1). When the rule becomes effective, we will make an adjustment decrease to the paperwork burden.

The rulemaking for 30 CFR part 250, subpart O, Well Control and Production Safety Training, will require some lessees and/or operators to modify their current training programs due to the changes to the definitions in subpart O. We estimate that this would be a one-time new paperwork burden on 24 operators who will modify their programs in-house (6 hours per modification) for a total of 144 burden hours. Those operators who purchase their off-the-shelf training programs will incur costs to modify the programs. This is considered a regulatory cost of doing business and is not a paperwork burden. Existing paperwork requirements for current subpart O are approved under 1010–0128, expiration 8/31/09 (under renewal, 2,106 hours).

The comments received in response to the proposed rule did not address the information collection; therefore, there were no changes in the one new information collection requirement from the proposed rule to the final rule.

An agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. The public may comment, at any time, on the accuracy of the information collection burden in this rule and may submit any comments to the Department of the Interior; Minerals Management Service; Attention: Regulations and Standards Branch; Mail Stop 4024; 381 Elden Street; Herndon, Virginia 20170–4817.

National Environmental Policy Act of 1969

This final rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because this rule is covered by a categorical exclusion. Specifically, this rule qualifies as a regulation of an administrative or procedural nature. *See* 43 CFR 46.210(i). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act of 1969.

Data Quality Act

In developing this final rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554, app. C § 515, 114 Stat. 2763, 2763A–153–154).

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

List of Subjects in 30 CFR Part 250

Administrative practice and procedure, Continental shelf, Oil and gas exploration, Public lands—mineral resources, Reporting and recordkeeping requirements.

Dated: July 15, 2009.

Ned Farquhar,

Acting Assistant Secretary—Land and Minerals Management.

■ For the reasons stated in the preamble, the Minerals Management Service amends 30 CFR part 250 as follows:

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 1. The authority citation for part 250 continues to read as follows:

Authority: 31 U.S.C. 9701, 43 U.S.C. 1334.

■ 2. Amend § 250.1201 by adding the definition of *Force majeure event* in alphabetical order as follows:

§ 250.1201 Definitions.

* * * * *

Force majeure event—an event beyond your control such as war, act of terrorism, crime, or act of nature which prevents you from operating the wells and meters on your OCS facility.

* * * * *

■ 3. Amend § 250.1202 by revising paragraphs (d)(3), (k)(3), and (k)(4) as follows:

§ 250.1202 Liquid hydrocarbon measurement.

* * * * *

(d) * * *

(3) Prove each operating royalty meter to determine the meter factor monthly, but the time between meter factor determinations must not exceed 42 days. When a force majeure event precludes the required monthly meter proving, meters must be proved within 15 days after being returned to service. The meters must be proved monthly thereafter, but the time between meter factor determinations must not exceed 42 days;

* * * * *

(k) * * *

(3) Prove operating allocation meters monthly if they measure 50 or more barrels per day per meter the previous month. When a force majeure event precludes the required monthly meter proving, meters must be proved within 15 days after being returned to service. The meters must be proved monthly thereafter; or

(4) Prove operating allocation meters quarterly if they measure less than 50 barrels per day per meter the previous month. When a force majeure event precludes the required quarterly meter proving, meters must be proved within 15 days after being returned to service. The meters must be proved quarterly thereafter;

* * * * *

■ 4. Amend § 250.1203 by revising paragraph (c)(1) as follows:

§ 250.1203 Gas measurement.

* * * * *

(c) * * *

(1) Verify/calibrate operating meters monthly, but do not exceed 42 days between verifications/calibrations. When a force majeure event precludes the required monthly meter verification/calibration, meters must be verified/calibrated within 15 days after being returned to service. The meters must be verified/calibrated monthly thereafter, but do not exceed 42 days between meter verifications/calibrations;

* * * * *

■ 5. Amend § 250.1204 by revising paragraph (b)(1) as follows:

§ 250.1204 Surface commingling.

* * * * *

(b) * * *

(1) Conduct a well test at least once every 60 days unless the Regional Supervisor approves a different frequency. When a force majeure event precludes the required well test within the prescribed 60 day period (or other frequency approved by the Regional Supervisor), wells must be tested within 15 days after being returned to production. Thereafter, well tests must be conducted at least once every 60 days (or other frequency approved by the Regional Supervisor);

* * * * *

■ 6. Amend § 250.1500 by adding the definitions *Contractor and contract personnel* and *Periodic* in alphabetical order and by revising the definition of *Production safety* as follows:

§ 250.1500 Definitions.

* * * * *

Contractor and contract personnel mean anyone, other than an employee of the lessee, performing well control or production safety duties for the lessee.

* * * * *

Periodic means occurring or recurring at regular intervals. Each lessee must specify the intervals for periodic training and periodic assessment of training needs in their training programs.

Production safety includes measures, practices, procedures, and equipment to ensure safe, accident-free, and pollution-free production operations, as well as installation, repair, testing, maintenance, and operation of surface and subsurface safety equipment. Production operations include, but are not limited to, separation, dehydration, compression, sweetening, and metering operations.

* * * * *

[FR Doc. E9–19204 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–MR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA–HQ–OAR–2008–0419, FRL–8943–3]

RIN 2060–AP96

Implementation of the 1997 8-Hour Ozone National Ambient Air Quality Standard: Addressing a Portion of the Phase 2 Ozone Implementation Rule Concerning Reasonable Further Progress Emissions Reductions Credits Outside Ozone Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to revise a portion of its Phase 2 implementation rule for the 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard) for which the Agency had sought a voluntary remand from the U.S. Circuit Court of Appeals for the District of Columbia Circuit. The Court granted EPA's request by remanding and vacating that portion of the rule. Specifically, this rule addresses an interpretation that allowed certain credits toward reasonable further progress (RFP) for the 8-hour standard from emissions reductions outside the nonattainment area.

DATES: This rule is effective on October 13, 2009.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0419. All documents in the docket are listed in *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: For further information on the this final rule contact: Ms. Denise Gerth, Office of Air Quality Planning and Standards, (C539–01), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5550 or by e-mail at *gerth.denise@epa.gov,* fax number (919) 541–0824; or Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539–01), Research Triangle Park, NC 27711, telephone number (919) 541–5666, fax number (919) 541–0824 or by e-mail at *silvasi.john@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected directly by this action include state, local, and tribal governments. Entities potentially affected indirectly by this rule include owners and operators of sources of emissions [volatile organic compounds (VOCs) and nitrogen oxides (NO_x)] that contribute to ground-level ozone concentrations.

B. Where Can I Get a Copy of This Document and Other Related Information?

A copy of this document and other related information is available from the docket EPA–HQ–OAR–2008–0419.

C. How Is This Notice Organized?

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II. What Is the Background for This Rule?

A. Proposed Regulatory Interpretation of the Phase 2 Rule To Address RFP Emission Credits Outside Ozone Nonattainment Areas

On July 21, 2008 (73 FR 42294), EPA published a proposed rule to revise its regulatory interpretation of the Phase 2 implementation rule for the 8-hour ozone NAAQS to address the U.S. Circuit Court of Appeals for the District of Columbia Circuit's vacatur and remand of that portion of the interpretation of the Phase 2 implementation rule for which EPA had asked for a voluntary remand. The proposal addressed a provision that allowed credit toward RFP for the 8-hour NAAQS from emission reductions outside the nonattainment area. Readers should refer to the proposed rule for additional background on this action, including the final Phase 2 ozone implementation rule and the Court's vacatur and remand of the provision allowing credit for emissions reductions outside a nonattainment area for the purposes of RFP for the 8-hour NAAQS.

III. This Action

A. Background

In the Phase 2 Rule to implement the 8-hour ozone NAAQS, EPA set forth an interpretation that stated that credits could be taken for emissions reductions from a source outside the nonattainment

area provided that emissions from these sources were included in the baseline for calculating the percent reduction needed. 70 FR 71612. However, emissions from other sources outside the nonattainment area did not have to be included in the baseline if they did not provide RFP credit for the nonattainment area. The regulatory interpretation stated that certain additional conditions must be met for such reductions to qualify for credit, including that credit could be taken for VOCs and NO_X emissions reductions within 100 kilometers (km) and 200 km respectively, and there must be a demonstration that the emissions from outside the nonattainment area had an impact on air quality levels within the nonattainment area.

The Natural Resources Defense Council (NRDC) filed a petition for review of the Phase 2 Rule including the implementation of the statutory provisions regarding RFP. After briefing had concluded in this case, EPA published its final rule implementing the NAAQS for fine particulate matter (the ''$PM_{2.5}$ Implementation Rule'') 72 FR 20586 (April 25, 2007). Because the $PM_{2.5}$ Implementation Rule significantly modified the interpretation regarding credits for emissions outside the nonattainment area, EPA requested a voluntary remand from the Court on July 17, 2007, to consider whether to revise the Phase 2 implementation rule to be consistent with the provisions in the $PM_{2.5}$ rule. In response, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded that portion of the Phase 2 Rule which provided credit under the 8-hour ozone RFP requirement for VOCs and NO_X emission reductions from outside a nonattainment area. EPA proposed to revise its regulatory interpretation of the RFP provisions in the Phase 2 Rule to be consistent with its regulatory interpretation of the RFP provisions in the $PM_{2.5}$ Implementation Rule. 73 FR 42294 (July 21, 2008).

EPA received seven comments on this proposed rule. A few commenters supported the proposal while others opposed the action we proposed. The commenters addressed the following topics: requested clarification on how the rule affects general conformity and whether the transportation conformity determinations are only required within the nonattainment areas; stated that nonattainment areas should be expanded to include areas that contribute to nonattainment as required under section 107(d) of the Clean Air Act (CAA) rather than allowing areas to take credit outside of their nonattainment for RFP reductions; requested assurance that the rules do not allow substitution of NO_X to meet the 15 percent VOC reduction requirement; stated that the rule lacks mechanisms for addressing overwhelming transport in State Implementation Plan (SIP) requirements; stated that the proposed rule flouts the language and purpose of the CAA and is arbitrary and that EPA fails to offer a lawful or rational justification for the proposal, etc. Detailed responses to these comments are in section C under Comments and Responses.

B. Final Rule

Following its stated objective in the request for a voluntary remand, EPA re-evaluted its interpretation of the RFP provision and is taking final action to revise the earlier interpretation as proposed on July 21, 2008 (73 FR 42294) which is consistent with the provisions in the $PM_{2.5}$ Implementation Rule (72 FR 20636). Consequently if the state justifies consideration of precursor emissions for an area outside the nonattainment area, EPA will expect state RFP assessments to reflect emissions changes from all sources in this area. The state must include all sources, not just some selected sources, for the area providing emission reductions in the calculation of either (a) the RFP baseline from which to calculate the percent reduction needed for RFP or (b) the reductions obtained that would be credited toward the RFP requirement and the analysis of whether the reductions from areas outside the nonattainment area would contribute to decreases in ozone levels in the nonattainment area. Also, the justification for considering emissions outside the nonattainment area will include justification of the state's selection of the area used in the RFP plan for each pollutant. As is the case with the $PM_{2.5}$ rule, if a state justifies consideration of precursor emissions for an area outside the nonattainment area, EPA expects state RFP assessments to reflect emissions changes from all sources in the area. The state cannot include only selected sources providing emission reductions in the analysis. The inventories for 2002, 2009, 2012 (where applicable) and the attainment year would all reflect the same source domain, i.e., the same set of sources except for the addition of any known new sources or removal of known, permanently shut down sources.

In cases where the state justifies consideration of emissions of one or both of the ozone precursors (i.e.,VOC and NO_X) from outside the nonattainment area, states must provide separate information regarding on-road mobile source emissions within the nonattainment area for transportation conformity purposes.[1] However, this final rule does not change existing statutory requirements that transportation conformity determinations are only required within the nonattainment area boundary. The CAA section 176(c)(5) and EPA's transportation conformity regulations (40 CFR 93.102(b)) only require conformity determinations in nonattainment and maintenance areas, and these requirements rely on SIP on-road motor vehicle emission budgets that address on-road emissions within the boundary of the designated nonattainment area. For this reason and consistent with the $PM_{2.5}$ Implementation Rule (72 FR 20636), if the state addresses emissions outside the nonattainment area for an ozone precursor, the on-road mobile source component of the RFP inventory will not satisfy the requirements for establishing a SIP budget for transportation conformity purposes. In such a case, the state must supplement the RFP inventory with an inventory of on-road mobile source emissions to be used to establish a motor vehicle emissions budget for transportation conformity purposes. This inventory must: (1) Address on-road motor vehicle emissions that occur only within the designated nonattainment area, (2) provide for the same milestone year or years as the RFP demonstration, and (3) satisfy other applicable requirements of the transportation conformity regulations (40 CFR part 93). As long as the state provides this separate emissions budget and conformity is determined to that budget, EPA believes that this approach will optimally address both the RFP and the transportation conformity provisions of the CAA.

In addition, we interpret this final rule to restrict the use of emission reductions for RFP credit to areas within the state, except in the case of multi-state nonattainment areas, and only then would allow RFP reductions from outside the state to be credited from outside the nonattainment area if the states involved develop and submit a coordinated RFP plan. EPA expects states with multi-state nonattainment areas to consult with other involved states, to formulate a list of the measures that they will adopt and the measures

[1] Transportation conformity is required under CAA section 176(c) to ensure that federally supported transportation plans, programs, and highway and transit projects are consistent with the purpose of the SIP.

that the other state(s) will adopt, and then to adopt their list of measures under the assumption that the other state(s) will adopt their listed measures. Each state would be responsible for adopting and thereby providing for enforcement of its list of measures, and then that state and ultimately EPA (at such time as the plan is approved) would be responsible for assuring compliance with the SIP requirements which is an approach consistent with the approach for RFP in the $PM_{2.5}$ Implementation rule. (72 FR 20640).

C. Comments and Responses

Comments Supporting EPA's Approach

1. Comment: One commenter noted that, in the Phase 2 Ozone Implementation Rule (70 FR 71648, November 29, 2005), EPA stated that modeling analyses relating to the NO_X SIP call demonstrate that significant contribution to nonattainment results not only from source emissions within a nonattainment area but also from source emissions over a much broader area. The commenter agrees that allowing states to take credit for reductions from sources outside of their nonattainment areas may help reduce ozone levels in the nonattainment area and believes that reductions from outside the nonattainment area are sometimes necessary to attain the standard.

EPA Response: The EPA agrees with commenter. The preamble to the final Phase 2 rule explains that the rationale for allowing emission reduction credits from outside the nonattainment area for RFP purposes is based on modeling analyses that showed that emissions from outside the nonattainment area could affect the nonattainment area and that emission reductions from upwind of a nonattainment area will help the nonattainment area achieve progress toward attainment. 70 FR 71648; 61 FR 65758 (December 13, 1996), and Memorandum of December 29, 1997 from Richard D. Wilson to Regional Administrators, Regions I–X entitled: ''Guidance for Implementing the 1–Hour Ozone and Pre-Existing PM_{10} NAAQS'' (the 1997 Policy) located at URL: *http://www.epa.gov/ttn/oarpg/t1/memoranda/iig.pdf.*

2. Comment: One commenter supports the proposal to revise the interpretation for crediting emissions reductions from outside a nonattainment area for RFP to be analogous with the provision in the $PM_{2.5}$ Implementation Rule. Specifically, the commenter supports the portion of the proposal that allows RFP reductions from outside the state to be credited from outside the nonattainment area if states develop a coordinated RFP plan as part of their SIPs.

EPA Response: The EPA agrees with commenter. The EPA by this action makes the RFP provisions regarding credits from emission reductions outside the nonattainment area in the context of the ozone NAAQS consistent with the interpretation in the context of the $PM_{2.5}$ NAAQS with respect to multi-state areas.

Clarification Requested on How This Rule Affects General Conformity

3. Comment: One commenter appreciates EPA's efforts in the proposal to clarify that a state may no longer include only selected sources from an area outside of a nonattainment area for emissions reduction credit in the SIP. The commenter also appreciates EPA's efforts to address how the proposed rule affects transportation conformity. The commenter requests that EPA provide clarity on how the proposed rule affects general conformity requirements and determinations in the final rule.

EPA Response: This regulatory interpretation does not affect the requirement for federal agencies to demonstrate conformity with SIPs. These requirements stem from section 176(c) of the CAA. Implementing regulations published by EPA (40 CFR 93.150 -160) provide for when and how federal agencies can make these determinations. EPA discussed transportation conformity in the proposal only to clarify that it applies only within nonattainment areas and to facilitate development of appropriate budgets for use in areas that take rate of progress (ROP) credit from outside the nonattainment area.

Nonattainment Areas Should Be Expanded To Include Contributing Sources

4. Comment: One commenter is opposed to the revision because it is contrary to the CAA. Section 107(d)(1)(A)(i) of the CAA requires the designation as nonattainment for ''any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for that pollutant.'' The CAA requires that instead of allowing an area that is contributing to the nonattainment area to be used to demonstrate RFP goals, the designated nonattainment area must be expanded to include that area. A commenter also feels that the proposal illegally circumvents the statutory designation provisions by allowing states to selectively claim credit for reductions from outside areas without subjecting those areas to the full range of safeguards mandated by Congress for such areas.

EPA Response: As a threshold matter, EPA is not taking any action through this regulatory interpretation to establish procedures for designating or not designating areas. The designations process for each NAAQS generally provides guidance on how to determine nonattainment areas. Under CAA section 107 (d)(1)(A) an area is designated ''nonattainment'' if it does not meet the NAAQS or is a ''nearby'' area that contributes to ambient air quality in an area that is violating the NAAQS.[2]

As the Agency explained in the final preamble to the Phase 2 rule, the CAA does not specify a distance that is ''nearby'' or a specific level of emissions that is deemed to ''contribute to'' nonattainment (70 FR at 71648). EPA also did not establish a hard-and-fast set of rules to determine which areas are ''nearby'' or ''contribute to'' nonattainment. Instead, in guidance EPA listed a broad set of factors for states and EPA to consider in determining the boundaries of each nonattainment area. As for the comment that EPA is circumventing the statutory designations provisions by not subjecting the outside areas to all the requirements for nonattainment areas, EPA believes that since these areas are not necessarily ''nearby'' for designations purposes, it is not appropriate to subject these areas to all of the requirements for nonattainment areas. In this rule EPA is allowing emissions reductions outside a nonattainment area that benefits the nonattainment area to be considered for credit in emission reductions for ROP purposes. Whether an area is ''nearby'' for purposes of designations is an issue that would be considered on a case-by-case basis when the area is initially designated nonattainment.

Clarification Requested That Transportation Conformity Only Applies in the Nonattainment Area

5. Comment: One state transportation agency requested clarification in the final rule that transportation conformity only applies inside the nonattainment area.

EPA Response: EPA's final rule does not change existing statutory requirements that transportation

[2] For example, Memorandum of March 28, 2002, from John S. Seitz, ''Boundary Guidance on Air Quality Designations for the 8-Hour Ozone National Ambient Air Quality Standards.''

conformity determinations are only required within the nonattainment area boundary. CAA section 176(c)(5) and section 93.102 of EPA's transportation conformity regulations only require conformity determinations in nonattainment and maintenance areas. These requirements rely on SIP on-road motor vehicle emission budgets that address on-road emissions within the boundary of the designated nonattainment area. For this reason and consistent with EPA's $PM_{2.5}$ implementation rule (72 FR 20636), if the state addresses emissions outside the nonattainment area for an ozone precursor, the on-road mobile source component of the RFP inventory will not satisfy the requirements for establishing a SIP budget for transportation conformity purposes. In such a case, the state must supplement the RFP inventory with an inventory of on-road mobile source emissions to be used to establish a motor vehicle emissions budget for transportation conformity purposes, as described in this final rule. As long as the state provides this separate emissions budget and conformity is determined to be within the geographic boundary of the nonattainment area, EPA believes that this approach will optimally address both the RFP and the transportation conformity provisions of the CAA.

Lack of Regulatory Text

6. Comment: One commenter believes that the proposed revision appears to provide an appropriate and reasonable degree of flexibility to states in meeting the RFP requirements. It is, however, difficult for the commenter to evaluate and comment on the proposal because EPA has not provided any proposed regulatory text that clearly states the precise provisions and limitations of the intended rule.

EPA Response: In this action we are modifying a regulatory interpretation that the Agency adopted in the Phase 2 rule (70 FR at 71647–48). Since publication of that rule, EPA modified its approach to RFP credits from outside the nonattainment area in its $PM_{2.5}$ Implementation Rule (72 FR 20636). This action provides a regulatory interpretation that is consistent with the approach adopted in the $PM_{2.5}$ Implementation Rule. Neither rule included regulatory text on the specific issue of RFP credits from outside the nonattainment area and EPA believes that it is unnecessary to include regulatory text in this action.

Substitution of NO_X To Meet 15 Percent VOC Requirement

7. Comment: The commenter assumes that EPA does not intend to apply, and will not apply, the policy reflected in the proposal in a way that would allow crediting of NO_X emission reductions outside the nonattainment area to meet the 15 percent VOC emission reduction requirement in section 182(b)(1) of the CAA. Further the commenter stated that allowing states to use NOx emission reductions—wherever they may occur—to satisfy section 182(b)(1) would contradict the explicit statutory provision that the 15 percent ROP reduction requirement must be met by VOC emission reductions only. *See* 70 FR 71,612, 71,636/1 (November 29, 2005).

The commenter also noted that this principle is also reflected in the December 1997 guidance memorandum that addressed taking credit outside nonattainment areas for purposes of RFP.

EPA Response: The commenter is correct that EPA does not intend to apply the policy interpretation in the proposed rule to allow substitution of NO_X emission reductions outside the ozone nonattainment area to meet the 15 percent VOC requirement in section 182(b)(1). This is consistent with the ''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM_{10} NAAQS'' that EPA issued on December 29, 1997 and the Phase 2 Ozone Implementation Rule that EPA issued on November 29, 2005.

Lack of Mechanism for Addressing Overwhelming Transport

8. Comment: One commenter feels that EPA's proposed rule lacks reasonable, equitable mechanisms for addressing overwhelming transport in SIP requirements. This rule, as proposed, would disallow RFP credit in the Michigan SIP for out-of-state reductions even though the local areas' contribution to high ozone concentrations measured at monitors in counties abutting Lake Michigan are negligible. The contributors, large urban areas 'across the lake, are in other states, and West Michigan nonattainment areas are not part of multistate nonattainment areas. The proposed rule does nothing to ameliorate the regulatory burdens of ozone transport into West Michigan. Additionally, the commenter stated that the CAA lacks adequate provisions to address ozone transport and include a presumption that local emissions reductions are necessary to reduce ozone levels. The commenter recommends that amendments to the CAA be pursued.

EPA Response: The regulatory interpretation was not intended to address the kind of situation posed by the commenter. The revised interpretation only applies to ROP plans and does not attempt to resolve issues of regional transport. Amendments to the CAA to address regional transport are only within Congress' purview.

CAA Does Not Give EPA Authority To Take Credit for Emissions Reductions Outside the Nonattainment Area nor Change the Emissions Baseline

9. Comment: One commenter believes that the proposed rule is unlawful and arbitrary. The commenter stated that CAA sections 182(b)(1) and 182(c)(2)(B) require SIPs for ozone nonattainment areas to provide for an initial 15 percent rate of progress cut in ozone-forming emissions and subsequent three percent per year emission cuts until attainment. The CAA requires these cuts to be made from emissions ''in'' each nonattainment area. § 182(b)(1). The commenter believes that allowing areas to claim credit toward these ROP requirements from emission cuts outside the nonattainment area would not require that outside reductions provide the same ozone reduction benefit to the nonattainment area as would equivalent emission reductions inside the nonattainment area. The commenter feels that the EPA is without authority to allow states to claim ROP credit for emission reductions occurring outside of the nonattainment area because section 182(b)(1)(A) requires each plan to provide for cuts in VOC emissions ''of at least 15 percent *from baseline emissions*'' (emphasis added). The statute goes on to define ''baseline emissions'' as ''the total amount of actual VOC or NO_X emissions from all anthropogenic sources *in the area,*'' with certain exclusions not relevant here. § 182(b)(1)(B) (emphasis added). Thus, Congress explicitly mandated that the required 15 percent emissions cut be achieved from a baseline comprising emissions from sources ''in the [nonattainment] area.'' Congress did not authorize EPA to grant rate of progress credit for emission reductions outside the nonattainment area or to redefine ''baseline emissions'' to include emissions from sources outside of the nonattainment area, even where those outside reductions are alleged to or do in fact ''contribute'' to ozone concentrations in the nonattainment area. The commenter feels that EPA cannot allow states to credit emission cuts from outside of the nonattainment area toward meeting post-15 percent

progress requirements. Nor can EPA alter the baseline for the post-15 percent cuts, a baseline that is identical to the one set in the statute for the 15 percent plans, and that is explicitly limited to emissions from within the nonattainment area.

EPA Response: The EPA notes first that the regulatory interpretation set forth here does not apply to the section 182(b)(1) requirement to provide 15 percent reductions within the first six years from a baseline year, but only to the section 182(c)(2)(B) requirement for an average of three percent per year for subsequent three year periods up to the attainment date. The interpretation is based on the December 29, 1997 memorandum from Richard D. Wilson, ''Guidance for Implementing the 1–Hour Ozone and Pre-Existing PM_{10} NAAQS.'' Page 7 of the attachment to that memorandum says: ''The EPA believes that the start date of the expanded locality-based substitution credit for ROP is changed from post-1999 ROP requirements to post-1996 requirements. EPA does not believe that it may allow credit for substitutions to complete or revise the 15 percent ROP requirement for VOC emission reductions in nonattainment areas through 1996. Although the start date for application of ROP substitution reductions from outside the nonattainment area would apply to post-1996 ROP requirements, consistent with past Agency policy, states would be able to bank excess earlier reduction credits (NO_X or VOC) to apply to post-1996 and later requirements.''

Secondly, EPA disagrees with the assertion in the comment that the proposed rule is unlawful and arbitrary and that EPA is without authority to allow RFP credit for emission reductions from outside the nonattainment area. The CAA does not expressly prohibit credits for emission reductions outside the area. In fact, the Fifth Circuit, which examined the same language at issue here, found the language ''ambiguous'' reasoning:

> On the one hand, the meaning of ''in the area'' could be limited to emissions within the nonattainment area. On the other hand, the CAA does not expressly state that emissions outside the nonattainment area are prohibited, rather the Act only states that emissions from sources ''in the area'' must be included. We therefore find the CAA ambiguous on this point.

Louisiana Envtl. Action Network (''LEAN'') v. *EPA,* 382 F.3d 575, 585 (5th Cir. 2004).[3] If Congress intended to disallow credits from outside the nonattainment area, it could have expressly disallowed it as it did for RFP credit for four other specific categories of emission reductions, 42 U.S.C. 7511a(b)(1)(D)(i)–(iv), while otherwise allowing credit for any reductions that ''have actually occurred after November 15, 1990,'' id. section 7511a(b)(1)(C). *See* also the discussion in response to comments 15 and 16.

Rule Is Unclear as to the Precise Requirements for Crediting Outside Reductions

10. Comment: One commenter stated that the proposal is actually unclear as to the precise requirements for crediting these outside reductions. The **Federal Register** notice describes EPA's approach for crediting outside reductions in the $PM_{2.5}$ Implementation Rule, and states that EPA is proposing to revise its earlier interpretation with respect to ozone plans ''to be consistent with the analogous provisions in the $PM_{2.5}$ Implementation Rule.'' The proposal does not explain whether ''consistent with'' means ''identical to'' or whether it allows some differences from the $PM_{2.5}$ approach. For purposes of these comments, the commenter will assume EPA is proposing an identical approach to the one adopted for $PM_{2.5}$.

EPA Response: The commenter is correct in the assumption that EPA's proposed approach follows the same approach for ozone as followed for $PM_{2.5}$.

Rule Does Not Set Meaningful Restrictions on Boundary Drawing for the Outside Area

11. Comment: One commenter alleged that the proposal sets no meaningful restrictions on boundary drawing for the ''outside'' area, thereby allowing states to gerrymander them in a way that includes sources expected to cut emissions while excluding sources that are likely to increase their emissions. Although the proposal appears to limit the ''outside'' to a doughnut around the nonattainment area of up to 200 km, it allows the states to choose the slice or hole in that surrounding doughnut to include for purposes of the RFP calculation. Assuming EPA is proposing the same approach used in the $PM_{2.5}$ rule, the state need only show that emissions from the area selected substantially impact ambient concentrations in the nonattainment area. There is no stated requirement that all areas substantially impacting the nonattainment area be included. The proposal does not prevent states from defining whatever area they choose—theoretically even the block on which the selected source sits—for inclusion in the RFP inventory.

EPA Response: Under this approach, as a prerequisite to including emission reductions from outside the nonattainment area in the RFP assessment, a state must justify the outside area. The justification must include a demonstration that these outside emissions have a substantial impact on nonattainment concentrations. Because the demonstration of such impacts likely involve differing factors and characteristics, EPA believes a one-size fits all ''boundary drawing'' approach is not an appropriate approach in this instance. EPA will evaluate each RFP assessment on a case-by-case basis to determine whether a state using RFP credits from outside the nonattainment area has included the appropriate and pertinent area for calculating the emission reductions. In addition, if a state wants to adopt this approach, the RFP assessment must include emissions for all sources within the pertinent area in order to ensure that the RFP plan reflects the actual net emissions changes that occur within that area.

12. Comment: One commenter alleged that the proposed 200 km radius for the ''outside'' area is also wholly arbitrary. EPA offers no rational basis, and none exists, for choosing that particular distance and applying it to each and every nonattainment area in the nation. There is no evidence, for example, that NO_X emission reductions 200 km outside a nonattainment area invariably provide the same ROP benefit as the same reductions inside the nonattainment area. EPA appears to have picked the 200 km figure out of thin air. The arbitrariness of EPA's approach here is confirmed by contrasting it with agency's approach in drawing nonattainment area boundaries. In the latter situation, EPA has taken the position that determining whether nearby sources contribute to nonattainment is too complex to be dictated by hard and fast rules, and instead requires a multi-factor analysis

[3] Although the Fifth Circuit found application of the 1997 policy as applied to the facts in that case unsupported, it did so for reasons that are inapposite here. First, the court was reviewing EPA's determination that continuing reductions outside an area could be used as contingency measures. The court found EPA had not demonstrated that the policy had ''any rational connection with the relevant issue of what contingency measures to apply when an attainment deadline passes.'' Id. at 586.

Second, the court found that in the specific case under review there was no data to support the presumption that the ''outside'' reductions selected in that case ''can affect emissions reductions in the * * * area.'' Id. In contrast, in its regulatory interpretation, EPA is explicitly requiring that such data be demonstrated in all cases prior to accepting credits from outside a nonattainment area. 70 FR at 71,647/3.

tailored to each area. *See* EPA's Final Brief in *Catawba County* v. *EPA,* No. 05–1064 (D.C. Cir) filed June 11, 2008.

EPA Response: The commenter's assertions are incorrect. EPA has not picked the distances ''out of thin air.'' As described below, EPA has had this policy, adopted after discussions and input from the scientific community, in place for over ten years. The December 1997 policy was developed ''as a result of the modeling results relating to the NO_X SIP Call, [which] demonstrate that significant contribution to nonattainment resulted not only from source emissions within a nonattainment area but also from source emissions over a much broader area.'' 1997 Policy at 5–6. In addition, under the Federal Advisory Committee Act (FACA), we formed a Subcommittee for Development of Ozone, Particulate Matter and Regional Haze Implementation Programs that provided recommendations and ideas to assist us in developing implementation approaches for these programs. We have incorporated ideas from the FACA process for a number of SIP elements, particularly those related to transport of ozone, the process for demonstrating attainment of the ozone standard, and requirements for ensuring reasonable further progress. The distance of 100 km for VOC and 200 km for NO_X resulted from discussions of the FACA Subcommittee and generally represent transport of one to two days.[4] Further information on the FACA process and its reports is found at the following Web site: *http://www.epa.gov/ttn/faca/*. This regulatory interpretation incorporates the same distance limitations, which must be supported in an individual area by data ''that are shown to be beneficial toward reducing ozone in the nonattainment area.'' [5] In addition, the proposed regulatory interpretation does not change the distances for crediting emissions from outside the nonattainment area for NO_X and VOCs. EPA proposed and finalized those distances in the rulemaking for the Phase 2 rule. The proposed regulatory interpretation only modifies those instances where the ozone RFP interpretations were not consistent with the $PM_{2.5}$ Implementation Rule such as whether emissions from all sources should be included in the RFP assessments for the pertinent area outside the nonattainment area. Thus, the comments on the distances themselves are outside the scope of this rulemaking.

Lack of Justification for Proposal

13. Comment: The commenter states that the proposed rule is unlawful and arbitrary in that EPA has failed to offer a lawful or rational justification for the proposal. The commenter states that the notice of proposed rulemaking offers no justification for allowing credit for outside reductions, other than a desire to provide ''flexibility.'' In the past, EPA has stated other rationales for allowing ROP credit for outside reductions, but as the agency does not state any intent to rely on them here, they cannot support this iteration of the proposal. If EPA wants to provide other rationales for the proposal, it must first provide public notice and an opportunity to comment.

EPA Response: EPA disagrees with the commenter's assertion that it has provided no justification for its proposal to modify its regulatory interpretation of the RFP provisions. First, in the preamble to the Phase 2 rule, EPA explained its rationale for permitting credits for reductions outside the nonattainment area (70 FR 71647–48). The proposed modification of that regulatory interpretation does not change the distances or the precursors for which such credits may be taken provided other conditions such as reductions are not attributed to measures otherwise mandated by the CAA are met. Second, the preamble to the proposed regulatory interpretation explains that EPA is modifying its approach to allowing credits for emission reductions from outside the nonattainment area to make it consistent with the approach that the Agency adopted in the $PM_{2.5}$ Implementation Rule. In the $PM_{2.5}$ Implementation Rule, EPA received comments that indicated that RFP inventories for areas outside the nonattainment area could include selected sources expecting substantial emissions reductions while excluding other sources in the area expecting emission increases. In response to those comments, EPA modified its approach and required that if a state justifies consideration of emissions for an area outside the nonattainment area, the RFP assessments will be expected to reflect emission changes from all sources in this area and would no longer allow states to include only selected sources that provide emission reductions. Because the rationale for the change there is equally applicable for ozone, EPA proposed the same regulatory interpretation for RFP assessments for ozone.

14. Comment: The commenter noted that EPA has also tried to justify overriding the statutory language by citing section 182(c)(2)(C) which provides for substitution of NO_X emission cuts for VOC emission cuts to meet the percentage reduction requirements in serious and above areas, where the state shows that equivalent ozone reductions will be achieved. EPA erroneously claimed that this provision somehow shows intent to allow even broader exceptions, such as the one here, as long as some ozone reductions are achieved within the nonattainment area. In reality, section 182(c)(2)(C) contains no language at all authorizing states to claim emission reduction credit for emission cuts outside of the nonattainment area, nor does it redefine ''baseline emissions'' to include emissions from outside the nonattainment area. The provision merely defines the limited circumstances in which an area can substitute NO_X emission cuts for VOC emission cuts to meet percentage reduction requirements. It does not allow the required reductions to be achieved outside the nonattainment area. Moreover, a key requirement of section 182(c)(2)(C) is that any substitution of NO_X reductions for VOC reductions will ''result in a reduction in ozone concentrations *at least equivalent''* to that which would result from the required VOC percentage reduction (emphasis added). EPA's proposed rule merely requires that emissions from the ''outside'' area ''contribute to'' ozone concentrations in the nonattainment area—it does not require the ozone benefits from cutting those outside emissions to be at least equivalent to those achievable by reductions inside the nonattainment area (70 FR 71647).

EPA Response: The Phase 2 rule clarified the 1997 policy to respond to concerns identified in the Office of Inspector General Report [OAR–2003–0079–0849 AT 80 (''OIG Report'')]. The regulatory interpretation for RFP did not allow crediting of outside emissions based solely on distance from the nonattainment area boundary. Instead, the regulatory interpretation stated that the distances are only a general presumption that would need area-specific data showing that reductions from sources in attainment areas benefit the particular nonattainment area. 70 FR 71647–49. Under this approach, as a prerequisite to including emission reductions from outside the nonattainment area in the RFP assessment, a state must justify the inclusion of sources outside the area. The justification must include a demonstration that these outside emissions have a substantial impact on nonattainment concentrations and that

[4] *See* Footnote 43 at 68 FR 32833 (June 2, 2003).

[5] 70 FR 71647, col 3. (November 29, 2005).

reductions in these emissions would have a beneficial impact on the nonattainment area.

As clarified in a response below, in evaluating RFP submittals, EPA would consider whether the reductions from outside the nonattainment area could reasonably be expected to yield comparable air quality benefits as would be obtained if the same quantity of reductions were to occur inside the nonattainment area.

15. Comment: The commenter offers as support for the previous comment based on the fact that EPA's Office of Inspector General (OIG) observed that EPA's policy allows credit ''for all emission reductions achieved by outside sources within specified distances outside the nonattainment area boundaries without any demonstration of the actual impact of these specific emissions on the area's nonattainment * * *'' OAR–2003–0079–0849 AT 80 (''OIG Report'').

EPA Response: EPA believes that when Congress allowed the substitution of NO_X controls for VOC controls to meet the section 182(c)(2)(C) RFP requirement, its choice of specific words is telling because it referred to ''reductions in ozone concentrations'' in the applicable nonattainment area, rather than ''reductions in emissions.'' 70 FR 71648. While the language in the CAA does not explicitly state that emission reductions from outside the nonattainment area may be credited for RFP assessments, EPA reasonably interpreted this language as an indication that Congress' intent was to lower ''ozone concentrations''—not just ''emissions'' of ozone precursors—within the nonattainment area. As EPA explained, ''(i)t is consistent with that intent that emissions reductions from outside the nonattainment area that will reduce ozone concentrations in the nonattainment area should be creditable (toward) RFP.'' 70 FR 71648.

As for the commenter's assertion that VOC and NO_X reductions should result in equivalent benefits within the area, the fact that EPA's policy always had limits for the distance outside the nonattainment area was intended to preclude emission reductions from having negligible ozone benefits within the nonattainment area. While it is implicit in EPA's proposed regulatory interpretation in its evaluation of the appropriateness of the credit reductions, the Agency is now clarifying in response to the commenter's statement that EPA, in evaluating RFP submittals, would consider whether the reductions from outside the nonattainment area could reasonably be expected to yield comparable air quality benefits as would be obtained if the same quantity of reductions were to occur inside the nonattainment area.

In setting forth a requirement for the ozone transport region in section 184 of the CAA, Congress realized that controlling ozone would require emission reductions from not just nonattainment areas, but all areas that were shown to contribute to ozone concentrations, including areas outside nonattainment areas. The work done under the Ozone Transport Assessment Group (OTAG) led to the NO_X SIP call, which resulted in State-wide NO_X emission budgets. The NO_X SIP call, with its significant NO_X emission reductions from attainment as well as nonattainment areas, was highly successful in reducing ozone concentrations, and indeed provided progress toward attainment for many of the nonattainment areas in the eastern portion of the U.S.[6]

A state's ozone attainment demonstration performed with photochemical grid modeling will invariably take account of emission reductions not only from within the nonattainment area, but also from outside the nonattainment area. Generally, a state will be unable to demonstrate attainment for many areas unless there are emission reductions from attainment and nonattainment areas outside the area for which the state is performing the attainment demonstration. An extreme hypothetical example of this situation would be a nonattainment area that is mostly rural with few emissions of its own, but which is ineligible for rural transport area treatment and that is affected by significant transport from upwind areas. For its attainment demonstration, it must rely totally on emission reductions from upwind areas and may not be able to demonstrate RFP from emission reductions totally within the nonattainment area.

Additionally, air quality modeling to make a determination of equivalent ozone reductions would be very difficult. Ozone reductions from a particular strategy of emission reductions vary based on a number of factors such as wind, climate, type of emission source, location of sources, and height of emissions release above the ground. Therefore, the location and spatial extent of ozone reductions may be highly variable on a day-to-day basis. In many cases, emission reductions from farther away from a receptor location could be more beneficial in reducing ozone than emission reductions from a nearer location in the nonattainment area. The fact that the NO_X SIP call regional emission reductions have been shown to reduce ozone concentrations in almost all nonattainment areas is a testament to the fact that regional NO_X controls are beneficial in reducing ozone. The current policy of allowing reductions for RFP purposes only out to certain well-defined geographic distances would serve to prevent abuse.

Section 182(c)(2)(C) does require that NO_X reductions must be shown to reduce ozone concentrations ''at least equivalent'' to that which would result from VOC reductions. In response to the CAA's requirement of section 182(c)(2)(C), EPA had in the early- and mid-1990's issued guidance,[7] [8] for implementation of this provision. The guidance is based on two principles: First, an equivalency demonstration requires that cumulative RFP emission reductions must be consistent with the NO_X and VOC emission reductions determined in the ozone attainment modeling demonstration; in other words, a ton of NO_X cannot simply substitute for a ton of VOC since the air quality impact might be entirely different. Second, specified reductions in NO_X and VOC emissions should be accomplished in the interim period between the time of the beginning of the RFP period in question (at the time, that was the end of 1996) and the attainment date, consistent with the continuous RFP emission reduction requirement. Thus, substituting NO_X emission reductions for VOC emission reductions for RFP purposes has consistently been done in the context of the area's attainment demonstration in order to demonstrate equivalent ozone reductions regardless of whether the emission reductions that are credited for RFP purposes come wholly within the nonattainment area or where some come from outside the nonattainment area.[9]

[6] ''Evaluating Ozone Control Programs in the Eastern United States: Focus on the NO_X Budget Trading Program, 2004'' United States Environmental Protection Agency; Office of Air and Radiation; Office of Air Quality Planning and Standards; Office of Atmospheric Programs. 1200 Pennsylvania Ave., NW., Washington, DC 20460. EPA454–K–05–001. August 2005. Found at: *http://www.epa.gov/airmarkt/progress/docs/ozonenbp.pdf.*

[7] NO_X Substitution Guidance, December, 1993. Office of Air Quality Planning and Standards; U.S. Environmental Protection Agency; Research Triangle Park, North Carolina 27711.

[8] Memorandum from John Seitz, ''Clarification of Policy for Nitrogen Oxides (NO_X) Substitution.'' August 8, 1994.

[9] It should be noted that reductions toward the RFP requirement of the CAA that actually occur within one part of a nonattainment area do not necessarily produce the same ozone reductions as emissions reductions in another part of the nonattainment area. Depending on where the reductions occur, even if all the RFP emission

Mandate From Subpart 1 for RFP

16. Comment: The commenter also feels that EPA has erroneously claimed support from Subpart 1's mandate for ''reasonable further progress,'' defined as ''such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.'' Section 171(1). The agency has asserted that this Subpart 1 provision somehow shows that Congress did not care about the location of emission reductions as long as they contributed to progress toward attainment. 70 FR 71648, quoting CAA section 171(1). This argument simply ignores the express language of Subpart 2, which explicitly requires the achievement of specified percentage reductions ''in'' the nonattainment area. EPA cannot rely on a general statutory provision to override a more specific one, or rely on policy goals to override express statutory mandates.

EPA Response: The EPA believes that its interpretation advances the general statutory purpose underlying RFP. For both Subparts 1 and 2,[10] Congress defined RFP to mean ''such annual incremental reductions in emissions of the relevant pollutant as are required by this part or may reasonably be required by (EPA) for the purpose of ensuring attainment * * * by the applicable date.'' CAA section 171(1). Under both Sections 172 and 182, the stated purpose of 'reasonable further progress' is to ensure attainment by the applicable attainment date. Acknowledging this stated purpose, EPA reasoned that ''specific, annual emissions reductions from geographic areas outside the nonattainment area boundaries that contribute to lower ambient ozone levels in the nonattainment area would fall within the scope of 'such annual incremental reductions' * * * as are required * * * for the purpose of ensuring attainment * * *.'' 70 FR 71,648/2. Therefore, while it is true that the statute does not expressly authorize RFP credit for outside emission reductions, EPA believes its interpretation of the statute to allow such credit in the absence of an express prohibition is reasonable. The commenter is incorrect in stating that this construction relies on a general statutory provision to override a more specific one. Although the RFP requirements in Subpart 2 are more specific than those in Subpart 1, they do not expressly and unambiguously limit the crediting of reductions in the manner the commenter suggests. Because no provision speaks precisely to the relevant issue, EPA appropriately considered the RFP and creditability provisions (CAA section 182 (b)(1)(c)) as a whole to reach a reasonable reading of the statute.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations of the Phase 2 Rule published on November 29, 2005 under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0594. The Phase 2 Rule's information collection request (ICR) covered the RFP interpretation that is the subject of this final rule. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards. (*See* 13 CFR 121.); (2) A governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impact of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not directly impose any requirements on small entities. Rather this final rule interprets the RFP requirements under the SIP for states to submit RFP plans in order to attain the ozone NAAQS.

D. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local, and tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The CAA imposes the obligation for states to submit SIPs, including RFP, to implement the Ozone NAAQS. In this final rule, EPA is merely providing an interpretation of those requirements. However, even if this interpretation did establish an independent requirement for states to submit SIPs, it is questionable whether such a requirement would constitute a federal mandate in any case. The obligation for a state to submit a SIP that arises out of section 110 and section 172 (part D) of the CAA is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of section 21(5)(9a)(I) of UMRA (2 U.S.C. 658(a)(I)). Even if it did, the duty could be viewed as falling within the exception for a condition of federal assistance under section 21(5)(a)(i)(I) of UMRA (2 U.S.C. 658(5)(a)(i)(I)).

The EPA has determined that this rule contains merely an interpretation of regulatory requirements and no regulatory requirements that may significantly or uniquely affect small governments, including tribal governments because these regulations affect federal agencies only.

reductions occur wholly within the nonattainment area, it is possible that there could actually be no reduction in ozone concentrations within that nonattainment area.

[10] *See* 42 U.S.C. 7501 (stating that the ensuing definitions apply ''(f)or the purpose of this part'').

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have Federalism implications.'' Policies that have ''Federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This final action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule addresses the Court's vacatur and remand of a portion of the Phase 2 implementation rule for the 8-hour standard, namely an interpretation that allowed credit toward RFP for the 8-hour standard from emission reductions outside the nonattainment area. In addressing the vacatur and remand, this rule merely explains the requirements for RFP and does not impose any additional requirements. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13121 and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comments on the proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final rule does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It does not have a substantial direct effect on one or more Indian tribes, since no tribe has to develop a SIP under this final rule. Furthermore, this final rule does not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. The CAA and the Tribal Air Rule establish the relationship of the federal government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This final action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866 and because EPA does not have reason to believe the environmental health or safety risk addressed by the 8-hour ozone RFP Regulations present a disproportionate risk to children. This final action addresses whether a SIP will adequately and timely achieve reasonable further progress to attain and maintain the NAAQS and meet the obligations of the CAA. The NAAQS are promulgated to protect the health and welfare of sensitive population, including children. However, EPA solicited comments on whether this action would result in an adverse environmental effect that would have a disproportionate effect on children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final action will address the Court's vacatur and remand of a portion of the Phase 2 implementation rule for the 8-hour standard, namely an interpretation that allowed credit toward RFP for the 8-hour standard from emission reductions outside the nonattainment area. This final action merely explains the requirements for RFP and does not impose any additional requirements.

K. Congressional Review Act

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). This rule will be effective October 13, 2009.

L. Determination Under Section 307(d)

Under section 307(b)(1) of the Act, judicial review of today's final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by October 13, 2009. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects

40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 51

Air pollution control, Intergovernmental relations, Ozone, Particulate matter, Transportation, Volatile organic compounds.

Authority: 42 U.S.C. 7409; 42 U.S.C. 7410; 42 U.S.C. 7511–7511f; 42 U.S.C. 7601(a)(1).

Dated: August 4, 2009.

Lisa P. Jackson,

Administrator.

[FR Doc. E9–19190 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0311; FRL–8941–6]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Revised Motor Vehicle Emission Budgets for the Scranton/Wilkes-Barre 8-Hour Ozone Maintenance Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The revision amends the 8-hour ozone maintenance plan for the Scranton/Wilkes-Barre Area 8-Hour Ozone Maintenance Area (the Area). This revision amends the maintenance plan's 2009 and 2018 motor vehicle emissions budgets (MVEBs) by unequally dividing the existing approved MVEBs which covers the entire maintenance area into three sub-regional MVEBs, one set of MVEBs for each county comprising the area. The revised plan continues to demonstrate maintenance of the 8-hour national ambient air quality standard (NAAQS) for ozone. EPA is approving this SIP revision to the Pennsylvania maintenance plan for the Scranton/Wilkes-Barre Area in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on October 13, 2009 without further notice, unless EPA receives adverse written comment by September 10, 2009. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0311 by one of the following methods:

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

B. *E-mail: febbo.carol@epa.gov*.

C. *Mail:* EPA–R03–OAR–2009–0311, Carol Febbo, Chief, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2009–0311. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an anonymous access system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Martin Kotsch, (215) 814–3335, or by e-mail at *kotsch.martin@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we'', ''us'', or ''our'' is used, we mean EPA.

Table of Contents

I. Background
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I. Background

On November 11, 2007 (72 FR 64948) EPA redesignated the Scranton/Wilkes-Barre area of Pennsylvania to attainment for the 8-hour ozone NAAQS. For this area, the redesignation included approval of an 8-hour ozone maintenance plan, which identifies on-road MVEBs for Volatile Organic Compounds (VOCs) and Nitrous Oxides (NO_X), which are ozone precursors, which are then used for transportation planning and conformity purposes. There are three separate metropolitan planning organizations (MPOs) in this maintenance area—one for Lackawana and Luzerne Counties, one for Monroe County and one for Wyoming County, with individual responsibility for doing transportation conformity within their respective planning boundaries within the Area. Pennsylvania has unequally divided the existing MVEBs and created sub-regional MVEBs for each MPO to better accommodate the transportation planning and conformity processes within the Area.

II. Summary of Pennsylvania's SIP Revision and EPA's Review

On April 21, 2008, the State of Pennsylvania submitted to EPA a formal revision to its State Implementation

Plan (SIP). The SIP revision proposes new MVEBs to reflect the reallocation of the existing overall MVEBS for the maintenance area. By reallocating the MVEBs, the Pennsylvania Department of Environmental Protection (PADEP) is ensuring that transportation conformity can be demonstrated in the Scranton/Wilkes-Barre area. The April 21, 2008 submittal still ensures maintenance of the NAAQS for ozone for the Scranton/Wilkes-Barre area.

The following table lists the previously approved MVEBs and the proposed reallocation of the MVEBs into sub-regional budgets for the Scranton/Wilkes-Barre area.

SCRANTON/WILKES-BARRE AREA REALLOCATION OF THE MVEBS INTO SUB-REGIONAL BUDGETS

Current MVEBs in the approved maintenance plan—all counties (tons/day)			
	2004 base year	2009 projection	2018 projection
VOC	31.6	25.2	16.9
NO_X	66.1	48.3	23.7

Proposed MVEBs in the Revised Maintenance Plan (tons/day) [1]		
	2009 budget	2018 budget
Lackawana-Luzerne Counties		
VOC	17.99	11.8
NO_X	34.58	16.7
Monroe County		
VOC	6.19	4.64
NO_X	12.16	6.36
Wyoming County		
VOC	0.99	0.54
NO_X	1.54	0.68

[1] Due to rounding, some of the new reallocated budgets, if combined, are insignificantly different than the previously approved mobile budgets for the entire area. This slight difference will still ensure maintenance of the 8-hour ozone attainment as the combined MVEBs are still lower than the attainment year budgets.

EPA is approving the 2009 and 2018 MVEBs for VOCs and NO_X emissions listed above in Table 1 as the new MVEBs for transportation conformity planning.

III. Final Action

EPA is approving Pennsylvania's April 21, 2008 SIP revision submittal which amends the 8-hour ozone maintenance plans for the Scranton/Wilkes Barre area. This revision unequally divides the previously approved 2009 and 2018 MVEBs to create sub-regional MVEBs for the two counties comprising the area. EPA is approving this SIP revision because the April 21, 2008 submittal continues to demonstrate maintenance of the 8-hour ozone NAAQS with the aggregated sub-regional MVEBs. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment, since no significant adverse comments were received on the SIP revision at the State level. However, in the Proposed Rules section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on October 13, 2009 without further notice unless EPA receives adverse comment by September 10, 2009.

If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time

IV. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

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

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

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

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

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 13, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking.

This action to approve the Scranton/Wilkes-Barre revised maintenance plan may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: July 28, 2009.

William C. Early,

Acting Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (e)(1) is amended by revising the entry for the 8-Hour Ozone Maintenance Plan and 2002 Base Year Emissions Inventory for the Scranton/Wilkes Barre, PA Area to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(e) * * *

(1) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
8-Hour Ozone Maintenance Plan and 2002 Base Year Emissions Inventory.	Scranton/Wilkes-Barre Area: Lackawanna, Luzerne, Monroe and Wyoming Counties.	6/12/07	11/14/07, 72 FR 64948.	
		4/21/08	8/11/09, [Insert page number where the document begins].	
*	*	*	*	*

* * * * *

[FR Doc. E9–18867 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2005–0011; FRL–8942–6]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Direct final Notice of Deletion of the Delilah Road Landfill, Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 2 is publishing a direct final Notice of Deletion of the Delilah Road Landfill, Superfund Site (Site), located in *Egg Harbor Township, New Jersey*, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is

an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) 40 CFR part 300. This direct final deletion is being published by EPA with the concurrence of the State of New Jersey, through the *New Jersey Department of Environmental Protection*, because EPA has determined that all appropriate response actions under CERCLA have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: This direct final deletion is effective October 13, 2009 unless EPA receives significant adverse comments by September 10, 2009. If significant adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect, and will continue with the deletion process on the basis of the Notice of Intent To Delete.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–2005–0011, by one of the following methods:

- *http://www.regulations.gov*. Follow on-line instructions for submitting comments.
- *E-mail: loney.natalie@epa.gov*.
- *Fax:* (212) 637–4445.
- *Mail:* Natalie Loney, Community Involvement Coordinator, U.S. Environmental Protection Agency, 290 Broadway, 26th Floor, New York, New York 10007–1866.
- *Hand delivery:* U.S. Environmental Protection Agency Records Center, Region 2, 290 Broadway, 18th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–2005–0011, EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at: United States Environmental Protection Agency Region 2 Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866, Building hours are Monday to Friday 9 a.m.–5 p.m., Telephone number is (212) 637–4308, or The Atlantic County Library, Egg Harbor Township Branch, 1 Swift Avenue, Egg Harbor Township, New Jersey 08234, Building hours are Monday to Thursday 9 a.m. to 8 p.m., Friday and Saturday 9 a.m. to 5 p.m., Telephone number is (609) 927–8664.

FOR FURTHER INFORMATION CONTACT: Tanya Mitchell, Remedial Project Manager, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, New York 10007–1866, (212) 637–4362, *e-mail: mitchell.tanya@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Site Deletion
V. Deletion Action

I. Introduction

EPA Region 2 is publishing this direct final Notice of Deletion of the Delilah Road Landfill, from the National Priorities List (NPL). The NPL constitutes Appendix B of 40 CFR part 300, which is the Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended. EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for Fund-financed remedial actions if future conditions warrant such actions.

Because EPA considers this action to be noncontroversial and routine, this action will be effective October 13, 2009 unless EPA receives adverse comments by September 10, 2009. Along with this direct final Notice of Deletion, EPA is co-publishing a Notice of Intent to Delete in the ''Proposed Rules'' section of the **Federal Register**. If significant adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely withdrawal of this direct final Notice of Deletion before the effective date of the deletion, and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Delilah Road Landfill Superfund Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the state, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. All appropriate Fund-financed response under CERCLA has been implemented, and no further response

action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

III. Deletion Procedures

The following procedures apply to deletion of the Site:

(1) EPA consulted with the state of New Jersey prior to developing this direct final Notice of Deletion and the Notice of Intent to Delete co-published today in the ''Proposed Rules'' section of the **Federal Register**.

(2) EPA has provided the state 30 working days for review of this notice and the parallel Notice of Intent to Delete prior to their publication today, and the state, through the New Jersey Department of Environmental Protection, has concurred on the deletion of the Site from the NPL.

(3) Concurrently with the publication of this direct final Notice of Deletion, a notice of the availability of the parallel Notice of Intent to Delete is being published in a major local newspaper, *Shore News Today*. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent to Delete the Site from the NPL.

(4) The EPA placed copies of documents supporting the proposed deletion in the deletion docket and made these items available for public inspection and copying at the Site information repositories identified above.

(5) If significant adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely notice of withdrawal of this direct final Notice of Deletion before its effective date and will prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Site Deletion

The following information provides EPA's rationale for deleting the Site from the NPL:

Site Background and History

The Delilah Road Landfill Site is located southwest of Delilah Road in Egg Harbor Township, Atlantic County, New Jersey, and is designated as Block 901, part of Lot 1 and all of Lots 2 and 52 on the Municipal Tax Map of Egg Harbor Township. This area is immediately northeast of the intersection of the Garden State Parkway and the Atlantic City Expressway (Exit 38 of the Garden State Parkway). The surrounding area is a suburb of Atlantic City, comprised of residential areas, small businesses, and warehouses. The regional topography is generally flat. The Site consists of approximately 52 acres of land at an average elevation of 50 feet above mean sea level.

The Atlantic City Reservoir is about a mile and a half north of the Site. The closest surface water is Jarrets Run, located 1,000 feet to the north of the landfill. This small and often dry creek runs into Absecon Creek, which flows into Absecon Bay. The New Jersey Water Company's public water supply wells are located to the northwest, northeast, southeast and southwest of the landfill and less than a mile away from the Site.

The Site was originally used for sand and gravel excavation. It was later converted into a solid waste disposal area. In 1972, NJDEP issued a Certificate of Registration for the operation of a sanitary landfill. At present, no future reuse/development is known. Deed restrictions at the Site stipulate no residential development is permitted.

Landfill operations ceased in 1980, when fill material reached the final design elevation. NJDEP records suggest that the landfill was not operated properly and not closed correctly. Several violations of NJDEP regulations were reported by NJDEP inspectors during the years of landfill operations and after operations ceased. These included emissions of foul odors, windblown paper and other material, and other operational and closure inadequacies. A 1982 preliminary assessment report prepared by EPA indicated that the landfill may have a potential impact on groundwater.

Remedial Investigation and Feasibility Study (RI/FS)

On October 4, 1984, the Delilah Road Landfill Site was placed on the National Priorities List (NPL) of Superfund sites (49 FR 40320). In June of 1985, Camp Dresser and McKee initiated a remedial investigation and feasibility study (RI/FS) to investigate the nature and extent of hazardous substances present at the Site. The RI/FS activities were conducted under state authority in accordance with New Jersey Regulations for Oversight of Contaminated Sites, N.J.A.C 7:26C. A field investigation of the Site was initiated in February 1986 to evaluate remedial alternatives to mitigate public health and environmental impacts associated with the landfill.

The Phase I RI/FS activities and the Phase II RI/FS activities conducted in 1986 and 1988 did not identify the presence of any organic compounds in the soil samples from under the fill material in the landfill which needed to be addressed. Metals were found at levels typical of background concentration of natural soils. Groundwater monitoring data for wells located upgradient, downgradient and side gradient to the landfill indicated the presence of several metals (chromium, lead, nickel, mercury, aluminum and zinc) in concentrations that exceeded the New Jersey Ground Water Quality Standards. The metal concentrations were consistent with background levels and no site related contamination was found in groundwater that warranted action. The RI/FS concluded that no response action was required under CERCLA. New Jersey, in accordance with New Jersey Regulations for Oversight of Contaminated Sites, N.J.A.C 7:26C, selected a remedy that would provide proper closure of the landfill and require closure monitoring and controls be enforced by the responsible parties.

Selected Remedy

On September 28, 1990, NJDEP issued a ROD in accordance with New Jersey Regulations for Oversight of Contaminated Sites, N.J.A.C 7:26C, which presented the selected remedy for the Site that included: Placement of an impermeable layer cap on the landfill; installation of a surface water control system; installation of a landfill gas collection and treatment system based on design studies to confirm the need for this system; implementation of an air and groundwater monitoring program; fencing of the Site; and establishment of an appropriate deed restriction. Since the RI/FS determined that response under CERCLA was not required, the EPA did not concur on the remedy.

In March 1993, the Delilah Road Potentially Responsible Party (PRP) group implemented a groundwater investigation at the Site in order to

determine if the impermeable layer cap was needed and to evaluate the long-term impact of the landfill on groundwater conditions further. The results of groundwater sampling conducted in October 1993 found that groundwater quality had not significantly changed from the RI/FS groundwater sampling events conducted in 1986 and 1988. Since the uncapped landfill was not shown to be degrading groundwater quality (beyond the extent observed in 1986 and 1988) and downgradient water users were utilizing a public water supply, NJDEP determined that a soil cap, rather than a synthetic membrane as presented in the ROD would provide sufficient protection for the Site.

NJDEP issued an ESD in September 1998 which substituted the soil cap for the impermeable cap. Under the modified remedy, the landfill soil cap would consist of 18 inches of soil cover over approximately 47 acres. The modified remedy includes all of the other elements of the selected ROD including: Fencing of the Site and establishment of appropriate deed restrictions; a groundwater quality monitoring program; installation of a surface water runoff control system; and installation of a landfill gas collection and treatment system subject to design studies confirming the need for such a system.

Response Actions

The PRP Group, composed of American Cyanamid Company (now Wyeth Holdings Corporation), Lenox Incorporated, and Atlantic City Electric Company, prepared a Remedial Action Work Plan Outline (RAWPO) which described the remedial design (RD) and RA activities needed to complete the project. The RAWPO was approved by NJDEP in accordance with New Jersey Regulations for Oversight of Contaminated Sites, N.J.A.C 7:26C and was included in the ACO, executed by the PRP Group and NJDEP, and became effective October 12, 1994.

In accordance with the RAWPO and the ACO, a Phase I RAWP was prepared and submitted to NJDEP to present the Site investigation activities proposed to support the design of the soil cap at the Site. A revised RAWP was approved by NJDEP February 1999. The Site investigation activities included: Delineation of the lateral extent of the landfill waste; determination of the existing cover depth within the landfill; and monitoring along the landfill perimeter for landfill gas. The lateral extent of the landfill waste was found to be limited to Block 901 Lots 2 and 52, and a small area of Lot 1. The extent of the existing soil cover within the interior of the landfill ranged from a few inches to 1.5 feet, and lateral migration of the landfill gas was detected in only one localized area beneath E. Atlantic Avenue.

The results of the Phase I investigation provided the basis for the soil cap design. The landfill waste delineation determined the necessary extent of the soil cap to be constructed, the landfill cover thickness information supported the soil cap grading requirements, and the landfill gas monitoring verified that a passive gas migration control/venting system would be necessary in a localized area of the landfill adjacent to E. Atlantic Avenue. NJDEP approved the June 16, 1999 Phase I Remedial Action Report (RAR) August 1999.

The PRP Group's consultant engineer, Environmental Resources Management (ERM), prepared remedial design plans and specifications, which NJDEP approved May 30, 2001 in the Phase II RAWP. ERM also served as the construction quality assurance (CQA) consultant to the PRP Group. On November 1, 2001, the PRP Group selected Envirocon, Inc. as the RA contractor for the construction of the soil cap. The contractor started construction in December of 2001.

The Phase II remedial actions included: Modification of existing groundwater monitoring well risers located within the areal extent of the cap system; regrading of the Site to achieve designed subgrade elevations; construction of an 18-inch soil cap over the subgrade, which included the placement of 12 inches of general fill (cover soil) and 6 inches of topsoil; hydroseeding of disturbed areas; installation of slope bench drains, downslope drains, and construction of three percolation basins; construction of a passive trench gas migration control/venting system parallel with and adjacent to East Atlantic Avenue; installation of a site security fence around the Site perimeter; and, construction of access roads.

EPA accompanied NJDEP during a pre-final Site inspection held on June 26, 2002. Minimal deficiencies were found and few punch list items were identified. Activities at the Site were found to be completed and in accordance *with Close Out Procedures for National Priorities List Sites* (OSWER Directive 9320.2–09A–P). Construction of the soil cap system was completed July 2002. The NJDEP approved the October 30, 2002 Phase II RAR on March 7, 2003.

Cleanup Goals

There were no cleanup goals required under CERCLA. The construction was performed under NJDEP oversight. NJDEP has determined that the RA was constructed consistent with the ROD as amended by the ESD and the Phase II RAWP and issued a No Further Action (NFA) determination on August 18, 2006.

Community Involvement

Community involvement relative to the landfill remedial action was solicited throughout the RI/FS and RD/RA process. The RI and FS Reports (prepared by Camp Dresser & McKee Inc.), which include the proposed remedial action alternative for the Site, were released to the public August 25, 1989. These documents were made available to the public at two information repositories: The Egg Harbor Township Municipal Building, Bargaintown, New Jersey and the Atlantic County Library, Bargaintown, New Jersey. Additional documentation regarding the remedy selection was made available within the administrative record for the remedy, which was placed in the NJDEP Division of Hazardous Site Mitigation, Bureau of Community Relations, in Trenton, New Jersey. The notice of availability for these documents was sent to residents, state, county, and local officials, and was published in local newspapers. In addition, a public meeting was held on August 18, 1989. At this meeting, representatives from NJDEP and EPA answered questions concerning the contamination and conditions at the Site and the remedial alternatives under consideration.

Community concerns regarding the landfill have remained at a moderate to low level throughout the remedial action activities. The major concern had been contamination of residential and business water supply wells. However, this concern was mitigated by the installation of a public water supply system proximate to the Site for area wide contamination of groundwater.

Determination That the Site Meets the Criteria for Deletion in the NCP

One of the three criteria for site deletion is that ''the remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.'' The contribution to that risk from exposure to soil was estimated to be 7×10^{-6}, which is within the acceptable risk range. Since then, the landfill has been

capped, thereby eliminating direct contact with contaminated soil. The site is also fenced, prohibiting trespassing. Exposure to groundwater contributed a risk of 3×10^{-4} and an HI of 3.3 to the overall risk and hazard calculations for the site. If the groundwater risk assessment were performed today, following the practices for calculating an exposure point concentration (an upper bound estimate of the mean concentration) described in the Risk Assessment Guidance for Superfund, Part A (1989), and later clarified in the ''Supplemental Guidance to RAGS: Calculating the Concentration Term'' (1992), the risk and hazard estimates would be within the acceptable risk range. Therefore, EPA determined that no response action under CERCLA was appropriate.

V. Deletion Action

The EPA, with concurrence of the State of New Jersey through the New Jersey Department of Environmental Protection, has determined that all appropriate response actions under CERCLA, have been completed. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective *October 13, 2009* unless EPA receives significant adverse comments by *September 10, 2009.* If significant adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion, and it will not take effect. EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: July 27, 2009.

George Pavlou,

Acting Regional Administrator, Region II.

■ For the reasons set out in this document, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to part 300 is amended by removing ''Delilah Road'', ''Egg Harbor Township, NJ.''

[FR Doc. E9–19066 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 09–65; MD Docket No. 08–65; FCC 09–62]

Assessment and Collection of Regulatory Fees for Fiscal Year 2009

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, we amend our Schedule of Regulatory Fees to collect $341,875,000 in regulatory fees for Fiscal Year (FY) 2009, pursuant to section 9 of the Communications Act of 1934, as amended (the Act). These fees are mandated by Congress and are collected to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.

DATES: Effective September 10, 2009.

FOR FURTHER INFORMATION CONTACT: Daniel Daly, Office of Managing Director at (202) 418–1832, or Roland Helvajian, Office of Managing Director at (202) 418–0444.

SUPPLEMENTARY INFORMATION:

I. Introduction

1. In this Report and Order we conclude the Assessment and Collection of Regulatory Fees for Fiscal Year (FY) 2009 proceeding [1] to collect $341,875,000 in regulatory fees for FY 2009, pursuant to section 9 of the Communications Act of 1934, as amended (the Act). Section 9 regulatory fees are mandated by Congress and are collected to recover the regulatory costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.[2] The annual regulatory fee amount to be collected is established each year in the Commission's annual appropriations act which is adopted by Congress and signed by the President and which funds the Commission.[3] In this annual regulatory fee proceeding, we retain many of the established methods, policies, and procedures for collecting section 9 regulatory fees adopted by the Commission in prior years. Consistent with our established practice, we intend to collect these regulatory fees during a filing window in September 2009 in order to collect the required amount by the end of our fiscal year.

II. Report and Order

2. On May 14, 2009, we released a Notice of Proposed Rulemaking and Order (*FY 2009 NPRM and Order*, 74 FR 26329, June 2, 2009) seeking comment on regulatory fee issues for FY 2009.[4] The section 9 regulatory fee proceeding is an annual rulemaking process to ensure the Commission collects the fee amount required by Congress each year. In the *FY 2009 NPRM and Order*, we proposed to largely retain the section 9 regulatory fee methodology used in the prior fiscal year except as discussed below. We received nine comments and two reply comments.[5] We address the issues raised in our *FY 2009 NPRM and Order* below.

A. FY 2009 Regulatory Fee Assessment Methodology—Development of FY 2009 Regulatory Fees

3. We note at the outset that in the context of their comments on the FY 2009 regulatory fee proceeding, commenters [6] discussed the Commission's Further Notice of Proposed Rulemaking, which accompanied the FY 2008 regulatory fee Report and Order (*FY 2008 Report and Order*, 73 FR 50285, August 26, 2008).[7] Through that proceeding the

[1] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, MD Docket No. 09–65, Notice of Proposed Rulemaking and Order, 24 FCC Rcd 5966 (2009) (*FY 2009 NPRM and Order*).

[2] 47 U.S.C. 159(a).

[3] *See Omnibus Appropriations Act, 2009*, P.L. 111–8, for the FY 2009 appropriations act language for the Commission establishing the amount of $341,875,000 of offsetting collections to be assessed and collected by the Commission pursuant to section 9 of the Communications Act.

[4] *See FY 2009 NPRM and Order.*

[5] *See* Appendix A for the list of commenters and abbreviated names.

[6] *See* comments from American Association of Paging Carriers (AAPC); Coalition of Canadian-Based Service Providers (Coalition); Independent Telephone and Telecommunications Alliance (ITTA); and United States Telecom Association (USTelecom).

[7] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket No. 08–65, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6389 (2008) (*FY 2008 Report and Order*).

Commission sought comment on how it could comprehensively make the Commission's regulatory fee process more equitable.[8] In the *FY 2009 NPRM and Order,* we adopted two proposals raised in the Further Notice of Proposed Rulemaking in the *FY 2008 Report and Order*.[9] The other outstanding matters stemming from the Further Notice of Proposed Rulemaking in the *FY 2008 Report and Order* will be decided at a later time in a separate *Report and Order*.[10]

4. In our FY 2009 regulatory fee assessment, we will use the same section 9 regulatory fee assessment methodology adopted for FY 2008. Each fiscal year, the Commission proportionally allocates the total amount that must be collected via section 9 regulatory fees. The results of our FY 2009 regulatory fee assessment methodology (including a comparison to the prior year's results) are contained in Appendix B. To collect the $341,875,000 required by Congress, we adjust the FY 2008 amount upward by approximately 9.6 percent and allocate this amount across the various fee categories. Consistent with past practice, we then divide the FY 2009 amount by the number of payment units in each fee category to determine the unit fee.[11] As in prior years, for cases involving small fees, *e.g.*, licenses that are renewed over a multiyear term, we divide the resulting unit fee by the term of the license and then round these unit fees consistent with the requirements of section 9(b)(2) of the Act.

5. In calculating the FY 2009 regulatory fees listed in Appendix C, we further adjusted the FY 2008 list of payment units (see Appendix D) based upon licensee databases and industry and trade group projections. In some instances, Commission licensee databases were used; in other instances, actual prior year payment records and/or industry and trade association projections were used in determining the payment unit counts.[12] Where appropriate, we adjusted and rounded our final estimates to take into consideration events that may impact the number of units for which regulatees submit payment, such as waivers and exemptions that may be filed in FY 2009, and fluctuations in the number of licensees or station operators due to economic, technical, or other reasons. Therefore, our estimated FY 2009 payment units are based on FY 2008 actual payment units, but the number may have been rounded or adjusted slightly to account for these variables.

1. AM and FM Radio Stations

6. As in previous years, we consider additional factors in determining regulatory fees for AM and FM radio stations. We did not receive any comments on the use of these factors. These factors are facility attributes and the population served by the radio station. The calculation of the population served is determined by coupling current U.S. Census Bureau data with technical and engineering data, as detailed in Appendix E. Consequently, the population served, as well as the class and type of service (AM or FM), will continue to determine the regulatory fee amount to be paid.[13]

2. Submarine Cable Methodology

7. In a *Second Report and Order* (*Submarine Cable Order*, 24 FCC Rcd) released on March 24, 2009, the Commission adopted a new submarine cable bearer circuit methodology that assessed regulatory fees on a per cable landing license basis, with higher fees for larger submarine cable systems and lower fees for smaller systems, without distinguishing between common carriers and non-common carriers.[14] For the other categories of international bearer circuits—common carrier and non-common carrier satellite facilities and common carrier terrestrial facilities—the *Submarine Cable Order* retained the existing regulatory fee methodology of assessing fees on a per 64 kbps circuit basis.

8. By way of brief background, in the proposed fee rates for submarine cable systems in the *FY 2009 NPRM and Order*,[15] the Commission allocated the total FY 2009 bearer circuit expected revenue into two revenue components: a submarine cable revenue component (87.6 percent) and a satellite/terrestrial revenue component (12.4 percent) using the Consensus Proposal allocation adopted by the Commission in the *Submarine Cable Order*.[16] According to the Consensus Proposal, this allocation of 87.6 percent (submarine cable) and 12.4 percent (satellite/terrestrial) was calculated by determining the revenue obligations of submarine cable systems with the revenue obligations of the satellite and terrestrial facilities using the FY 2008 revenue requirement as its basis.[17] For calculating these new bearer circuit fees, we will use these allocation percentages of 87.6 percent (submarine cable) and 12.4 percent (satellite and terrestrial) as a starting point. Consistent with the Commission's annual process of updating its schedule of regulatory fees based on the most recent data, we will re-examine the allocation percentages described above on an annual basis as the starting point for applying the new submarine cable methodology.

9. After the adoption of the *Submarine Cable Order,* the Commission notified Congress on April 15, 2009 per section 9(b)(4)(B) of the Communications Act of the methodology change.[18] The pending 90-day congressional notification period expired on July 15, 2009. The new bearer circuit methodology is effective.

[8] *FY 2008 Report and Order* at paragraph 2.

[9] *FY 2009 NPRM and Order* at paragraphs 2–5; *FY 2008 Report and Order* at paragraphs 55 and 56.

[10] In an effort to explore how the Commission could comprehensively make the regulatory fee process more equitable, the Commission sought and received comments during FY 2008 about the regulatory fee process, the calculation of regulatory fees, and issues relating to specific categories of fees. *FY 2008 Report and Order* at paragraphs 25–58. The comprehensive regulatory fee revision issues raised in the FY 2008 Further Notice of Proposed Rulemaking remain outstanding at this time.

[11] In many instances, the regulatory fee amount is a flat fee per licensee or regulatee. In some instances, the fee amount represents a per-unit fee (such as for International Bearer Circuits), a per-unit subscriber fee (such as for Cable, Commercial Mobile Radio Service (CMRS) Cellular/Mobile and CMRS Messaging), or a fee factor per revenue dollar (Interstate Telecommunications Service Provider (ITSP) fee). The payment unit is the measure upon which the fee is based, such as a licensee, regulatee, or subscriber fee.

[12] The databases we consulted are the following: the Commission's Universal Licensing System (ULS), International Bureau Filing System (IBFS), Consolidated Database System (CDBS) and Cable Operations and Licensing System (COALS). We also consulted industry sources including, but not limited to, *Television & Cable Factbook* by Warren Publishing, Inc. and the *Broadcasting and Cable Yearbook* by Reed Elsevier, Inc., as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast* and *Annual CMRS Competition Report*.

[13] In addition, beginning in FY 2005, we established a procedure by which we set regulatory fees for AM and FM radio and VHF and UHF television Construction Permits each year at an amount no higher than the lowest regulatory fee in that respective service category. For example, the regulatory fee for a Construction Permit for an AM radio station will never be more than the regulatory fee for an AM Class C radio station serving a population of less than 25,000.

[14] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Second Report and Order, 24 FCC Rcd 4208, paragraph 1 (May 12, 2009) (*Submarine Cable Order*).

[15] *See FY 2009 NPRM and Order* at Appendix A.

[16] *See Submarine Cable Order* at paragraphs 1 and 6.

[17] *Id.* at 6.

[18] 47 U.S.C. 159(b)(4)(B); Letter concerning permitted amendment from Office of Managing Director, Federal Communications Commission to Chair and Ranking Members of U.S. House of Representatives' Committees on Energy and Commerce and Appropriations and applicable Subcommittees and to Chair and Ranking Members of the United States Senate Committees on Commerce, Science, and Transportation and Appropriations and applicable Subcommittees (sent April 15, 2009).

The FY 2009 regulatory fee rates for submarine cable systems included in the FY 2009 Schedule of Regulatory Fees in Appendix C reflect the Commission's adoption of the methodology in the *Submarine Cable Order*.

3. Elimination of Regulatory Fee Categories for International Public Fixed Radio and International High Frequency Broadcast Stations

10. In our *FY 2008 Report and Order*, we sought comment on eliminating several categories of services from our schedule of regulatory fees.[19] The Commission received no comments on those proposals. In the *FY 2009 NPRM and Order*, the Commission adopted an Order which eliminated the regulatory fee categories for International Public Fixed Radio and International High Frequency Broadcast Stations.[20]

11. After the adoption of the *FY 2009 NPRM and Order*, the Commission notified Congress on May 20, 2009 per section 9(b)(4)(B) of the Communications Act of the methodology change.[21] After the pending 90-day congressional notification period expires, *i.e.*, after August 18, 2009, the elimination of these two regulatory fee categories will become effective. The FY 2009 Schedule of Regulatory Fees in Appendix C reflects the elimination of these two categories based on the Commission's action in the *FY 2009 NPRM and Order*.

B. Regulatory Fee Obligations for Digital Broadcasters

12. In our *FY 2009 NPRM and Order*, we reiterated that consistent with past years, we would not assess FY 2009 regulatory fees for both digital and analog licenses from a licensee in the process of transitioning from analog to digital.[22] Furthermore, we stated that stations that were broadcasting in both analog and digital on October 1, 2008 would be assessed FY 2009 regulatory fees for their analog license only.[23] Also consistent with our past practice, we noted that stations that were broadcasting in digital only on October 1, 2008 would not be assessed regulatory fees for their digital license for FY 2009.[24]

13. In our *FY 2009 NPRM and Order,* we proposed that beginning in FY 2010, we plan to collect regulatory fees from digital broadcasters, and we sought comment on this plan to collect regulatory fees on full-power digital broadcast stations beginning with FY 2010, *i.e.*, the fiscal year after the nation-wide transition date on June 12, 2009.[25] We received no comments on this issue. Our goal is to ensure that digital broadcasters will pay their share of regulatory fees in the years after the nation-wide transition is complete. Therefore, in FY 2010, we will collect regulatory fees from digital broadcasters. During the FY 2010 regulatory fee process, we will again remind digital broadcasters of their regulatory fee obligations.

C. Commercial Mobile Radio Service Messaging Service

14. Commercial Mobile Radio Service (CMRS) Messaging Service, which replaced the CMRS One-Way Paging fee category in 1997, includes all narrowband services.[26] In the *FY 2009 NPRM and Order*, we proposed maintaining the messaging service regulatory fee at $0.08 per subscriber, the rate first established for this service in FY 2002.[27]

15. One commenter, AAPC, addressed this issue.[28] AAPC submits that maintaining the fee at the existing level is the minimum reasonable and appropriate action under the prevailing circumstances in the paging industry.[29] We conclude that for FY 2009 we should continue this regulatory fee rate at $0.08 per subscriber due to the declining subscriber base in this industry.[30]

D. International Bearer Circuits

1. Terrestrial Non-Common Carrier Circuits

16. As part of our comprehensive effort to review our regulatory fees process for possible ways to make the process more equitable, we sought comment in our *FY 2009 NPRM and Order* on whether, beginning in FY 2010, carriers providing international service over terrestrial circuits should also pay international bearer circuit (IBC) fees on non-common carrier circuits.[31] Five parties filed comments or reply comments. In joint comments, Bestel USA Inc., Hibernia Atlantic US LLC, and Level 3 Communications LLC (Joint Commenters) argue that carriers should not be assessed regulatory fees on their non-common carrier circuits, in part, because the Commission does not authorize those services or collect data on them, and thus there is no burden on the Commission to regulate these services.[32] The Coalition of Canadian-Based Service Providers (Coalition) echoes these arguments, contending that international terrestrial fiber-based non-common carriers are not regulated by the Commission, they do not hold 214 licenses, and are not subject to enforcement and policymaking activities.[33] Sprint Nextel (Sprint) opposes the imposition of regulatory fees on terrestrial non-common carrier bearer circuits that are used exclusively for providing Internet/IP services.[34] AT&T, on the other hand, argues that in the interest of providing equitable treatment of all providers, per circuit fees should be levied on non-common carrier terrestrial circuits.[35] Verizon and Verizon Wireless agree with Joint Commenters, the Coalition and Sprint, that non-common carrier services over terrestrial international circuits is inherently different from such services over satellite circuits and submarine cable systems.[36] In its reply comments, AT&T argues that non-common carrier terrestrial circuits currently receive an unfair cost advantage because they are not assessed a regulatory fee, and it is possible that common carriers will increasingly market capacity on a non-common carrier basis to avoid paying these fees, thereby increasing the fees for the smaller pool of remaining common carrier circuits.[37]

17. The commenters present a number of competing arguments on whether carriers should be assessed regulatory fees for their terrestrial non-common carrier circuits. In the *FY 2009 NRPM and Order,* we sought comment on whether we should make such an assessment starting in FY 2010, at the earliest. Given the complexity of the

[19] *FY 2008 Report and Order* at paragraphs 55 and 56.

[20] *FY 2009 NPRM and Order* at paragraph 5.

[21] 47 U.S.C. 159(b)(4)(B); Letter concerning permitted amendment from Office of Managing Director, Federal Communications Commission to Chair and Ranking Members of U.S. House of Representatives' Committees on Energy and Commerce and Appropriations and applicable Subcommittees and to Chair and Ranking Members of the United States Senate Committees on Commerce, Science, and Transportation and Appropriations and applicable Subcommittees (sent May 20, 2009).

[22] *FY 2009 NPRM and Order* at paragraph 10.

[23] *Id.*

[24] *Id.*

[25] *Id.* at paragraph 11.

[26] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96–186, Report and Order, 12 FCC Rcd 17161, 17184–85, paragraph 60 (1997) (*FY 1997 Report and Order*).

[27] *FY 2009 NPRM and Order* at paragraph 12.

[28] AAPC Comments at 1–4.

[29] *Id.* at 2.

[30] The subscriber base in the paging industry declined 83 percent from 40.8 million to 6.95 million, from FY 1997 to FY 2008, according to FY 2008 collection data as of September 30, 2008.

[31] *FY 2009 NPRM and Order* at paragraph 13–14.

[32] Bestel USA, Hibernia Atlantic US, and Level 3 Communications comments at 3–4.

[33] Coalition comments at 3, 8–9.

[34] Sprint comments at 1.

[35] AT&T comments at 1.

[36] Verizon and Verizon Wireless comments at 2–3.

[37] AT&T reply comments at 1–2.

legal, policy and equity issues involved, we decline to make a determination at this time. We may further consider this issue in the future.

E. Administrative and Operational Issues

18. In our *FY 2009 NPRM and Order,* we sought general comment on ways to improve our procedures in collecting annual section 9 regulatory fees.[38] We received comments from the American Cable Association (ACA) regarding the fee notification of CARS (Cable Television Relay Service) and Earth Station licensees, and one specific comment from AT&T to send annual notification assessments to licensees of submarine cable systems. We received no reply comments relating to our collection procedures and processes. We will address these comments in the appropriate paragraphs below.

1. Mandatory Use of Fee Filer

19. In our *FY 2009 NPRM and Order,* we proposed to institute a mandatory filing requirement using the Commission's electronic filing and payment system (also known as Fee Filer).[39] Fee Filer is not a new system at the Commission, and although we have strongly encouraged its use for many years for the filing and payment of annual regulatory fees, we proposed this year to make its use mandatory. We received no comments and no reply comments regarding this matter.

20. For the reasons discussed in the *FY 2009 NPRM and Order,* we conclude that beginning in the FY 2009 regulatory fee cycle, licensees filing their annual regulatory fee payments must begin the process by entering the Commission's Fee Filer system with a valid FRN and password. Therefore, it is very important for licensees to have a current and valid FRN address on file in the Commission's Registration System (CORES). Licensees will also need to have their FRN passwords available when entering the Commission's CORES registration system. In some instances, it will be necessary to use a specific FRN and password that is linked to a particular regulatory fee bill. Going forward, only Form 159–E documents generated from Fee Filer will be permitted when sending in a regulatory fee payment to U.S. Bank. By requiring licensees to use Fee Filer to begin the regulatory fee payment process, errors resulting from illegible handwriting on hardcopy Form 159's will be greatly reduced, and we will be able to create an electronic record of licensee payment attributes that are more easily traced than those payments that are simply mailed in with a hardcopy Form 159.

21. There are many benefits to licensees for using the Commission's electronic filing and payment system: (1) Expeditious submission of payment; (2) no postage or courier costs (when paid through Fee Filer); (3) fewer errors caused by illegible handwriting or payments submitted without an FRN number or the appropriate data attributes (*e.g.*, payers will avoid receiving delinquency notices because of payment submission errors); (4) improved recordkeeping and payment reconciliation; (5) reduced administrative burden on both licensees and on Commission staff in processing regulatory fee payments; (6) less expensive than a wire transfer; and (7) a reduced burden of preparing, mailing, and storing paper documents.

22. We realize that not all licensees are able to pay their regulatory fees using Fee Filer. In some instances, the regulatory fee payment may be greater than $99,999, in which case, the use of a credit card will be limited by restrictions placed on it by the U.S. Treasury. For those licensees who choose to pay by check or money order or pay via wire transfer, a voucher Form 159–E will be needed before mailing the check to the Commission's lockbox bank, or in the case of a wire transfer, faxing the Form 159–E to the lockbox bank. For those licensees choosing to make a payment using their bank account (also known as an Automated Clearing House (''ACH'') payment), the submission of Form 159–E to the lockbox bank will not be necessary. In such situations, regardless of whether a payment is made online or submitted with a check or money order along with a Form 159–E, the Commission's requirement now is to begin the process of paying regulatory fees by starting with Fee Filer. The primary difference is that by starting the payment process using Fee Filer, even if the payment is then mailed to the Commission's lockbox bank, a voucher Form 159–E will be generated that will have important electronic attributes associated with this regulatory fee payment.

23. The mandatory use of Fee Filer to begin the regulatory fee payment process is an important step forward in providing our licensees with a paperless, electronic environment to use when conducting business with the Commission. This practice of using Fee Filer will not only enable the Commission to process regulatory fee payments more efficiently and accurately, it will also benefit licensees by reducing the administrative burden of filing and paying annual regulatory fees. Because no comments or reply comments were submitted to the contrary regarding this issue, we will institute a mandatory use of Fee Filer to begin the process of filing to pay annual regulatory fees. Beginning in the FY 2009 regulatory fee cycle, only Form 159–E documents generated from Fee Filer will be permitted when sending in a regulatory fee payment to U.S. Bank.

2. Notification and Collection of Regulatory Fees

a. Pre-Bills

24. In prior years, the Commission mailed pre-bills via surface mail to licensees in select regulatory fee categories: Interstate telecommunications service providers (ITSPs), Geostationary (GSO) and Non-Geostationary (NGSO) satellite space station licensees,[40] holders of Cable Television Relay Service (CARS) licenses, and Earth Station licensees.[41] The remaining regulatees did not receive pre-bills. In our *FY 2009 NPRM and Order,* we proposed to show the attributes of these pre-bills on Fee Filer, but not actually mail them out to licensees via surface mail.[42] We received one general comment from the American Cable Association (ACA), and one specific comment from AT&T. We received no reply comments.

25. The ACA contends that because there are many small cable operators and independent earth station licensees, the Commission should provide notice to each licensee via e-mail when the pre-bill information for CARS and Earth Stations is available for viewing in Fee Filer.[43] ACA understands why the

[38] *FY 2009 NPRM and Order* at paragraph 15.

[39] *FY 2009 NPRM and Order* at paragraph 16.

[40] Geostationary orbit space station (GSO) licensees received regulatory fee pre-bills for satellites that (1) were licensed by the Commission and operational on or before October 1 of the respective fiscal year; and (2) were not co-located with and technically identical to another operational satellite on that date (*i.e.,* were not functioning as a spare satellite). Non-geostationary orbit space station (NGSO) licensees received regulatory fee pre-bills for systems that were licensed by the Commission and operational on or before October 1 of the respective fiscal year.

[41] An assessment is a proposed statement of the amount of regulatory fees owed by an entity to the Commission (or proposed subscriber count to be ascribed for purposes of setting the entity's regulatory fee) but it is not entered into the Commission's accounting system as a current debt. A pre-bill is considered an account receivable in the Commission's accounting system. Pre-bills reflect the amount owed and have a payment due date of the last day of the regulatory fee payment window. Consequently, if a pre-bill is not paid by the due date, it becomes delinquent and is subject to our debt collection procedures. *See also* 47 CFR 1.1161(c), 1.1164(f)(5), and 1.1910.

[42] *See FY 2009 NPRM and Order* at paragraph 20.

[43] American Cable Association (ACA) comments at 4.

Commission has decided to discontinue mailing these pre-bills, but contends that the Commission should consider e-mail as an alternate way of notifying small operators that their bill information is available in Fee Filer.[44] ACA also contends that if the Commission decides to cease mailing pre-bill notices, it is likely that many small operators will be unaware of this change, and as a result, some operators may inadvertently miss the filing deadline while waiting for receipt of the pre-bill.[45] For this reason, ACA suggests that cable operators with 5,000 or fewer subscribers should receive a 180-day grace period for FY 2009 CARS and Earth Station regulatory fee payments.[46] In its comments, AT&T recommends that the Commission send a separate annual fee assessment notification to each submarine cable licensee informing them of their obligation to pay submarine cable regulatory fees.[47]

26. The Commission does not maintain a systematic listing of e-mail addresses for individual CARS and Earth Station licensees, and so, attempting to use such a listing to contact small cable operators and independent earth station licensees may not prove useful. However, because all pre-bills will be loaded into Fee Filer, once Fee Filer becomes operational, this will be the signal by which licensees can view their pre-bill information online. As we have for many years, the Commission will post a Public Notice online announcing the date Fee Filer will become operational, and once this Notice is published, licensees will know that they can view their pre-bill information in Fee Filer. Having provided this Notice to licensees and having urged licensees to use Fee Filer for several years, the Commission will not provide a 180-day grace period for regulatory fee payments as ACA suggests.

27. In its comments, AT&T suggests that the Commission notify licensees of their obligation to pay submarine cable system regulatory fees. AT&T contends that because there is a new regulatory fee methodology for submarine cable fees, and there can be multiple license holders for each submarine cable system, the Commission should try to contact the license holders of submarine cable systems to inform them of their obligation to pay submarine cable regulatory fees.[48] In the *Submarine Cable Order,*[49] the Commission did implement a regulatory fee methodology change for submarine cable systems. Although there may be multiple license holders for each submarine cable system, the total number of license holders is small and information available for each license holder is relatively accurate. However, rather than sending individual notification assessments to each submarine cable licensee, as AT&T suggests, the Commission in FY 2009 will publish a Public Notice that identifies the license holders of each submarine cable system. This Public Notice will serve as notice to all submarine cable license holders of their FY 2009 obligation to pay regulatory fees under the new methodology.

III. Procedural Matters

28. Included below are procedural items as well as our current payment and collection methods that we have revised over the past several years to expedite the processing of regulatory fee payments. We include these payments and collection procedures here as a useful way to remind regulatory fee payers and the public about these aspects of the annual regulatory fee collection process. For FY 2009, we have not changed our procedures with the exception of Pre-Bills, which as discussed above the Commission will no longer be sending out via surface mail. We also discuss at the outset a procedural matter about waivers raised by a commenter.

29. In its comments, the Named State Broadcasters Associations (State Associations) suggested that the Commission's standard for deciding whether to grant a waiver for financial hardship should be revised to allow greater flexibility.[50] The State Associations commented that the current recession is crippling stations nationwide.[51] Furthermore, the State Associations commented that: ''Especially during this period of deep recession, if a station shows the Commission (i) that its revenues are down substantially and that it has had to cut expenses, including employee layoffs, furloughs, and salary reductions in order to keep the station operating, or (ii) that it has broken, or is close to breaking, loan covenants or is otherwise in default of its financing, or (iii) that it is on the brink of some form of foreclosure or bankruptcy, a waiver of the FY 2009 regulatory fee payment requirement should be granted.'' [52]

30. We decline to adopt the State Associations' proposals. In establishing the regulatory fee program, the Commission recognized that in certain instances payment of a regulatory fee may impose an undue financial hardship upon a licensee. The Commission therefore decided to grant waivers or reductions of its regulatory fees in those instances where a ''petitioner presents a compelling case of financial hardship.'' [53] Under the current standard employed by the Commission, regulatees can establish financial hardship by submitting: ''Information such as a balance sheet and profit and loss statement (audited, if available), a cash flow projection * * * (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information.'' [54] The Commission also accepts as evidence of financial hardship that licensees' stations are bankrupt, undergoing Chapter 11 reorganization, or in receivership.[55] Furthermore, the Commission will accept evidence that a broadcast station is not broadcasting (dark) as evidence of financial hardship.[56] The current financial hardship standards have proven useful as bright line tests that can be administered predictably. The Commission does not intend to change these standards at this time and notes that various groups of licensees are impacted by the broader economy from year to year. Modifying our financial hardship waiver standards to accommodate fluctuating economic changes and a potentially limitless variety of different financial showings would not assure that waivers are granted predictably, fairly, and efficiently, and would therefore not be in the public interest.

A. Public Notices and Fact Sheets

31. Each year we post public notices and fact sheets pertaining to regulatory fees on our web site. These documents contain information about the payment due date and the regulatory fee payment procedures. We will continue to post

[44] *Id.* at 4.

[45] *Id.* at 5.

[46] *Id.*

[47] AT&T comments at 3.

[48] *Id.* at 3.

[49] *See Submarine Cable Order* at paragraph 1.

[50] State Associations at 6–7.

[51] *Id.* at 7.

[52] *Id.*

[53] *See Implementation of Section 9 of the Communications Act,* 9 FCC Rcd 5333, 5346 (1994), *recon. granted,* 10 FCC Rcd 12759 (1995) (*Implementation of Section 9 Order*).

[54] *Implementation of Section 9 Order,* 10 FCC Rcd at 12762, paragraph 13.

[55] *Id.* at 12762, paragraph 14.

[56] *Id.* at 12762, paragraph 15.

this information on *http://www.fcc.gov/fees/regfees.html,* but as in previous years we will not send out public notices and fact sheets to regulatees en masse.

B. Assessment Notifications

1. Media Services Licensees

32. Beginning in FY 2003, we sent fee assessment notifications via surface mail to media services entities on a per-facility basis.[57] The notifications provided the assessed fee amount for the facility in question, as well as the data attributes that determined the fee amount. We have since refined this initiative with improved results.[58] Consistent with procedures used last year, we will continue our notification assessment initiative in FY 2009 and mail media assessment notifications to licensees at their primary record of contact populated in our Consolidated Database System (CDBS), and to a secondary record of contact, if available. We again will issue fee assessments for AM and FM Radio Stations, AM and FM Construction Permits, FM Translators/Boosters, VHF and UHF Television Stations, VHF and UHF Television Construction Permits, Satellite Television Stations, Low Power Television (LPTV) Stations and LPTV Translators/Boosters, to the extent that applicants, permittees and licensees of such facilities do not qualify as government entities or non-profit entities. Fee assessments have not been issued for broadcast auxiliary stations in prior years, nor will they be issued in FY 2009. We will also continue to make the Commission-authorized web site available to licensees so that they can update or correct any information regarding their facilities and their fee-exempt status.[59]

33. Although the Commission will continue to mail media assessment notifications, licensees (including media services) will be required to use Fee Filer as the first step to paying their regulatory fee obligations. The notification assessments are primarily intended to provide licensees with media data attributes and should not be considered a substitute to using Fee Filer as the first step in filing and paying regulatory fees. As explained previously in paragraphs 19 through 23, licensees must first log onto the Commission's Fee Filer system to begin the process of filing and paying their regulatory fees, but once in Fee Filer, licensees may pay by check or money order, credit card, wire transfer, or by ACH. To pay by check, money order, or wire transfer, licensees must log onto Fee Filer and generate a Form 159–E before mailing in their payment along with Form 159–E.

2. CMRS Cellular and Mobile Services Assessments

34. As we have done in prior years, we will continue to mail an assessment letter to CMRS providers using data from the Numbering Resource Utilization Forecast (NRUF) report that is based on ''assigned'' number counts that have been adjusted for porting to net Type 0 ports (''in'' and ''out'').[60] This letter will include a listing of the carrier's Operating Company Numbers (OCNs) upon which the assessment is based.[61] The letters will not include OCNs with their respective assigned number counts, but rather, an aggregate total of assigned numbers for each carrier.

35. We will also continue our procedure of giving entities an opportunity to revise their subscriber counts by sending an initial and a final assessment letter. If the carrier does not agree with the number of subscribers listed on the initial assessment letter, the carrier can correct its subscriber count on the letter and return it by the date specified in the assessment letter or by contacting the Commission and stating a reason for the change (*e.g.,* a purchase or sale of a subsidiary), the date of the transaction, and any other pertinent information that will help to justify a reason for the change. If we receive no response or correction to our initial assessment letter, we will expect the fee payment to be based on the number of subscribers listed on the initial assessment. We will review all responses to the initial assessment letters and determine whether a change in the number of subscribers is warranted. The final assessment letter will inform carriers as to whether we have accepted their revision in the number of subscribers.

36. Because some carriers do not file the NRUF report, they may not receive a letter of assessment. In these instances, the carriers should compute their fee payment using the standard methodology[62] that is currently in place for CMRS Wireless services (*e.g.,* compute their subscriber counts as of December 31, 2008), and submit their fee payment accordingly. Whether a carrier receives an assessment letter or not, the Commission reserves the right to audit the number of subscribers for which regulatory fees are paid. In the event that the Commission determines that the number of subscribers is inaccurate or that an insufficient reason is given for making a correction on the initial assessment letter, the Commission will assess the carrier for the difference between what was paid and what should have been paid.

C. Streamlined Regulatory Fee Payment Process

1. Cable Television Subscribers

37. We will continue to permit cable television operators to base their regulatory fee payment on their company's aggregate year-end subscriber count, rather than requiring them to sub-report subscriber counts on a per community unit identifier (CUID) basis.

2. CMRS Cellular and Mobile Providers

38. In FY 2006, we streamlined the CMRS payment process by eliminating the requirement for CMRS providers to identify their individual calls signs when making their regulatory fee payment, requiring instead for CMRS providers to pay their regulatory fees only at the aggregate subscriber level without having to identify their various call signs.[63] We will continue this practice in FY 2009. In FY 2007, we consolidated the CMRS cellular and CMRS mobile fee categories into one fee category and as one fee code, thereby eliminating the requirement for CMRS

[57] As stated previously at footnote 42, an assessment is a proposed statement of the amount of regulatory fees owed by an entity to the Commission (or proposed subscriber count to be ascribed for purposes of setting the entity's regulatory fee) but it is not entered into the Commission's accounting system as a current debt.

[58] Some of those refinements have been to provide licensees with a Commission-authorized web site to update or correct any information concerning their facilities, and to amend their fee-exempt status, if need be. Also, our notifications now provide licensees with a telephone number to call in the event that they need customer assistance. The notifications themselves have been refined so that licensees of fewer than four facilities receive individual fee assessment postcards for their facilities; whereas licensees of four or more facilities now receive a single assessment letter that lists all of their facilities and the associated regulatory fee obligation for each facility.

[59] If there is a change of address for the facility, it is the licensee's responsibility to make the address change in the Media Bureau's CDBS system, as well as in the Commission's Registration System (CORES). The Commission-authorized web site for media services licensees is *http://www.fccfees.com.*

[60] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2005* and *Assessment and Collection of Regulatory Fees for Fiscal Year 2004,* MD Docket Nos. 05–59 and 04–73, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12264, paragraphs 38–44 (2005).

[61] *Id.*

[62] *See, e.g.,* Federal Communications Commission, *Regulatory Fees Fact Sheet: What You Owe—Commercial Wireless Services for FY 2008* at 1 (rel. Aug. 2008).

[63] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006,* MD Docket No. 06–68, Report and Order, 21 FCC Rcd 8092, 8105, paragraph 48 (2006).

providers to separate their subscriber counts into CMRS cellular and CMRS mobile fee categories during the regulatory fee payment process. This consolidation of fee categories enabled the Commission to process payments more quickly and accurately. For FY 2009, we will continue this practice of combining the CMRS cellular and CMRS mobile fee categories into one regulatory fee category.

3. Interstate Telecommunications Service Providers (ITSP)

39. In FY 2007, we adopted a proposal to round lines 14 (total subject revenues) and 16 (total regulatory fee owed) on FCC Form 159–W to the nearest dollar. This revision enabled the Commission to process the ITSP regulatory fee payments more quickly because rounding was performed in a consistent manner and eliminated processing issues that occurred in prior years. In FY 2009, we will continue rounding lines 14 and 16 when calculating the FY 2009 ITSP fee obligation, but as indicated earlier, we will not be mailing out Form 159–W via surface mail.

D. Payment of Regulatory Fees

1. Lock Box Bank

40. All lock box payments to the Commission for FY 2009 will be processed by U.S. Bank, St. Louis, Missouri, and payable to the FCC. For all regulatory fees, the address is: Federal Communications Commission, Regulatory Fees, P.O. Box 979084, St. Louis, MO 63197–9000.

2. Receiving Bank for Wire Payments

41. The receiving bank for all wire payments is the Federal Reserve Bank, New York, New York (TREAS NYC). When making a wire transfer, regulatees must fax a copy of their Fee Filer generated Form 159–E to U.S. Bank, St. Louis, Missouri at (314) 418–4232 at least one hour before initiating the wire transfer (but on the same business day), so as to not delay crediting their account. Wire transfers initiated after 6:00 p.m. (EDT) will be credited the next business day. Complete instructions for making wire payments are posted at *http://www.fcc.gov/fees/wiretran.html*.

3. De Minimis Regulatory Fees

42. Regulatees whose total FY 2009 regulatory fee liability, including all categories of fees for which payment is due, is less than $10 are exempted from payment of FY 2009 regulatory fees.

4. Standard Fee Calculations and Payment Dates

43. The Commission will accept fee payments made in advance of the window for the payment of regulatory fees. The responsibility for payment of fees by service category is as follows:

• *Media Services:* Regulatory fees must be paid for initial construction permits (including construction permits for digital television stations) that were granted on or before October 1, 2008 for AM/FM radio stations, analog VHF/UHF full service television stations, and satellite television stations. Regulatory fees must be paid for all broadcast facility licenses granted on or before October 1, 2008. In instances where a permit or license is transferred or assigned after October 1, 2008, responsibility for payment rests with the holder of the permit or license as of the fee due date.

• *Wireline (Common Carrier) Services:* Regulatory fees must be paid for authorizations that were granted on or before October 1, 2008. In instances where a permit or license is transferred or assigned after October 1, 2008, responsibility for payment rests with the holder of the permit or license as of the fee due date. We note that audio bridging service providers are included in this category.[64]

• *Wireless Services:* CMRS cellular, mobile, and messaging services (fees based on number of subscribers or telephone number count): Regulatory fees must be paid for authorizations that were granted on or before October 1, 2008. The number of subscribers, units, or telephone numbers on December 31, 2008 will be used as the basis from which to calculate the fee payment.

• The first eleven regulatory fee categories in our Schedule of Regulatory Fees (*see* Appendix C) pay ''small multi-year wireless regulatory fees.'' Entities pay these regulatory fees in advance for the entire amount of their five-year or ten-year term of initial license, and only pay regulatory fees again when the license is renewed or a new license is obtained. We include these fee categories in our Schedule of Regulatory Fees to publicize our estimates of the number of ''small multi-year wireless'' licenses that will be renewed or newly obtained in FY 2009.

• *Multichannel Video Programming Distributor Services (cable television operators and CARS licensees):* Regulatory fees must be paid for the number of basic cable television subscribers as of December 31, 2008.[65] Regulatory fees also must be paid for CARS licenses that were granted on or before October 1, 2008. In instances where a CARS license is transferred or assigned after October 1, 2008, responsibility for payment rests with the holder of the license as of the fee due date.

• *International Services:* Regulatory fees must be paid for earth stations, geostationary orbit space stations and non-geostationary orbit satellite systems that were licensed and operational on or before October 1, 2008. In instances where a license is transferred or assigned after October 1, 2008, responsibility for payment rests with the holder of the license as of the fee due date. Regulatory fees will be paid for international bearer circuits under our newly adopted methodology pending a 90-day Congressional notification for this permitted amendment;[66] if for any reason the methodology change is not instituted in FY 2009, the pre-FY 2009 methodology will be used to calculate FY 2009 bearer circuit regulatory fees.

E. Enforcement

44. Regulatory fee payments must be received and stamped at the lockbox bank by the last day of the regulatory fee filing window to be considered timely. Section 9(c) of the Act requires us to impose an additional charge as a penalty for late payment of any regulatory fee.[67] A late payment penalty of 25 percent of the unpaid amount of the required regulatory fee will be assessed on the first day following the deadline date for filing of these fees. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including those set forth in § 1.1910 of the Commission's rules[68] and in the Debt Collection Improvement

[64] Audio bridging services are toll teleconferencing services, and audio bridging service providers are required to contribute directly to the universal service fund based on revenues from these services. On June 30, 2008, the Commission released the *InterCall Order,* in which the Commission stated that InterCall, Inc. and all similarly situated audio bridging service providers are required to contribute directly to the universal service fund. *See Request for Review by InterCall, Inc. of Decision of Universal Service Administrator,* CC Docket No. 96–45, Order, 23 FCC Rcd 10731 (2008) (''*InterCall Order*'').

[65] Cable television system operators should compute their basic subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, *etc.*) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers = Total annual bulk-rate charge divided by basic annual subscription rate for individual households. Operators may base their count on ''a typical day in the last full week'' of December 2008, rather than on a count as of December 31, 2008.

[66] *See Submarine Cable Order.*

[67] 47 U.S.C. 159(c).

[68] *See* 47 CFR 1.1910.

Act of 1996 (DCIA).[69] We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the related debt pursuant to the DCIA and § 1.1940(d) of the Commission's rules.[70] These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In case of partial payments (underpayments) of regulatory fees, the licensee will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner.

45. We will withhold action on any applications or other requests for benefits filed by anyone who is delinquent in any non-tax debts owed to the Commission (including regulatory fees) and will ultimately dismiss those applications or other requests if payment of the delinquent debt or other satisfactory arrangement for payment is not made.[71] Failure to pay regulatory fees can also result in the initiation of a proceeding to revoke any and all authorizations held by the entity responsible for paying the delinquent fee(s).

F. Final Regulatory Flexibility Analysis

46. As required by the Regulatory Flexibility Act of 1980 (RFA),[72] the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order. The FRFA is set forth in Appendix F.

G. Congressional Review Act Analysis

47. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[73]

H. Final Paperwork Reduction Act Analysis

48. This Report and Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA.[74] Our proposed new form for submarine cable operators is attached as Appendix G. OMB and the general public will be afforded an opportunity to comment on the modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' We received no comment regarding such potential small business burdens.

IV. Ordering Clauses

49. Accordingly, *it is ordered* that, pursuant to sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 159, and 303(r), this Report and Order is hereby adopted.

50. *It is further ordered* that the FY 2009 section 9 regulatory fee assessment requirements *are adopted* as specified herein.

51. *It is further ordered* that part 1 of the Commission's rules *is amended* as set forth in the Rule Changes, and these rules shall become effective September 10, 2009.

52. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis in Appendix F, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

■ 2. Section 1.1152 is revised to read as follows:

§ 1.1152 Schedule of annual regulatory fees and filing locations for wireless radio services.

Exclusive use services (per license)	Fee amount [1]	Address
1. Land Mobile (Above 470 MHz and 220 MHz Local, Base Station & SMRS) (47 CFR, Part 90)		
(a) New, Renew/Mod (FCC 601 & 159)	$40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
220 MHz Nationwide		
(a) New, Renew/Mod (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	40.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
2. Microwave (47 CFR Pt. 101) (Private)		
(a) New, Renew/Mod (FCC 601 & 159)	30.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	30.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.

[69] Delinquent debt owed to the Commission triggers application of the ''red light rule'' which requires offsets or holds on pending disbursements. 47 CFR 1.1910. In 2004, the Commission adopted rules implementing the requirements of the DCIA. *See Amendment of Parts 0 and 1 of the Commission's Rules,* MD Docket No. 02–339, Report and Order, 19 FCC Rcd 6540 (2004); 47 CFR Part 1, Subpart O, Collection of Claims Owed the United States.

[70] 47 CFR 1.1940(d).

[71] *See* 47 CFR 1.1161(c), 1.1164(f)(5), and 1.1910.

[72] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''), Public Law 104–121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

[73] *See* 5 U.S.C. 801(a)(1)(A). The Congressional Review Act is contained in Title II, 251, of the CWAAA; *see* Public Law 104–121, Title II, 251, 110 Stat. 868.

[74] 44 U.S.C. 3507(d).

Exclusive use services (per license)	Fee amount [1]	Address
(c) Renewal Only (FCC 601 & 159)	30.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	30.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
3. 218–219 MHz Service		
(a) New, Renew/Mod (FCC 601 & 159)	65.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	65.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	65.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	65.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
4. Shared Use Services		
Land Mobile (Frequencies Below 470 MHz—except 220 MHz)		
(a) New, Renew/Mod (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
General Mobile Radio Service		
(a) New, Renew/Mod (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Rural Radio (Part 22)		
(a) New, Additional Facility, Major Renew/Mod (Electronic Filing) (FCC 601 & 159).	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) Renewal, Minor Renew/Mod (Electronic Filing) (FCC 601 & 159).	20.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Marine Coast		
(a) New, Renewal/Mod (FCC 601 & 159)	45.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renewal/Mod (Electronic Filing) (FCC 601 & 159)	45.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	45.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 601 & 159)	45.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Aviation Ground		
(a) New, Renewal/Mod (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renewal/Mod (Electronic Filing) (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Only) (FCC 601 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Marine Ship		
(a) New, Renewal/Mod (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renewal/Mod (Electronic Filing) (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 605 & 159)	10.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Aviation Aircraft		
(a) New, Renew/Mod (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) New, Renew/Mod (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(c) Renewal Only (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(d) Renewal Only (Electronic Filing) (FCC 605 & 159)	5.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
5. Amateur Vanity Call Signs		
(a) Initial or Renew (FCC 605 & 159)	1.34	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
(b) Initial or Renew (Electronic Filing) (FCC 605 & 159)	1.34	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
6. CMRS Cellular/Mobile Services (per unit)		
(FCC 159)	.18[2]	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.
7. CMRS Messaging Services (per unit)		
(FCC 159)	.08[3]	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.
8. Broadband Radio Service		
(formerly MMDS and MDS)	320	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.
9. Local Multipoint Distribution Service	320	FCC, P.O. Box 979084, St. Louis, MO 63197–9000.

[1] Note that ''small fees'' are collected in advance for the entire license term. Therefore, the annual fee amount shown in this table that is a small fee (categories 1 through 5) must be multiplied by the 5- or 10-year license term, as appropriate, to arrive at the total amount of regulatory fees owed. It should be further noted that application fees may also apply as detailed in § 1.1102 of this chapter.

[2] These are standard fees that are to be paid in accordance with § 1.1157(b) of this chapter.

[3] These are standard fees that are to be paid in accordance with § 1.1157(b) of this chapter.

■ 3. Section 1.1153 is revised to read as follows:

§ 1.1153 Schedule of annual regulatory fees and filing locations for mass media services.

1. *AM Class A*		
<=25,000 population	$675	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	1,350	
75,001–150,000 population	2,025	
150,001–500,000 population	3,050	
500,001–1,200,000 population	4,400	
1,200,001–3,000,000 population	6,750	

>3,000,000 population	8,100	
2. *AM Class B*		
<=25,000 population	550	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	1,075	
75,001–150,000 population	1,350	
150,001–500,000 population	2,300	
500,001–1,200,000 population	3,500	
1,200,001–3,000,000 population	5,400	
>3,000,000 population	6,475	
3. *AM Class C*		
<=25,000 population	500	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	750	
75,001–150,000 population	1,000	
150,001–500,000 population	1,500	
500,001–1,200,000 population	2,500	
1,200,001–3,000,000 population	3,750	
>3,000,000 population	4,750	
4. *AM Class D*		
<=25,000 population	575	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	875	
75,001–150,000 population	1,450	
150,001–500,000 population	1,725	
500,001–1,200,000 population	2,875	
1,200,001–3,000,000 population	4,600	
>3,000,000 population	5,750	
5. AM Construction Permit	400	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
6. *FM Classes A, B1 and C3*		
<=25,000 population	650	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	1,325	
75,001–150,000 population	1,825	
150,001–500,000 population	2,800	
500,001–1,200,000 population	4,450	
1,200,001–3,000,000 population	7,250	
>3,000,000 population	9,250	
7. *FM Classes B, C, C0, C1 and C2*		
<=25,000 population	825	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
25,001–75,000 population	1,450	
75,001–150,000 population	2,725	
150,001–500,000 population	3,550	
500,001–1,200,000 population	5,225	
1,200,001–3,000,000 population	8,350	
>3,000,000 population	10,850	
8. FM Construction Permits	650	FCC, Radio, P.O. Box 979084, St. Louis, MO 63197–9000.
TV (47 CFR, Part 73) VHF Commercial		
1. Markets 1 thru 10	77,575	FCC, TV Branch, P.O. Box 979084, St. Louis, MO 63197–9000.
2. Markets 11 thru 25	60,550	
3. Markets 26 thru 50	37,575	
4. Markets 51 thru 100	22,950	
5. Remaining Markets	5,950	
6. Construction Permits	5,950	
UHF Commercial		
1. Markets 1 thru 10	24,250	FCC, UHF Commercial, P.O. Box 979084, St. Louis, MO, 63197–9000.
2. Markets 11 thru 25	21,525	
3. Markets 26 thru 50	13,350	
4. Markets 51 thru 100	7,600	
5. Remaining Markets	1,950	
6. Construction Permits	1,950	
Satellite UHF/VHF Commercial		
1. All Markets	1,275	FCC Satellite TV P.O. Box 979084, St. Louis, MO 63197–9000.
2. Construction Permits	650	
Low Power TV, Class A TV, TV/FM Translator, & TV/FM Booster (47 CFR Part 74).	400	FCC, Low Power, P.O. Box 979084, St. Louis, MO 63197–9000.
Broadcast Auxiliary	10	FCC, Auxiliary, P.O. Box 979084, St. Louis, MO 63197–9000.

■ 4. Section 1.1154 is revised to read as follows:

§ 1.1154 Schedule of annual regulatory charges and filing locations for common carrier services.

	Fee amount	Address
Radio Facilities:		

	Fee amount	Address
1. Microwave (Domestic Public Fixed) (Electronic Filing) (FCC Form 601 & 159).	$30.00	FCC, P.O. Box 979097, St. Louis, MO 63197–9000.
Carriers:		
1. Interstate Telephone Service Providers (per interstate and international end-user revenues (see FCC Form 499–A).	.00342	FCC, Carriers, P.O. Box 979084, St. Louis, MO 63197–9000.

■ 5. Section 1.1155 is revised to read as follows:

§ 1.1155 Schedule of regulatory fees and filing locations for cable television services.

	Fee amount	Address
1. Cable Television Relay Service	$260	FCC, Cable, P.O. Box 979084, St. Louis, MO 63197–9000.
2. Cable TV System (per subscriber)	.88	

■ 6. Section 1.1156 is revised to read as follows:

§ 1.1156 Schedule of regulatory fees and filing locations for international services.

(a) The following schedule applies for the listed services:

Fee category	Fee amount	Address
(1) Space Stations (Geostationary Orbit)	$127,175	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
(2) Space Stations (Non-Geostationary Orbit)	137,225	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
(3) Earth Stations: Transmit/Receive & Transmit only (per authorization or registration).	210	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

(b) (1) *International Terrestrial and Satellite.* Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31, of the prior year in any terrestrial or satellite transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. ''Active circuits'' for these purposes include backup and redundant circuits. In addition, whether circuits are used specifically for voice or data is not relevant in determining that they are active circuits.

(2) The fee amount, per active 64 KB circuit or equivalent will be determined for each fiscal year. Payment, if mailed, shall be sent to: FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

International terrestrial and satellite (capacity as of December 31, 2008)	Fee amount	Address
Terrestrial Common Carrier, Satellite Common Carrier, Satellite Non-Common Carrier.	$0.75 per 64 KB Circuit	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

(c) *Submarine cable:* Regulatory fees for submarine cable systems will be paid annually, per cable landing license, for all submarine cable systems operating as of December 31 of the prior year. The fee amount will be determined by the Commission for each fiscal year. Payment, if mailed, shall be sent to: FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Submarine cable systems (capacity as of December 31)	Fee amount	Address
< 2.5 Gbps	$15,075	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
2.5 Gbps or greater, but less than 5 Gbps	30,125	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
5 Gbps or greater, but less than 10 Gbps	60,250	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
10 Gbps or greater, but less than 20 Gbps	120,525	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Submarine cable systems (capacity as of December 31)	Fee amount	Address
20 Gbps or greater	241,025	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Note: The following appendixes will not appear in the Code of Federal Regulations.

Appendix A

LIST OF COMMENTERS

Commenter	Abbreviated name
American Association of Paging Carriers	AAPC.
American Cable Association	ACA.
AT&T, Inc	AT&T.
Bestel USA Inc., Hibernia Atlantic US LLC, and Level 3 Communications, LLC	Joint Commenters.
Coalition of Canadian-Based Service Providers	Coalition.
Independent Telephone and Telecommunications Alliance	ITTA.
Sprint Nextel	Sprint.
Named State Broadcasters Associations	State Associations.
United States Telecom Association	USTelecom.

LIST OF COMMENTERS—REPLY COMMENTS

Commenter	Abbreviated name
AT&T, Inc	AT&T.
Verizon and Verizon Wireless	Verizon.

Appendix B

CALCULATION OF FY 2009 REVENUE REQUIREMENTS AND PRO-RATA FEES

[Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed]

Fee category	FY 2009 payment units	Years	FY 2008 revenue estimate	Pro-rated FY 2009 revenue requirement	Computed new FY 2009 regulatory fee	Rounded new FY 2009 regulatory fee	Expected FY 2009 revenue
PLMRS (Exclusive Use)	1,200	10	460,000	501,932	42	40	480,000
PLMRS (Shared use)	11,500	10	2,300,000	2,509,659	22	20	2,300,000
Microwave	7,500	10	1,960,000	2,138,666	29	30	2,250,000
218–219 MHz (Formerly IVDS)	3	10	1,800	1,964	65	65	1,950
Marine (Ship)	7,500	10	840,000	916,571	12	10	750,000
GMRS	11,000	5	350,000	381,905	7	5	275,000
Aviation (Aircraft)	7,000	10	375,000	409,183	6	5	350,000
Marine (Coast)	275	10	108,500	118,390	43	45	123,750
Aviation (Ground)	1,500	10	170,000	185,497	12	10	150,000
Amateur Vanity Call Signs	15,000	10	184,500	201,318	1.34	1.34	201,000
AM Class A	65	1	227,500	248,238	3,819	3,825	248,625
AM Class B	1,567	1	2,737,000	2,986,494	1,906	1,900	2,977,300
AM Class C	938	1	958,375	1,045,737	1,115	1,125	1,055,250
AM Class D	1,715	1	3,241,400	3,536,873	2,062	2,050	3,515,750
FM Classes A, B1 & C3	3,045	1	6,764,000	7,405,656	2,432	2,425	7,384,125
FM Classes B, C, C0, C1 & C2	3,051	1	8,292,175	9,073,132	2,974	2,975	9,076,725
AM Construction Permits	107	1	39,425	43,019	402	400	42,800
FM Construction Permits [1]	224	1	179,400	145,600	650	650	145,600
Satellite TV	127	1	149,225	162,828	1,282	1,275	161,925
Satellite TV Construction Permit	3	1	1,785	1,948	649	650	1,950
VHF Markets 1–10	42	1	2,984,100	3,257,932	77,570	77,575	3,258,150
VHF Markets 11–25	55	1	3,050,925	3,330,848	60,561	60,550	3,330,250
VHF Markets 26–50	75	1	2,581,425	2,818,550	37,581	37,575	2,818,125
VHF Markets 51–100	118	1	2,480,950	2,708,256	22,951	22,950	2,708,100
VHF Remaining Markets	200	1	1,092,000	1,191,542	5,958	5,950	1,190,000
VHF Construction Permits [1]	3	1	22,400	17,850	5,950	5,950	17,850
UHF Markets 1–10	87	1	1,931,475	2,109,219	24,244	24,250	2,109,750
UHF Markets 11–25	81	1	1,596,950	1,744,200	21,533	21,525	1,743,525
UHF Markets 26–50	110	1	1,344,700	1,468,956	13,354	13,350	1,468,500
UHF Markets 51–100	164	1	1,142,400	1,247,604	7,607	7,600	1,246,400

CALCULATION OF FY 2009 REVENUE REQUIREMENTS AND PRO-RATA FEES—Continued

[Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed]

Fee category	FY 2009 payment units	Years	FY 2008 revenue estimate	Pro-rated FY 2009 revenue requirement	Computed new FY 2009 regulatory fee	Rounded new FY 2009 regulatory fee	Expected FY 2009 revenue
UHF Remaining Markets	195	1	347,400	379,068	1,944	1,950	380,250
UHF Construction Permits [1]	15	1	32,400	29,250	1,950	1,950	29,250
Broadcast Auxiliaries	27,500	1	276,000	301,159	11	10	275,000
LPTV/Translators/Boosters/Class A TV	3,450	1	1,277,500	1,393,952	404	400	1,380,000
CARS Stations	650	1	153,750	167,765	258	260	169,000
Cable TV Systems	64,500,000	1	51,840,000	56,565,522	0.8769	0.88	56,760,000
Interstate Telecommunication Service Providers	46,800,000,000	1	146,638,000	160,004,920	0.0034189	0.00342	160,056,000
CMRS Mobile Services (Cellular/Public Mobile)	276,000,000	1	44,200,000	48,280,138	0.1749	0.180	49,680,000
CMRS Messag. Services	7,000,000	1	560,000	560,000	0.080	0.080	560,000
BRS [2]	1,725	1	501,500	552,000	320	320	552,000
LMDS	335	1	98,825	107,200	320	320	107,200
Per 64 kbps Int'l Bearer Circuits Terrestrial (Common) & Satellite (Common & Non-Common)	1,482,372	1	8,137,500	1,106,700	0.747	0.75	1,111,779
Submarine Cable Providers (see chart in Appendix C) [3]	32.44	1	.....	7,818,300	241,008	241,000	7,818,040
Earth Stations	4,050	1	780,000	851,102	210	210	850,500
Space Stations (Geostationary)	87	1	10,140,500	11,064,866	127,182	127,175	11,064,225
Space Stations (Non-Geostationary	6	1	754,500	823,277	137,213	137,225	823,350
* * * Total Estimated Revenue to be Collected	.....	.....	313,305,285	341,814,783	.....	.....	342,998,994
* * * Total Revenue Requirement	.....	.....	312,000,000	341,875,000	.....	.....	341,875,000
Difference	.....	.....	1,305,285	39,783	.....	.....	1,123,994

[1] The FM Construction Permit revenues and the VHF and UHF Construction Permit revenues were adjusted to set the regulatory fee to an amount no higher than the lowest licensed fee for that class of service. The reductions in the FM Construction Permit revenues are offset by increases in the revenue totals for FM radio stations. Similarly, reductions in the VHF and UHF Construction Permit revenues are offset by increases in the revenue totals for VHF and UHF television stations, respectively.

[2] MDS/MMDS category was renamed Broadband Radio Service (BRS). *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 and 2500–2690 MHz Bands,* Report & Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14169, paragraph 6 (2004).

[3] The chart at the end of Appendix C lists the submarine cable bearer circuit regulatory fees (common and non-common carrier basis) that resulted from the adoption of the following proceedings: *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* Second Report and Order (MD Docket No. 08–65, RM–11312), released March 24, 2009; and *Assessment and Collection of Regulatory Fees for Fiscal Year 2009* and *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* Notice of Proposed Rulemaking and Order (MD Docket No. 09–65, MD Docket No. 08–65), released on May 14, 2009.

Appendix C

FY 2009 SCHEDULE OF REGULATORY FEES

[Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed]

Fee category	Annual regulatory fee (U.S. $'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	40
Microwave (per license) (47 CFR part 101)	30
218–219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	65
Marine (Ship) (per station) (47 CFR part 80)	10
Marine (Coast) (per license) (47 CFR part 80)	45
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	20
PLMRS (Shared Use) (per license) (47 CFR part 90)	20
Aviation (Aircraft) (per station) (47 CFR part 87)	5
Aviation (Ground) (per license) (47 CFR part 87)	10
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.34
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.18
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
	320

FY 2009 SCHEDULE OF REGULATORY FEES—Continued

[Regulatory fees for the categories shaded in gray are collected by the Commission in advance to cover the term of the license and are submitted along with the application at the time the application is filed]

Fee category	Annual regulatory fee (U.S. $'s)
Broadband Radio Service (formerly MMDS/MDS) (per license) (47 CFR part 21)	
Local Multipoint Distribution Service (per call sign) (47 CFR, part 101)	320
AM Radio Construction Permits	400
FM Radio Construction Permits	650
TV (47 CFR part 73) VHF Commercial:	
Markets 1–10	77,575
Markets 11–25	60,550
Markets 26–50	37,575
Markets 51–100	22,950
Remaining Markets	5,950
Construction Permits	5,950
TV (47 CFR part 73) UHF Commercial:	
Markets 1–10	24,250
Markets 11–25	21,525
Markets 26–50	13,350
Markets 51–100	7,600
Remaining Markets	1,950
Construction Permits	1,950
Satellite Television Stations (All Markets)	1,275
Construction Permits—Satellite Television Stations	650
Low Power TV, Class A TV, TV/FM Translators & Boosters (47 CFR part 74)	400
Broadcast Auxiliaries (47 CFR part 74)	10
CARS (47 CFR part 78)	260
Cable Television Systems (per subscriber) (47 CFR part 76)	.88
Interstate Telecommunication Service Providers (per revenue dollar)	.00342
Earth Stations (47 CFR part 25)	210
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes DBS Service (per operational station) (47 CFR part 100)	127,175
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	137,225
International Bearer Circuits—Terrestrial/Satellites (per 64KB circuit)	.75
International Bearer Circuits—Submarine Cable	([1])

[1] See table below.

FY 2009 SCHEDULE OF REGULATORY FEES (Continued)

FY 2009 Radio Station Regulatory Fees

Population served	AM class A	AM class B	AM class C	AM class D	FM classes A, B1 & C3	FM classes B, C, C0, C1 & C2
<= 25,000	$675	$550	$500	$575	$650	$825
25,001–75,000	1,350	1,075	750	875	1,325	1,450
75,001–150,000	2,025	1,350	1,000	1,450	1,825	2,725
150,001–500,000	3,050	2,300	1,500	1,725	2,800	3,550
500,001–1,200,000	4,400	3,500	2,500	2,875	4,450	5,225
1,200,001–3,000,00	6,750	5,400	3,750	4,600	7,250	8,350
> 3,000,000	8,100	6,475	4,750	5,750	9,250	10,850

FY 2009 SCHEDULE OF REGULATORY FEES—INTERNATIONAL BEARER CIRCUITS—SUBMARINE CABLE

Submarine cable systems (capacity as of December 31, 2008)	Fee amount	Address
< 2.5 Gbps	$15,075	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
2.5 Gbps or greater, but less than 5 Gbps	30,125	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
5 Gbps or greater, but less than 10 Gbps	60,250	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
10 Gbps or greater, but less than 20 Gbps	120,525	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
20 Gbps or greater	241,025	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Appendix D

Sources of Payment Unit Estimates for FY 2009

In order to calculate individual service fees for FY 2009, we adjusted FY 2008 payment units for each service to more accurately reflect expected FY 2009 payment liabilities. We obtained our updated estimates through a variety of means. For example, we used Commission licensee data bases, actual prior year payment records and industry and trade association projections when available. The databases we consulted include our Universal Licensing System (ULS), International Bureau Filing System (IBFS), Consolidated Database System (CDBS) and Cable Operations and Licensing System (COALS), as well as reports generated within the Commission such as the Wireline Competition Bureau's *Trends in Telephone Service* and the Wireless Telecommunications Bureau's *Numbering Resource Utilization Forecast.*

We tried to obtain verification for these estimates from multiple sources and, in all cases, we compared FY 2009 estimates with actual FY 2008 payment units to ensure that our revised estimates were reasonable. Where appropriate, we adjusted and/or rounded our final estimates to take into consideration the fact that certain variables that impact on the number of payment units cannot yet be estimated exactly. These include an unknown number of waivers and/or exemptions that may occur in FY 2009 and the fact that, in many services, the number of actual licensees or station operators fluctuates from time to time due to economic, technical, or other reasons. When we note, for example, that our estimated FY 2009 payment units are based on FY 2008 actual payment units, it does not necessarily mean that our FY 2009 projection is exactly the same number as FY 2008. We have either rounded the FY 2009 number or adjusted it slightly to account for these variables.

Fee category	Sources of payment unit estimates
Land Mobile (All), Microwave, 218–219 MHz, Marine (Ship & Coast), Aviation (Aircraft & Ground), GMRS, Amateur Vanity Call Signs, Domestic Public Fixed.	Based on Wireless Telecommunications Bureau (WTB) projections of new applications and renewals taking into consideration existing Commission licensee data bases. Aviation (Aircraft) and Marine (Ship) estimates have been adjusted to take into consideration the licensing of portions of these services on a voluntary basis.
CMRS Cellular/Mobile Services	Based on WTB projection reports, and FY 08 payment data.
CMRS Messaging Services	Based on WTB reports, and FY 08 payment data.
AM/FM Radio Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2008 payment units.
UHF/VHF Television Stations	Based on CDBS data, adjusted for exemptions, and actual FY 2008 payment units.
AM/FM/TV Construction Permits	Based on CDBS data, adjusted for exemptions, and actual FY 2008 payment units.
LPTV, Translators and Boosters, Class A Television	Based on CDBS data, adjusted for exemptions, and actual FY 2008 payment units.
Broadcast Auxiliaries	Based on actual FY 2008 payment units.
BRS (formerly MDS/MMDS)	Based on WTB reports and actual FY 2008 payment units.
LMDS	Based on WTB reports and actual FY 2008 payment units.
Cable Television Relay Service (CARS) Stations	Based on data from Media Bureau's COALS data base and actual FY 2008 payment units.
Cable Television System Subscribers	Based on publicly available data sources for estimated subscriber counts and actual FY 2008 payment units.
Interstate Telecommunication Service Providers	Based on FCC Form 499–Q data for the four quarters of calendar year 2008, the Wireline Competition Bureau projected the amount of calendar year 2008 revenue that will be reported on 2008 FCC Form 499–A worksheets in April 2009.
Earth Stations	Based on International Bureau (IB) licensing data and actual FY 2008 payment units.
Space Stations (GSOs & NGSOs)	Based on IB data reports and actual FY 2008 payment units.
International Bearer Circuits	Based on IB reports and submissions by licensees.
Submarine Cable Licenses	Based on IB license information.

Appendix E

Factors, Measurements, and Calculations That Go Into Determining Station Signal Contours and Associated Population Coverages

AM Stations

For stations with nondirectional daytime antennas, the theoretical radiation was used at all azimuths. For stations with directional daytime antennas, specific information on each day tower, including field ratio, phasing, spacing and orientation was retrieved, as well as the theoretical pattern root-mean-square of the radiation in all directions in the horizontal plane (RMS) figure milliVolt per meter (mV/m) @ 1 km) for the antenna system. The standard, or modified standard if pertinent, horizontal plane radiation pattern was calculated using techniques and methods specified in 73.150 and 73.152 of the Commission's rules.[1] Radiation values were calculated for each of 360 radials around the transmitter site. Next, estimated soil conductivity data was retrieved from a data base representing the information in FCC Figure R3.[2] Using the calculated horizontal radiation values, and the retrieved soil conductivity data, the distance to the principal community (5 mV/m) contour was predicted for each of the 360 radials. The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2,000 block centroids were contained in the polygon. (A block centroid is the center point of a small area containing population as computed by the U.S. Census Bureau.) The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

FM Stations

The greater of the horizontal or vertical effective radiated power (ERP) (kW) and respective height above average terrain (HAAT) (m) combination was used. Where the antenna height above mean sea level (HAMSL) was available, it was used in lieu of the average HAAT figure to calculate specific HAAT figures for each of 360 radials under study. Any available directional pattern information was applied as well, to produce a radial-specific ERP figure. The HAAT and ERP figures were used in conjunction with the Field Strength (50–50) propagation curves specified in 47 CFR 73.313 of the Commission's rules to predict the distance to the principal community (70 dBu (decibel above 1 microVolt per meter) or 3.17 mV/m) contour for each of the 360 radials.[3] The resulting distance to principal community contours were used to form a geographical polygon. Population counting was accomplished by determining which 2,000 block centroids were contained in the polygon. The sum of the population figures for all enclosed blocks represents the total population for the predicted principal community coverage area.

Appendix F

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),[1] the Commission prepared an

[1] 47 CFR 73.150 and 73.152.

[2] *See Map of Estimated Effective Ground Conductivity in the United States,* 47 CFR 73.190 Figure R3.

[3] 47 CFR 73.313.

[1] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612 has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121,

Continued

Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in its *Notice of Proposed Rulemaking*.[2] Written public comments were sought on the FY 2009 fees proposal, including comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

I. Need for, and Objectives of, the Report and Order

2. This rulemaking proceeding was initiated for the Commission to amend its Schedule of Regulatory Fees in the amount of $341,875,000, which is the amount that Congress has required the Commission to recover. The Commission seeks to collect the necessary amount through its revised Schedule of Regulatory Fees in the most efficient manner possible and without undue public burden.

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. No parties have raised issues in response to the IRFA.

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[4] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[5] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[6] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

5. Small Businesses. Nationwide, there are a total of approximately 27.2 million small businesses, according to the SBA.[8]

6. Small Organizations. Nationwide, there are approximately 1.6 million small organizations.[9]

7. Small Governmental Jurisdictions. The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.''[10] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[11] We estimate that, of this total, 84,377 entities were ''small governmental jurisdictions.''[12] Thus, we estimate that most governmental jurisdictions are small.

8. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.''[13] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[14] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

9. Incumbent Local Exchange Carriers (ILECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[15] According to Commission data,[16] 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

10. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.'' Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[17] According to Commission data,[18] 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are ''Other Local Service Providers.'' Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by our proposed action.

11. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[19] According to Commission data,[20] 151 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 149 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our proposed action.

12. Toll Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[21] According to Commission data,[22] 815 carriers have reported that they are engaged in the provision of toll resale services. Of these, an estimated 787 have 1,500 or fewer employees and 28 have more than 1,500 employees. Consequently, the Commission estimates that the majority of toll resellers are small entities that may be affected by our proposed action.

13. Payphone Service Providers (PSPs). Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA

110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2009,* MD Docket No. 09–65, Notice of Proposed Rulemaking and Order, (rel. May 14, 2009) (*FY 2009 NPRM and Order*).

[3] 5 U.S.C. 604.

[4] 5 U.S.C. 603(b)(3).

[5] 5 U.S.C. 601(6).

[6] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[7] 15 U.S.C. 632.

[8] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' *http://web.sba.gov/faqs* (accessed Jan. 2009).

[9] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[10] 5 U.S.C. 601(5).

[11] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, p. 272, Table 415.

[12] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[13] 15 U.S.C. 632.

[14] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[15] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517110.

[16] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''*Trends in Telephone Service*'' at Table 5.3, Page 5–5 (Aug. 2008) (*Trends in Telephone Service*). This source uses data that are current as of November 1, 2006.

[17] 13 CFR 121.201, NAICS code 517110.

[18] ''*Trends in Telephone Service*'' at Table 5.3.

[19] 13 CFR 121.201, NAICS code 517310.

[20] ''*Trends in Telephone Service*'' at Table 5.3.

[21] 13 CFR 121.201, NAICS code 517310.

[22] ''*Trends in Telephone Service*'' at Table 5.3.

rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[23] According to Commission data,[24] 526 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 524 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our proposed action.

14. Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[25] According to Commission data,[26] 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

15. Operator Service Providers (OSPs). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[27] According to Commission data,[28] 28 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 27 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

16. Prepaid Calling Card Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[29] According to Commission data,[30] 88 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 85 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our proposed action.

17. 800 and 800-Like Service Subscribers.[31] Neither the Commission nor the SBA has developed a small business size standard specifically for 800 and 800-like service (toll free) subscribers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[32] The most reliable source of information regarding the number of these service subscribers appears to be data the Commission receives from Database Service Management on the 800, 866, 877, and 888 numbers in use.[33] According to our data, at the end of December 2007, the number of 800 numbers assigned was 7,860,000; the number of 888 numbers assigned was 5,210,184; the number of 877 numbers assigned was 4,388,682; and the number of 866 numbers assigned was 7,029,116. We do not have data specifying the number of these subscribers that are independently owned and operated or have 1,500 or fewer employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small businesses under the SBA size standard. Consequently, we estimate that there are 7,860,000 or fewer small entity 800 subscribers; 5,210,184 or fewer small entity 888 subscribers; 4,388,682 or fewer small entity 877 subscribers, and 7,029,116 or fewer entity 866 subscribers.

18. Satellite Telecommunications and All Other Telecommunications. These two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.[34] The second has a size standard of $25 million or less in annual receipts.[35] The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in these categories.[36]

19. The category of Satellite Telecommunications ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [37] For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.[38] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[39] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

20. The second category of All Other Telecommunications comprises, *inter alia,* ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.'' [40] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[41] Of this total, 303 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[42] Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

21. Wireless Telecommunications Carriers (except Satellite). This category includes cellular, PCS, and certain SMR. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[43] Prior to that time, such firms were within the now-superseded categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' [44] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[45] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[46] Of this

[23] 3 CFR 121.201, NAICS code 517110.

[24] ''*Trends in Telephone Service*'' at Table 5.3.

[25] 13 CFR 121.201, NAICS code 517110.

[26] ''*Trends in Telephone Service*'' at Table 5.3.

[27] 13 CFR 121.201, NAICS code 517110.

[28] ''*Trends in Telephone Service*'' at Table 5.3.

[29] 13 CFR 121.201, NAICS code 517310.

[30] ''*Trends in Telephone Service*'' at Table 5.3.

[31] We include all toll-free number subscribers in this category.

[32] 13 CFR 121.201, NAICS code 517310.

[33] ''*Trends in Telephone Service*'' at Tables 18.4, 18.5, 18.6, and 18.7.

[34] 13 CFR 121.201, NAICS code 517410.

[35] 13 CFR 121.201, NAICS code 517919.

[36] 13 CFR 121.201, NAICS codes 517410 and 517910 (2002).

[37] U.S. Census Bureau, 2007 NAICS Definitions, ''517410 Satellite Telecommunications''; *http://www.census.gov/naics/2007/def/ND517410.HTM.*

[38] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517410 (issued Nov. 2005).

[39] *Id.* An additional 38 firms had annual receipts of $25 million or more.

[40] U.S. Census Bureau, 2007 NAICS Definitions, ''517919 All Other Telecommunications''; *http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.*

[41] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517910 (issued Nov. 2005).

[42] *Id.* An additional 14 firms had annual receipts of $25 million or more.

[43] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[44] U.S. Census Bureau, 2002 NAICS Definitions, ''517211 Paging''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*; U.S. Census Bureau, 2002 NAICS Definitions, ''517212 Cellular and Other Wireless Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[45] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[46] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005).

total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[47] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[48] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[49] Thus, we estimate that the majority of wireless firms are small.

22. Internet Service Providers. The 2007 Economic Census places these providers, which includes voice over Internet protocol (VoIP) providers, in the category of All Other Telecommunications.[50] The SBA small business size standard for such firms is: Those having annual average receipts of $25 million or less.[51] The most current Census Bureau data on such entities, however, are the 2002 data for the previous census category[52] called Internet Service Providers. The 2002 data show that there were 2,529 such firms that operated for the entire year.[53] Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24,999,999.[54] Consequently, we estimate that the majority of ISP firms are small entities that may be affected by our action.

23. Common Carrier Paging. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite) firms within the broad economic census categories of ''Cellular and Other Wireless Telecommunications.''[55] Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[56] Prior to that time, such firms were within the now-superseded categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.''[57] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[58] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[59] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[60] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[61] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[62] Thus, we estimate that the majority of wireless firms are small.

24. In addition, in the *Paging Second Report and Order,* the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[63] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[64] The SBA has approved this definition.[65] An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[66] Fifty-seven companies claiming small business status won 440 licenses.[67] An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[68] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[69]

25. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 281 carriers reported that they were engaged in the provision of ''paging and messaging'' services.[70] Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees.[71] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

26. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[72] The SBA has approved these definitions.[73] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

27. 1670–1675 MHz Services. An auction for one license in the 1670–1675 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

28. Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size

[47] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[48] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005).

[49] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1,000 employees or more.''

[50] U.S. Census Bureau, 2007 NAICS Definitions, ''517919 All Other Telecommunications''; *http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.*

[51] 13 CFR 121.201, NAICS code 517919 (updated for inflation in 2008).

[52] U.S. Census Bureau, ''2002 NAICS Definitions: 518111 Internet Service Providers''; *http://www.census.gov/epcd/naics02/def/NDEF518.HTM.*

[53] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 518111 (issued Nov. 2005).

[54] An additional 45 firms had receipts of $25 million or more.

[55] 13 CFR 121.201, NAICS code 517212.

[56] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[57] U.S. Census Bureau, 2002 NAICS Definitions, ''517211 Paging''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM*; U.S. Census Bureau, 2002 NAICS Definitions, ''517212 Cellular and Other Wireless Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[58] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[59] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005).

[60] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1,000 employees or more.''

[61] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005).

[62] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1,000 employees or more.''

[63] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Second Report and Order, 12 FCC Rcd 2732, 2811–2812, paras. 178–181 (*Paging Second Report and Order*); *see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085–10088, paragraphs 98–107 (1999).

[64] *Paging Second Report and Order,* 12 FCC Rcd at 2811, paragraph 179.

[65] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (''WTB''), FCC (Dec. 2, 1998) (*Alvarez Letter 1998*).

[66] *See ''929 and 931 MHz Paging Auction Closes,''* Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[67] *See id.*

[68] *See ''Lower and Upper Paging Band Auction Closes,''* Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[69] *See* ''Lower and Upper Paging Bands Auction Closes,'' Public Notice, 18 FCC Rcd 11154 (WTB 2003).

[70] *''Trends in Telephone Service''* at Table 5.3.

[71] *''Trends in Telephone Service''* at Table 5.3.

[72] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS),* Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[73] *See Alvarez Letter 1998.*

standard for Wireless Telecommunications Carriers (except Satellite).[74] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[75] According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony.[76] Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.[77] We have estimated that 222 of these are small under the SBA small business size standard.

29. Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[78] For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[79] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[80] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[81] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[82]

30. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses.[83] Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction No. 58. There were 24 winning bidders for 217 licenses.[84] Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[85] Of the 14 winning bidders, six were designated entities.[86]

31. Narrowband Personal Communications Services. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less.[87] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[88] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.[89] A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[90] A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[91] The SBA has approved these small business size standards.[92] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[93] Three of these claimed status as a small or very small entity and won 311 licenses.

32. Lower 700 MHz Band Licenses. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[94] The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[95] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[96] Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (''MSA/RSA'') licenses. The third category is ''entrepreneur,'' which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[97] The SBA approved these small size standards.[98] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.[99] A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[100] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[101] On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

33. The Commission recently reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.[102] An

[74] 13 CFR 121.201, NAICS code 517210.

[75] *Id.*

[76] ''*Trends in Telephone Service*'' at Table 5.3.

[77] ''*Trends in Telephone Service*'' at Table 5.3.

[78] *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap,* Report and Order, 11 FCC Rcd 7824, 7850–7852, paras. 57–60 (1996) (*PCS Report and Order*); *see also* 47 CFR 24.720(b).

[79] *See PCS Report and Order,* 11 FCC Rcd at 7852, para. 60.

[80] *See Alvarez Letter 1998.*

[81] FCC News, ''Broadband PCS, D, E and F Block Auction Closes,'' No. 71744 (rel. Jan. 14, 1997).

[82] *See* ''C, D, E, and F Block Broadband PCS Auction Closes,'' *Public Notice,* 14 FCC Rcd 6688 (WTB 1999).

[83] *See* ''C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,'' *Public Notice,* 16 FCC Rcd 2339 (2001).

[84] *See* ''Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,'' *Public Notice,* 20 FCC Rcd 3703 (2005).

[85] *See* ''Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,'' *Public Notice,* 22 FCC Rcd 9247 (2007).

[86] *Id.*

[87] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS,* Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[88] *See* ''Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674,'' *Public Notice,* PNWL 94–004 (rel. Aug. 2, 1994); ''Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787,'' *Public Notice,* PNWL 94–27 (rel. Nov. 9, 1994).

[89] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS,* Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (*Narrowband PCS Second Report and Order*).

[90] *Narrowband PCS Second Report and Order,* 15 FCC Rcd at 10476, para. 40.

[91] *Id.*

[92] *See Alvarez Letter 1998.*

[93] *See* ''Narrowband PCS Auction Closes,'' *Public Notice,* 16 FCC Rcd 18663 (WTB 2001).

[94] *See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59),* Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52–59 Report and Order*).

[95] *See Channels 52–59 Report and Order,* 17 FCC Rcd at 1087–88, paragraph 172.

[96] *See id.*

[97] *See id.,* 17 FCC Rcd at 1088, paragraph 173.

[98] *See Letter from Aida Alvarez,* Administrator, SBA, to Thomas Sugrue, Chief, WTB, FCC (Aug. 10, 1999) (*Alvarez Letter 1999*).

[99] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice,* 17 FCC Rcd 17272 (WTB 2002).

[100] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice,* 18 FCC Rcd 11873 (WTB 2003).

[101] *See id.*

[102] *Service Rules for the 698–746, 747–762 and 777–792 MHz Bands*, WT Docket No. 06–150, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94–102, *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, WT Docket No. 01–309, *Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, WT Docket 03–264, *Former Nextel Communications, Inc. Upper 700*

Continued

auction of 700 MHz licenses commenced January 24, 2008. For the Lower 700 MHz band, 176 licenses over Economic Areas in the A Block, 734 licenses over Cellular Market Areas in the B Block, and 176 licenses over EAs in the E Block are available for licensing.[103] Winning bidders may be eligible for small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years), or very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years).

34. Upper 700 MHz Band Licenses. In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses. On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band are available for licensing: 12 licenses over Regional Economic Area Groupings (REAGs) in the C Block, and one nationwide license in the D Block.[104] Winning bidders may be eligible for small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years), or very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years.

35. 700 MHz Guard Band Licenses. In the 700 MHz Guard Band Order, the Commission adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[105] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[106] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[107] SBA approval of these definitions is not required.[108] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[109] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[110]

36. Specialized Mobile Radio. The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[111] The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[112] The SBA has approved these small business size standards for the 900 MHz Service.[113] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[114] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[115]

37. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard.[116] In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[117] Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

38. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees.[118] We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

39. 220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to Wireless Telecommunications Carriers (except Satellite).[119] This category provides that a small business is a wireless company employing no more than 1,500 persons.[120] The Commission estimates that most such licensees are small businesses under the SBA's small business standard.

40. 220 MHz Radio Service—Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order, the Commission adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[121] This small business standard indicates that a ''small business'' is an entity that, together

MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06–169, *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06–229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96–86, Second Report and Order, FCC 07–132 (2007) (*700 MHz Second Report and Order*).

[103] *See* ''Auction of 700 MHz Band Licenses Scheduled for January 16, 2008; Comment Sought on Competitive Bidding Procedures For Auction 73,'' *Public Notice*, FCC Rcd 15004 (WTB 2007).

[104] *See id.*

[105] *See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

[106] *See 746–764 MHz Band Second Report and Order*, 15 FCC Rcd at 5343, para. 108.

[107] *See id.*

[108] *See id.*, 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[109] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 15 FCC Rcd 18026 (2000).

[110] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

[111] 47 CFR 90.814(b)(1).

[112] 47 CFR 90.814(b)(1).

[113] *See Alvarez Letter 1999*.

[114] *See* ''Correction to Public Notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,' '' *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

[115] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[116] *See* ''800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced,'' *Public Notice*, 15 FCC Rcd 17162 (2000).

[117] *See*, ''800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,'' *Public Notice*, 16 FCC Rcd 1736 (2000).

[118] *See generally* 13 CFR 121.201, NAICS code 517210.

[119] *Id.*

[120] *Id.*

[121] *Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068–70, paras. 291–295 (1997).

with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[122] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[123] The SBA has approved these small size standards.[124] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[125] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[126] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[127] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[128] The Commission conducted a fourth auction in 2007 with three of the five winning bidders claiming small or very small business status.[129]

41. Private Land Mobile Radio (PLMR). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[130] The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[131]

42. The Commission's 1994 Annual Report on PLMRs [132] indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that the revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

43. Fixed Microwave Services. Fixed microwave services include common carrier,[133] private operational-fixed,[134] and broadcast auxiliary radio services.[135] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.[136] The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

44. 39 GHz Service. The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years.[137] An additional size standard for ''very small business'' is: An entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[138] The SBA has approved these small business size standards.[139] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

45. Local Multipoint Distribution Service. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[140] The auction of the 986 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[141] An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[142] The SBA has approved these small business size standards in the context of LMDS auctions.[143] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

46. 218–219 MHz Service. The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).[144] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, the Commission defined a small

[122] *Id.* at 11068, para. 291.

[123] *Id.*

[124] *See* Letter from Aida Alvarez, Administrator, SBA, to Daniel Phythyon, Chief, WTB, FCC (Jan. 6, 1998) (*Alvarez to Phythyon Letter 1998*).

[125] *See generally* ''220 MHz Service Auction Closes,'' *Public Notice*, 14 FCC Rcd 605 (1998).

[126] *See* ''FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,'' *Public Notice*, 14 FCC Rcd 1085 (1999).

[127] *See* ''Phase II 220 MHz Service Spectrum Auction Closes,'' *Public Notice*, 14 FCC Rcd 11218 (1999).

[128] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice*, 17 FCC Rcd 1446 (2002).

[129] *See* ''Auction of Phase II 220 MHz Service Spectrum Licenses Closes,'' *Public Notice*, 22 FCC Rcd 11573 (WTB 2007).

[130] *See* 13 CFR 121.201, NAICS code 517210.

[131] *See generally* 13 CFR 121.201.

[132] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at paragraph 116.

[133] *See* 47 CFR 101 *et seq.* for common carrier fixed microwave services (except Multipoint Distribution Service).

[134] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[135] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's rules. *See* 47 CFR Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[136] 13 CFR 121.201, NAICS code 517210.

[137] *See Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands*, ET Docket No. 95–183, Report and Order, 12 FCC Rcd 18600 (1997).

[138] *Id.*

[139] *See* Letter from Aida Alvarez, Administrator, SBA, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 4, 1998); *See* Letter from Hector Barreto, Administrator, SBA, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Jan. 18, 2002).

[140] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, paragraph 348 (1997) (*LMDS Second Report and Order*).

[141] *See LMDS Second Report and Order*, 12 FCC Rcd at 12689–90, paragraph 348.

[142] *See id.*

[143] *See Alvarez to Phythyon Letter 1998.*

[144] *See ''Interactive Video and Data Service (IVDS) Applications Accepted for Filing,''* Public Notice, 9 FCC Rcd 6227 (1994).

business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[145] In the *218–219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[146] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[147] The SBA has approved of these definitions.[148] A subsequent auction is not yet scheduled. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps most, of the licenses may be awarded to small businesses.

47. Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[149] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[150] These definitions have been approved by the SBA.[151] An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

48. Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[152] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[153] In the present context, we will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.[154] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

49. Air-Ground Radiotelephone Service.[155] The Commission has previously used the SBA's small business definition applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.[156] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[157] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[158] These definitions were approved by the SBA.[159] In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

50. Aviation and Marine Radio Services. There are approximately 26,162 aviation, 34,555 marine (ship), and 3,296 marine (coast) licensees.[160] The Commission has not developed a small business size standard specifically applicable to all licensees. For purposes of this analysis, we will use the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.[161] We are unable to determine how many of those licensed fall under this standard. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 62,969 licensees that are small businesses under the SBA standard.[162] In December 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For this auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[163] Further, the Commission made available Automated Maritime Telecommunications System (AMTS) licenses in Auctions 57 and 61.[164] Winning bidders could claim status as a very small business or a very small business. A very small business for this service is defined as an entity with attributed average annual gross revenues that do not exceed $3 million for the preceding three years, and a small business is defined as an entity with attributed average annual gross revenues of more than $3 million but less than $15 million for the preceding three years.[165] Three of the winning bidders in Auction 57 qualified as small or very small businesses, while three winning entities in Auction 61 qualified as very small businesses.

51. Offshore Radiotelephone Service. This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[166] There is presently 1 licensee in this service. We do not have information whether that licensee would qualify as small under the SBA's small

[145] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

[146] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

[147] *Id.*

[148] *See Alvarez to Phythyon Letter 1998.*

[149] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192, paragraph 20 (1998) (*Automatic Vehicle Monitoring Systems Second Report and Order*); *see also* 47 CFR 90.1103.

[150] *Automatic Vehicle Monitoring Systems Second Report and Order*, 13 FCC Rcd at 15192, para. 20; *see also* 47 CFR 90.1103.

[151] *See Alvarez Letter 1998.*

[152] The service is defined in section 22.99 of the Commission's rules, 47 CFR 22.99.

[153] BETRS is defined in 22.757 and 22.759 of the Commission's rules, 47 CFR 22.757 and 22.759.

[154] 13 CFR 121.201, NAICS code 517210.

[155] The service is defined in section 22.99 of the Commission's rules, 47 CFR 22.99.

[156] 13 CFR 121.201, NAICS codes 517210.

[157] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03–103 and 05–42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paragraphs 28–42 (2005).

[158] *Id.*

[159] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB, FCC (Sept. 19, 2005).

[160] Vessels that are not required by law to carry a radio and do not make international voyages or communications are not required to obtain an individual license. *See* Amendment of Parts 80 and 87 of the Commission's rules to Permit Operation of Certain Domestic Ship and Aircraft Radio Stations Without Individual Licenses, *Report and Order*, WT Docket No. 96–82, 11 FCC Rcd 14849 (1996).

[161] 13 CFR 121.201, NAICS code 517210.

[162] A licensee may have a license in more than one category.

[163] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92–257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[164] *See ''Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,''* Public Notice, 19 FCC Rcd 9518 (WTB 2004); *''Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 3, 2005, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures for Auction No. 61,''* Public Notice, 20 FCC Rcd 7811 (WTB 2005).

[165] 47 CFR 80.1252.

[166] This service is governed by Subpart I of Part 22 of the Commission's rules. *See* 47 CFR 22.1001–22.1037.

business size standard for Wireless Telecommunications Carriers (except Satellite) services.[167] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[168]

52. Multiple Address Systems (MAS). Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[169] ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years.[170] The SBA has approved of these definitions.[171] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.[172] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. On May 18, 2005, the Commission completed an auction (Auction No. 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

53. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the small business size standard developed by the SBA would be more appropriate. The applicable size standard in this instance appears to be that of Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[173] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

54. 1.4 GHz Band Licensees. The Commission conducted an auction of 64 1.4 GHz band licenses, beginning on February 7, 2007,[174] and closing on March 8, 2007.[175] In that auction, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, had average gross revenues that exceed $15 million but do not exceed $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years.[176] Neither of the two winning bidders sought designated entity status.[177]

55. Incumbent 24 GHz Licensees. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of Wireless Telecommunications Carriers (except Satellite). This category provides that such a company is small if it employs no more than 1,500 persons.[178] The broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[179] and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. There are approximately 122 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 122 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

56. Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[180] ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[181] The SBA has approved these definitions.[182] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

57. Broadband Radio Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[183] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[184] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[185] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

58. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[186] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic

[167] 13 CFR 121.201, NAICS code 517210.

[168] *Id.*

[169] *See Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008, paragraph 123 (2000).

[170] *Id.*

[171] *See Alvarez Letter 1999.*

[172] *See ''Multiple Address Systems Spectrum Auction Closes,''* Public Notice, 16 FCC Rcd 21011 (2001).

[173] *See* 13 CFR 121.201, NAICS code 517210.

[174] *See ''Auction of 1.4 GHz Bands Licenses Scheduled for February 7, 2007,''* Public Notice, 21 FCC Rcd 12393 (WTB 2006).

[175] *See ''Auction of 1.4 GHz Band Licenses Closes; Winning Bidders Announced for Auction No. 69,''* Public Notice, 22 FCC Rcd 4714 (2007) (*Auction No. 69 Closing PN*).

[176] *Auction No. 69 Closing PN,* Attachment C.

[177] *See Auction No. 69 Closing PN.*

[178] 13 CFR 121.201, NAICS code 517210.

[179] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[180] *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967, paragraph 77 (2000) (*24 GHz Report and Order*); *see also* 47 CFR 101.538(a)(2).

[181] *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 CFR 101.538(a)(1).

[182] *See* Letter from Gary M. Jackson, Assistant Administrator, SBA, to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, WTB, FCC (July 28, 2000).

[183] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94–131 and PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589, 9593, paragraph 7 (1995) (*MDS Auction R&O*).

[184] 47 CFR 21.961(b)(1).

[185] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard.

[186] The term ''small entity'' within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on EBS licensees.

census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [187] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts.[188] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[189] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[190] Thus, the majority of these firms can be considered small.

59. Television Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' [191] The SBA has created the following small business size standard for Television Broadcasting firms: those having $14 million or less in annual receipts.[192] The Commission has estimated the number of licensed commercial television stations to be 1,379.[193] In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of $13 million or less.[194] We therefore estimate that the majority of commercial television broadcasters are small entities.

60. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [195] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

61. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.[196] These stations are nonprofit, and therefore considered to be small entities.[197]

62. In addition, there are also 2,295 low power television stations (LPTV).[198] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

63. Radio Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.'' [199] The SBA has established a small business size standard for this category, which is: Such firms having $7 million or less in annual receipts.[200] According to Commission staff review of BIA Publications, Inc.'s *Master Access Radio Analyzer Database* on March 31, 2005, about 10,840 (95%) of 11,410 commercial radio stations had revenues of $6 million or less. Therefore, the majority of such entities are small entities.

64. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.[201] In addition, to be determined to be a ''small business,'' the entity may not be dominant in its field of operation.[202] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

65. Auxiliary, Special Broadcast and Other Program Distribution Services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[203]

66. The Commission estimates that there are approximately 5,618 FM translators and boosters.[204] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($7.0 million for a radio station or $14.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[205]

67. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [206] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in

[187] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition); *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110*.

[188] 13 CFR 121.201, NAICS code 517110.

[189] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[190] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[191] U.S. Census Bureau, 2007 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/naics/2007/def/ND515120.HTM#N515120*.

[192] 13 CFR 121.201, NAICS code 515120 (updated for inflation in 2008).

[193] *See FCC News Release*, ''Broadcast Station Totals as of December 31, 2007,'' dated March 18, 2008; *http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf*.

[194] We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

[195] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.'' 13 CFR 21.103(a)(1).

[196] *See FCC News Release*, ''Broadcast Station Totals as of December 31, 2007,'' dated March 18, 2008; *http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf*.

[197] *See generally* 5 U.S.C. 601(4), (6).

[198] *See FCC News Release*, ''Broadcast Station Totals as of December 31, 2007,'' dated March 18, 2008; *http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf*.

[199] U.S. Census Bureau, 2007 NAICS Definitions, ''515112 Radio Stations''; *http://www.census.gov/naics/2007/def/ND515112.HTM#N515112*.

[200] 13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008).

[201] ''Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.'' 13 CFR 121.103(a)(1) (an SBA regulation).

[202] 13 CFR 121.102(b) (an SBA regulation).

[203] 13 CFR 121.201, NAICS codes 515112 and 515120.

[204] *See supra* note 242.

[205] *See* 15 U.S.C. 632.

[206] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition); *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110*.

annual receipts.[207] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[208] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[209] Thus, the majority of these firms can be considered small.

68. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[210] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[211] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[212] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[213] Thus, under this second size standard, most cable systems are small.

69. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [214] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[215] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[216] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[217] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

70. Open Video Systems. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[218] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[219] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' [220] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for such services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts.[221] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[222] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[223] Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[224] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.[225] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

71. Cable Television Relay Service. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [226] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts.[227] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[228] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[229] Thus, the majority of these firms can be considered small.

72. Multichannel Video Distribution and Data Service. MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[230]

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[207] 13 CFR 121.201, NAICS code 517110.

[208] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[209] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[210] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[211] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[212] 47 CFR 76.901(c).

[213] Warren Communications News, *Television & Cable Factbook 2006*, ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[214] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[215] 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[216] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[217] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[218] 47 U.S.C. 571(a)(3)–(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, 606 paragraph 135 (2009) (''*Thirteenth Annual Cable Competition Report*'').

[219] *See* 47 U.S.C. 573.

[220] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers''; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110*.

[221] 13 CFR 121.201, NAICS code 517110.

[222] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[223] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[224] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html*.

[225] *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606–07 paragraph 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[226] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition); *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110*.

[227] 13 CFR 121.201, NAICS code 517110.

[228] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[229] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[230] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and*

Continued

These definitions were approved by the SBA.[231] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[232] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[233]

73. Amateur Radio Service. These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

74. Aviation and Marine Services. Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.[234] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[235] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

75. Personal Radio Services. Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[236] These services include Citizen Band Radio Service (CB), General Mobile Radio Service (GMRS), Radio Control Radio Service (R/C), Family Radio Service (FRS), Wireless Medical Telemetry Service (WMTS), Medical Implant Communications Service (MICS), Low Power Radio Service (LPRS), and Multi-Use Radio Service (MURS).[237] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which a small entity is defined as employing 1,500 or fewer persons.[238] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the proposed rules.

76. Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[239] There are a total of approximately 127,540 licensees in these services. Governmental entities[240] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[241]

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

77. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. Most licensees will be required to count the number of licenses or call signs authorized, complete and submit an FCC Form 159 Remittance Advice, and pay a regulatory fee based on the number of licenses or call signs.[242] Interstate telephone

Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2–12.7 GHz Band, ET Docket No. 98–206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, paragraph 252 (2002).

[231] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

[232] *See* ''*Multichannel Video Distribution and Data Service Auction Closes,*'' Public Notice, 19 FCC Rcd 1834 (2004).

[233] *See* ''*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,*'' Public Notice, 20 FCC Rcd 19807 (2005).

[234] 13 CFR 121.201, NAICS code 517210.

[235] *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[236] 47 CFR Part 90.

[237] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by Subpart D, Subpart A, Subpart C, Subpart B, Subpart H, Subpart I, Subpart G, and Subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.

[238] 13 CFR 121.201, NAICS Code 517210.

[239] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to provide highway maintenance service and emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[240] 47 CFR 1.1162.

[241] 5 U.S.C. 601(5).

[242] *See* 47 CFR 1.1162 for the general exemptions from regulatory fees. *E.g.*, Amateur radio licensees (except applicants for vanity call signs) and operators in other non-licensed services (*e.g.*, Personal Radio, part 15, ship and aircraft). Governments and non-profit (exempt under section 501(c) of the Internal Revenue Code) entities are exempt from payment of regulatory fees and need not submit payment. Non-commercial educational broadcast licensees are exempt from regulatory fees as are licensees of auxiliary broadcast services such as low power auxiliary stations, television auxiliary service stations, remote pickup stations and aural broadcast auxiliary stations where such licenses are used in conjunction with commonly owned non-commercial educational stations. Emergency Alert System licenses for auxiliary service facilities are also exempt as are instructional television fixed service licensees. Regulatory fees are automatically waived for the licensee of any translator station that: (1) Is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from members of the community served for support. Receive only earth station permittees are exempt from payment of regulatory fees. A regulatee will be relieved of its fee payment requirement if its total fee due, including all categories of fees for which payment is due by the entity, amounts to less than $10.

service providers must compute their annual regulatory fee based on their interstate and international end-user revenue using information they already supply to the Commission in compliance with the Form 499–A, Telecommunications Reporting Worksheet, and they must complete and submit the FCC Form 159. Compliance with the fee schedule will require some licensees to tabulate the number of units (*e.g.*, cellular telephones, pagers, cable TV subscribers) they have in service, and complete and submit an FCC Form 159. Licensees ordinarily will keep a list of the number of units they have in service as part of their normal business practices. No additional outside professional skills are required to complete the FCC Form 159, and it can be completed by the employees responsible for an entity's business records.

78. As discussed previously in the accompanying Order at paragraphs 19 through 23, the Commission has concluded that beginning in the FY 2009 regulatory fee cycle, licensees filing their annual regulatory fee payments must begin the process by entering the Commission's Fee Filer system with a valid FRN and password. In some instances, it will be necessary to use a specific FRN and password that is linked to a particular regulatory fee bill. Going forward, the submission of hardcopy Form 159 documents will not be permitted for making a regulatory fee payment. By requiring licensees to use Fee Filer to begin the regulatory fee payment process, errors resulting from illegible handwriting on hardcopy Form 159's will be reduced, and we will create an electronic record of licensee payment attributes that are more easily traced than those payments that are simply mailed in with a hardcopy Form 159.

79. Licensees and regulatees are advised that failure to submit the required regulatory fee in a timely manner will subject the licensee or regulatee to a late payment penalty of 25 percent in addition to the required fee.[243] If payment is not received, new or pending applications may be dismissed, and existing authorizations may be subject to rescission.[244] Further, in accordance with the DCIA, federal agencies may bar a person or entity from obtaining a federal loan or loan insurance guarantee if that person or entity fails to pay a delinquent debt owed to any federal agency.[245] Nonpayment of regulatory fees is a debt owed the United States pursuant to 31 U.S.C. 3711 *et seq.*, and the DCIA. Appropriate enforcement measures as well as administrative and judicial remedies, may be exercised by the Commission. Debts owed to the Commission may result in a person or entity being denied a federal loan or loan guarantee pending before another federal agency until such obligations are paid.[246]

80. The Commission's rules currently provide for relief in exceptional circumstances. Persons or entities may request a waiver, reduction or deferment of payment of the regulatory fee.[247] However, timely submission of the required regulatory fee must accompany requests for waivers or reductions. This will avoid any late payment penalty if the request is denied. The fee will be refunded if the request is granted. In exceptional and compelling instances (where payment of the regulatory fee along with the waiver or reduction request could result in reduction of service to a community or other financial hardship to the licensee), the Commission will defer payment in response to a request filed with the appropriate supporting documentation.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

81. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[248] In the *NPRM*, we sought comment on alternatives that might simplify our fee procedures or otherwise benefit filers, including small entities, while remaining consistent with our statutory responsibilities in this proceeding. We received no comments specifically in response to the IRFA.

82. Several categories of licensees and regulatees are exempt from payment of regulatory fees. Also, waiver procedures provide regulatees, including small entity regulatees, relief in exceptional circumstances. We note that small entities should be assisted by our implementation of the Fee Filer program, and that we have continued our practice of exempting fees whose total sum owed is less than $10.00.

VI. Report to Congress

83. The Commission will send a copy of this Report and Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[249]. In addition, the Commission will send a copy of this Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.[250]

Appendix G

Proposed Letter to Submarine Cable Operators

[insert address of submarine cable operator]

Re:/Regulatory Fees for Fiscal Year [insert year]

Our annual regulatory fee assessment for submarine cable operators is based on the total capacity for the submarine cable system. For this reason, we require submarine cable operators to advise us of the appropriate category for determining regulatory fees. Please indicate below the correct category and return this letter to us by February 15, 20_____.

Submarine cable systems (capacity as of December 31)	Please check the appropriate category
<2.5 Gbps.	
2.5 Gbps or greater, but less than 5 Gbps.	
5 Gbps or greater, but less than 10 Gbps.	
10 Gbps or greater, but less than 20 Gbps.	
20 Gbps or greater.	

Thank you for your assistance in this matter.

Certification Statement

I _____ certify under penalty of perjury that the foregoing and supporting information is true and correct to the best of my knowledge, information and belief.

Signature _____ Date _____

Appendix H

FY 2008 SCHEDULE OF REGULATORY FEES

Fee category	Annual regulatory fee (U.S. $'s)
PLMRS (per license) (Exclusive Use) (47 CFR part 90)	40
Microwave (per license) (47 CFR part 101)	40
218–219 MHz (Formerly Interactive Video Data Service) (per license) (47 CFR part 95)	60
Marine (Ship) (per station) (47 CFR part 80)	10

[243] 47 CFR 1.1164.

[244] 47 CFR 1.1164(c).

[245] Public Law 104–134, 110 Stat. 1321 (1996).

[246] 31 U.S.C. 7701(c)(2)(B).

[247] 47 CFR 1.1166.

[248] 5 U.S.C. 603.

[249] *See* 5 U.S.C. 801(a)(1)(A). The Congressional Review Act is contained in Title II, section 251, of the CWAAA; *see* Public Law 104–121, Title II, section 251, 110 Stat. 868.

[250] *See* 5 U.S.C. 604(b).

FY 2008 SCHEDULE OF REGULATORY FEES—Continued

Fee category	Annual regulatory fee (U.S. $'s)
Marine (Coast) (per license) (47 CFR part 80)	35
General Mobile Radio Service (per license) (47 CFR part 95)	5
Rural Radio (47 CFR part 22) (previously listed under the Land Mobile category)	20
PLMRS (Shared Use) (per license) (47 CFR part 90)	20
Aviation (Aircraft) (per station) (47 CFR part 87)	5
Aviation (Ground) (per license) (47 CFR part 87)	10
Amateur Vanity Call Signs (per call sign) (47 CFR part 97)	1.23
CMRS Mobile/Cellular Services (per unit) (47 CFR parts 20, 22, 24, 27, 80 and 90)	.17
CMRS Messaging Services (per unit) (47 CFR parts 20, 22, 24 and 90)	.08
Broadband Radio Service (formerly MMDS/MDS) (per license sign) (47 CFR part 21)	295
Local Multipoint Distribution Service (per call sign) (47 CFR, part 101)	295
AM Radio Construction Permits	415
FM Radio Construction Permits	600
TV (47 CFR part 73) VHF Commercial:	
Markets 1–10	71,050
Markets 11–25	53,525
Markets 26–50	33,525
Markets 51–100	21,025
Remaining Markets	5,600
Construction Permits	5,600
TV (47 CFR part 73) UHF Commercial:	
Markets 1–10	21,225
Markets 11–25	19,475
Markets 26–50	11,900
Markets 51–100	6,800
Remaining Markets	1,800
Construction Permits	1,800
Satellite Television Stations (All Markets)	1,175
Construction Permits—Satellite Television Stations	595
Low Power TV, TV/FM Translators & Boosters (47 CFR part 74)	365
Broadcast Auxiliary (47 CFR part 74)	10
CARS (47 CFR part 78)	205
Cable Television Systems (per subscriber) (47 CFR part 76)	.80
Interstate Telecommunication Service Providers (per revenue dollar)	.00314
Earth Stations (47 CFR part 25)	195
Space Stations (per operational station in geostationary orbit) (47 CFR part 25) also includes Direct Broadcast Satellite Service (per operational station) (47 CFR part 100)	119,300
Space Stations (per operational system in non-geostationary orbit) (47 CFR part 25)	125,750
International Bearer Circuits (per active 64KB circuit)	.93
International Public Fixed (per call sign) (47 CFR part 23)	2,025
International (HF) Broadcast (47 CFR part 73)	860

FY 2008 SCHEDULE OF REGULATORY FEES (Continued)

FY 2008 Radio Station Regulatory Fees						
Population served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	$650	$500	$450	$525	$600	$775
25,001–75,000	1,325	1,025	650	775	1,225	1,375
75,001–150,000	1,975	1,275	875	1,300	1,675	2,550
150,001–500,000	2,975	2,175	1,325	1,550	2,600	3,325
500,001–1,200,000	4,300	3,325	2,200	2,575	4,125	4,900
1,200,001–3,000,000	6,600	5,100	3,300	4,125	6,700	7,850
>3,000,000	7,925	6,125	4,175	5,150	8,550	10,200

[FR Doc. E9–19104 Filed 8–10–09; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 74, No. 153
Tuesday, August 11, 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.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 742 and 774

[Docket No. 080721866–8871–01]

RIN 0694–AE42

Revisions to the Commerce Control List To Update and Clarify Crime Control License Requirements

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule would update and clarify export and reexport license requirements on striking weapons, restraint devices, shotguns and parts, optical sighting devices, and electric shock devices. It would also add equipment designed for executions to the Commerce Control List. This proposed rule would make no changes to the longstanding policy of denial of applications to export or reexport specially designed implements of torture. The proposed rule would provide additional illustrative examples of such items and would adopt a definition of torture used in a U.S. statute that implements the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. BIS is publishing this rule as part of an ongoing review of crime control license requirements and policy.

DATES: Comments concerning this rule must be received by BIS no later than September 25, 2009.

ADDRESSES: Comments on this rule may be submitted to the Federal eRulemaking Portal at *http://www.regulations.gov* (follow the instructions for submitting comments), by e-mail directly to BIS at *publiccomments@bis.doc.gov* (refer to regulatory identification number 0694–AE42 in the subject line), or on paper to Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, Room H2705, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Refer to Regulatory Identification Number (RIN) 0694–AE42 in all comments.

FOR FURTHER INFORMATION CONTACT: Chantal Lakatos, Office of Non-proliferation and Treaty Compliance, Bureau of Industry and Security, telephone: 202–482–1739; fax: 202–482–4145; e-mail: *clakatos@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Export Administration Regulations (15 CFR parts 730–774) impose license requirements for certain exports from the United States and reexports from other countries for, among other reasons, ''crime control.'' The crime control license requirements are intended for the ''support of U.S. foreign policy to promote human rights throughout the world'' (15 CFR 742.7(a)). This rule is part of an effort by BIS to review and, where appropriate, revise the crime control license requirements in the Export Administration Regulations. In connection with this effort, BIS published a notice of inquiry seeking public comments on whether the scope of items and destinations that are subject to crime control license requirements should be changed (73 FR 14769, March 19, 2008). After reviewing the public comments on that notice and conducting its own policy deliberations, BIS plans to proceed with this review in stages.

In the first stage, BIS is publishing this proposed rule, which addresses relatively simple extensions, modifications or removals of items currently on the Commerce Control List or additions to that list of items that have a clearly identified crime control or law enforcement nexus.

In one or more subsequent stages, BIS intends to address more complex Commerce Control List matters such as whether, and, if so, the extent to which biometric measuring devices, integrated data systems, simulators, and communications equipment should be listed on the Commerce Control List; the degree to which software and technology related to commodities on the Commerce Control List should be listed and how such software and technology should be described; and general policy issues such as whether the range of destinations to which crime control license requirements apply should be modified.

Summary of the Changes Proposed

Revisions to § 742.7—Crime control. This proposed rule would change the section heading to read ''Crime control and detection'' to reflect the contents of the section. It also would revise paragraph (a) to set forth a license requirement to all destinations for a proposed new ECCN 0A981 that would apply to equipment designed for the execution of human beings. Finally, this rule would revise paragraph (d) to state that in maintaining these controls, the United States considers international norms and the practices of other countries that control exports to promote the observance of human rights; however, the controls are not based on the decisions of any multilateral export control regime and may differ from controls imposed by other countries. This proposed rule would remove language from paragraph (d) that could be read as erroneously implying that the United States is the only country that imposes export controls on crime control and detection items.

Revisions to § 742.11—Specially designed implements of torture. This proposed rule would revise the heading to match the revised language that this rule applies to ECCN 0A983, *i.e.* ''Specially designed implements of torture, including thumbscrews, thumbcuffs, fingercuffs, spiked batons, shock sleeves and parts and accessories, n.e.s.'' This proposed rule also would revise paragraph (d) to state that in maintaining these controls, the United States considers international norms and the practices of other countries that control exports to promote the observance of human rights; however, the controls are not based on the decisions of any multilateral export control regime and may differ from controls imposed by other countries. This proposed rule would remove language from paragraph (d) that could be read as erroneously implying that the United States is the only country that imposes export controls on specially designed implements of torture. This proposed rule would make no changes to the policy of denial of applications to export items subject to § 742.11 or to the prohibition (stated in § 740.2(a)(10) of

the EAR) on use of license exceptions to export commodities subject to § 742.11 of the EAR.

Revisions to ECCN 0A978—Saps. The items covered by this ECCN would be expanded from ''saps'' to ''law enforcement striking weapons.'' Saps, police batons, side handle batons, tonfas, sjamboks and whips would be listed as examples of law enforcement striking weapons. BIS believes that this change would provide consistent license requirements for several items that have substantially similar crime control functions.

Creation of ECCN 0A981—Equipment for the Execution of Human Beings. This rule would create a new ECCN 0A981 that would apply to equipment designed for the execution of human beings. Such equipment would require a license to all destinations. BIS is proposing adding this ECCN because equipment designed for the execution of human beings has a clear nexus to crime control and an obvious potential use in repressing human rights.

Revisions to ECCN 0A982—Restraint Devices. Several changes would be made to this ECCN to (a) make clear that it applies to law enforcement restraint devices, rather than safety or medical equipment, (b) update the illustrative list of commodities to which this ECCN applies, and (c) cross reference other ECCNs that apply to similar devices. These changes are intended to focus the ECCN on items of crime control significance and to reduce the possibility of misinterpretations.

- The rule would add the phrase ''Law enforcement'' to the heading.
- The rule would add ''multipoint restraint devices including restraint chairs'' to the illustrative list of restraint devices because use of these devices has increased in recent years and because they have potential for use in human rights abuse.
- The rule would also revise the related controls paragraph of this ECCN to note (a) that finger cuffs and shock sleeves are classified under ECCN 0A983—Specially designed implements of torture, (b) that law enforcement restraint devices that administer an electric shock are controlled under ECCN 0A985, and (c) that electronic devices that monitor and report a person's location to enforce restrictions on movement for law enforcement or penal reasons are controlled under ECCN 3A981.
- This rule would add a note stating that this ECCN does not apply to medical devices that are equipped to restrain patient movement during medical procedures, devices that confine memory-impaired patients to appropriate medical facilities, or safety equipment such as safety belts or child automobile safety seats.

BIS believes that the proposed revised language would clarify the scope of ECCN 0A982 and is not a substantive change.

Revisions to ECCN 0A983—Specially Designed Implements of Torture. This rule would make no changes to the Export Administration Regulations' stated policies of denial of license applications for the export or reexport of specially designed implements of torture and prohibition of use of any license exception to export or reexport specially designed implements of torture.

The heading of ECCN 0A983 would be revised to add the word ''including'' immediately following the phrase ''specially designed implements of torture'' to make clear that the items listed are examples of specially designed implements of torture rather than an exclusive list of such implements. The heading would also be revised to add fingercuffs, spiked batons and shock sleeves to the ECCN as additional examples of specially designed implements of torture. A new note would state that ''torture'' in this ECCN has the same meaning as set forth in 18 U.S.C. 2340(1), which is the definition employed by the United States criminal statute that implements the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. BIS believes that these changes would more clearly distinguish specially designed implements of torture from crime control and detection items.

Revisions to ECCN 0A984—Shotguns. This rule would remove the phrase ''parts n.e.s.'' and add the following specific parts for the shotguns controlled by this ECCN: barrels of 18 inches (45.72 cm) or longer but not longer than 24 inches (60.96 cm), receivers, breech mechanisms, complete trigger mechanisms, and magazines or magazine extension tubes. The parts are subject to CC column 1 license requirements. BIS believes that the purposes of the control can be met by retaining the license requirement on the shotguns themselves and on the critical parts set forth in this rule. BIS believes that continuing to require licenses for other parts would pose a burden on legitimate trade in shotgun repair parts that is not needed to achieve the purpose of these controls or of the controls related to the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials.

Revisions to ECCN 0A985—Discharge Type Arms. ECCN 0A985 applies to discharge type arms and to some electroshock devices that are not discharge type arms. To provide greater clarity and to include a representative description of devices currently available, this proposed rule would add the phrase ''devices to administer electric shock'' to the heading and would add stun cuffs and shock shields to the illustrative list of items classified under this ECCN. This rule would also add references to the ''Related Controls'' paragraph informing readers that shock sleeves are controlled by ECCN 0A983 and that electronic devices that monitor and report a person's location to enforce restrictions on movement for law enforcement or penal reasons are controlled under ECCN 3A981.

Revisions to ECCN 0A987—Optical Sighting Devices for Firearms. This rule would replace the general description in the heading of ECCN 0A987 with a list of items controlled. With this change, the ECCN would clearly state that it applies to specific sighting devices, their associated optical elements, and adjustment mechanisms.

Revisions to ECCN 0E984—Technology for shotguns. This rule would modify ECCN 0E984 to apply CC Column 1 as a reason for control of technology for the development and production of all shotguns and shotgun shells controlled by ECCN 0A984. Currently, ECCN 0E984 applies reasons for control that are parallel to the reasons for control in ECCN 0A984, *i.e.,* CC Column 1, 2, or 3 is applied depending on whether the barrel length exceeds 24 inches and whether the end-user is a law enforcement agency. BIS is proposing the change described in this paragraph because it believes that the technology for the development and production of shotguns is substantially the same for all shotguns with barrel length exceeding 18 inches and does not vary based on the end user of the shotgun.

Revisions to ECCN 3A981—Polygraphs and other electronic devices. This proposed rule would add a cross reference to the restraint devices controlled by ECCN 0A982. This proposed rule would also add a note expressly stating that the electronic monitoring restraint devices in ECCN 3A981 are devices that monitor or report the location of confined persons for law enforcement or penal reasons. The note would exclude devices used to confine memory impaired patients to appropriate medical facilities. BIS views these proposed changes in wording as clarifications rather than substantive changes.

Request for Comments

BIS is seeking public comments on this rule and will consider all comments received on or before September 25, 2009 in developing any final rule. Comments received after that date will be considered if feasible, but their consideration cannot be assured. All public comments on this rule must be in writing (including electronic postings on *regulations.gov* or e-mail) and will be a matter of public record, available for public inspection and copying.

Rulemaking Requirements

1. This rule is a significant rule for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves a collection of information that has been approved by OMB under control number 0694–0088, which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748P. Miscellaneous and recordkeeping activities account for 12 minutes per submission. BIS believes that the changes proposed will increase the number of submissions subject to this collection by approximately 1,200 annually. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to Jasmeet Seehra, Office of Management and Budget (OMB), by e-mail to *jseehra@omb.eop.gov,* or by fax to (202) 395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, Room 2705, 14th Street and Pennsylvania Ave., NW., Washington, DC 20230.

3. This rule does not contain policies with Federalism implications as this term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military or foreign affairs function of the United States (see 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) are not applicable. However, to obtain the benefit of a variety of viewpoints, BIS is issuing this rule as a proposed rule with a request for comments.

List of Subjects

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, BIS proposes to amend the Export Administration Regulations (15 CFR parts 730–774) as follows:

PART 742—[AMENDED]

1. The authority citation for part 742 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq;* Pub. L. 106–508; 50 U.S.C. 1701 *et seq;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

2. In § 742.7, revise the heading, redesignate existing paragraph (a)(5) as paragraph (a)(6), add a new paragraph (a)(5) and revise paragraph (d) to read as follows:

§ 742.7 Crime control and detection.

(a) * * *

(5) Items designed for the execution of human beings as identified in ECCN 0A981 require a license to all destinations including Canada.

* * * * *

(d) *U.S. controls.* In maintaining its controls on crime control and detection items, the United States considers international norms regarding human rights and the practices of other countries that control exports to promote the observance of human rights. However, these controls are not based on the decisions of any multinational export control regime and may differ from controls imposed by other countries.

3. In § 742.11, revise the heading and paragraph (d) to read as follows:

§ 742.11 Specially designed implements of torture, including thumbscrews, thumbcuffs, fingercuffs, spiked batons, shock sleeves, and parts and accessories, n.e.s.

* * * * *

(d) *U.S. controls.* In maintaining its controls on specially designed instruments of torture the United States considers international norms regarding human rights and the practices of other countries that control exports to promote the observance of human rights. However, these controls are not based on the decisions of any multinational export control regime and may differ from controls imposed by other countries.

PART 774—[AMENDED]

4. The authority citation for part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.,* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

5. In Supplement No. 1 to part 774, Category 0, revise the heading of Export Control Classification (ECCN) 0A978 to read as follows:

0A978 Law enforcement striking weapons, including saps, police batons, side handle batons, tonfas, sjamboks, and whips.

* * * * *

6. In Supplement No. 1 to part 774, Category 0, add a new ECCN 0A981 immediately following ECCN 0A980 and immediately preceding ECCN 0A982 to read as follows:

0A981 Equipment designed for the execution of human beings (See list of items controlled).

License Requirements

Reason for Control: CC.

Control(s): CC applies to entire entry. A license is required for all destinations regardless of end-use. Accordingly, a column specific to this control does not appear on the Commerce Country Chart. (See § 742.7 of the EAR for additional information.)

License Exceptions

LVS: N/A.
GBS: N/A.
CIV: N/A.

List of Items Controlled

Unit: $ value.
Related Controls: N/A.
Related Definitions: N/A.
Items: a. Gallows and guillotines.
b. Electric chairs for the purpose of executing human beings.
c. Air tight vaults designed for the execution of human beings by the administration of a lethal gas or substance.
d. Automatic drug injection systems designed for the execution of human beings by administration of a lethal substance.

7. In Supplement No. 1 to part 774, Category 0, ECCN 0A982, revise the

heading, revise the ''Related Controls'' paragraph in the ''List of Items Controlled'' section and add a note at the end of ECCN 0A982 to read as follows:

0A982 Law enforcement restraint devices, including leg irons, shackles, and handcuffs; straight jackets; multipoint restraint devices such as restraint chairs; and parts and accessories, n.e.s.

License Requirements

* * * * *

List of Items Controlled

Unit: $ * * *

Related Controls: Thumbcuffs, fingercuffs and shock sleeves are classified under ECCN 0A983, specially designed implements of torture. Other law enforcement restraint devices that administer an electric shock are controlled under ECCN 0A985. Restraint devices that electronically monitor or report the location of confined persons for law enforcement or penal reasons are controlled under ECCN 3A981.

* * * * *

Note to ECCN 0A982. This ECCN applies to restraint devices used in law enforcement activities. It does not apply to medical devices that are equipped to restrain patient movement during medical procedures. It does not apply to devices that confine memory impaired patients to appropriate medical facilities. It does not apply to safety equipment such as safety belts or child automobile safety seats.

8. In Supplement No. 1 to part 774, Category 0, ECCN 0A983, revise the heading, and add a note at the end of ECCN 0A983 to read as follows:

0A983 Specially designed implements of torture, including thumbscrews, thumbcuffs, fingercuffs, spiked batons, shock sleeves, and parts and accessories, n.e.s.

* * * * *

Note to ECCN 0A983. In this ECCN, ''torture'' has the meaning set forth in Section 2340(1) of Title 18, United States Code.

9. In Supplement No. 1 to part 774, Category 0, ECCN 0A984, revise the heading and the license requirements section of ECCN 0A984 to read as follows:

0A984 Shotguns with barrel length 18 inches (45.72 cm) or over; receivers; barrels of 18 inches (45.72 cm) or longer but not longer than 24 inches (60.96 cm); complete trigger mechanisms; magazines and magazine extension tubes; complete breech mechanisms; buckshot shotgun shells; except equipment used exclusively to treat or tranquilize animals, and except arms designed solely for signal, flare, or saluting use.

License Requirements

Reason for Control: CC, FC, UN.

Control(s)	*Country Chart*
FC applies to entire entry	FC Column 1.
CC applies to shotguns with a barrel length greater than or equal to 18 in. (45.72 cm), but less than 24 in. (60.96 cm), shotgun parts controlled by this entry, and buckshot shotgun shells controlled by this entry, regardless of end-user.	CC Column 1.
CC applies to shotguns with a barrel length greater than or equal to 24 in. (60.96 cm), regardless of end-user	CC Column 2.
CC applies to shotguns with a barrel length greater than or equal to 24 in. (60.96 cm) if for sale or resale to police or law enforcement.	CC Column 3.
UN applies to entire entry	Iraq, North Korea, and Rwanda.

* * * * *

10. In Supplement No. 1 to part 774, Category 0, ECCN 0A985, revise the heading and the ''Related Controls'' paragraph of the ''List of Items Controlled'' section to read as follows:

0A985 Discharge type arms and devices to administer electric shock, for example, stun guns, shock batons, stun cuffs, shock shields, electric cattle prods, immobilization guns and projectiles; except equipment used exclusively to treat or tranquilize animals, and except arms designed solely for signal, flare, or saluting use; and parts, n.e.s.

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: Shock sleeves are controlled by ECCN 0A983. Electronic devices that monitor and report a person's location to enforce restrictions on movement for law enforcement or penal reasons are controlled under ECCN 3A981.

* * * * *

11. In Supplement No. 1 to part 774, Category 0, ECCN 0A987, revise the heading and the ''Items'' paragraph of the ''List of Items Controlled'' section to read as follows:

0A987 Optical sighting devices for firearms (including shotguns controlled by 0A984); and parts (See list of items controlled).

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: * * *

Related Definitions: * * *

Items: a. Telescopic sights.

b. Holographic sights.

c. Reflex or ''red dot'' sights.

d. Reticle sights.

e. Other sighting devices that contain optical elements.

f. Laser pointing devices designed for use on firearms.

g. Lenses, other optical elements and adjustment mechanisms for articles in paragraphs a, b, c, d or e.

12. In Supplement No. 1 to part 774, Category 0, ECCN 0E984, revise the license requirements section of ECCN 0E984 to read as follows:

0E984 ''Technology'' for the ''development'' or ''production'' of shotguns controlled by 0A984 and buckshot shotgun shells.

License Requirements

Reason for Control: CC, UN.

Control(s)	*Country Chart*
CC applies to ''technology'' for shotguns with a barrel length over 18 in. (45.72 cm), and for shotgun shells controlled by ECCN 0A984.	CC Column 1.

13. In Supplement No. 1 to part 774, Category 3 add a note to the end of ECCN 3A981 to read as follows:

3A981 Polygraphs (except biomedical recorders designed for use in medical facilities for monitoring biological and neurophysical responses); fingerprint analyzers, cameras and equipment, n.e.s.; automated fingerprint and identification retrieval systems, n.e.s.; psychological stress analysis equipment; electronic monitoring restraint devices; and specially designed parts and accessories, n.e.s.

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: See ECCN 0A982 for other types of restraint devices.

Related Definitions: * * *

Items: * * *

Note to ECCN 3A981. In this ECCN, electronic monitoring restraint devices are devices used to record or report the location of confined persons for law enforcement or penal reasons. The term does not include devices that confine memory impaired patients to appropriate medical facilities.

Dated: August 5, 2009.

Matthew S. Borman,

Acting Assistant Secretary for Export Administration.

[FR Doc. E9–19099 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–33–P

FEDERAL TRADE COMMISSION

16 CFR Part 425

Rule Concerning the Use of Prenotification Negative Option Plans

AGENCY: Federal Trade Commission (FTC or Commission)

ACTION: Re-opening the record for submission of public comments.

SUMMARY: The FTC re-opens the time period for filing public comments in response to its Advance Notice of Proposed Rulemaking and Request for Public Comments for sixty (60) days.

DATES: Written comments must be received on or before October 13, 2009.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Prenotification Negative Option Rule Review, Matter No. P064202'' to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form and clearly labeled ''Confidential.'' [1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-NegativeOptionRuleANPR*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-NegativeOptionRuleANPR*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov*) to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Prenotification Negative Option Rule Review, Matter No. P064202'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–135 (Annex Q), 600 Pennsylvania Avenue, N.W., Washington, DC. 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act (''FTC Act'') and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Robin Rosen Spector, (202) 326–3740 or Matthew Wilshire, (202) 326–2976, Attorneys, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC. 20580.

SUPPLEMENTARY INFORMATION: On May 14, 2009, the Commission published an Advance Notice of Proposed Rulemaking (''Notice'') seeking comment on the overall costs, benefits, necessity, and regulatory and economic impact of the FTC's Trade Regulation Rule concerning ''Use of Prenotification Negative Option Plans''[2] (''Negative Option Rule'' or ''Rule''). Currently, the Rule addresses only prenotification negative option plans for the delivery of merchandise. The Notice solicits comments on whether the Commission should expand the Rule to address additional negative option marketing categories and on the Rule's costs and benefits. The notice designated July 27, 2009, as the deadline for filing public comments.

Three parties filed requests for an extension of the comment period in this matter in mid-July. The Commonwealth of Pennsylvania, Office of Attorney General, Bureau of Consumer Protection, ''along with several other states including without limitation, Vermont, Florida, Iowa and Colorado'' (collectively ''states'') requested a 30-day extension. The Broward County

[1] The comment must also be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

[2] 74 FR 22720 (May 14, 2009).

Licensing and Consumer Protection Division requested a 60-day extension. Finally, the American Association of Law Libraries (''AALL'') requested a 30-day extension.

These entities explain that extension of the comment period will allow them to provide more comprehensive comments. Specifically, the states explain that they are compiling data responsive to some of the Notice's specific questions and that the data they collect may be relevant to the Commission's decision on whether to expand the Negative Option Rule to cover additional types of negative option offers. Similarly, Broward County explains that it has received numerous complaints concerning trial conversion negative option offers that it believes demonstrate that an expansion of the Rule's coverage is warranted. Finally, the AALL explains that it represents ''more than 5000 law librarians who are institutional consumers of enormous amounts of legal and other published material,'' and as such, are parties to many types of negative option plans. AALL states that it is requesting information from its membership regarding the Rule and an extension of the comment period would provide it with additional time to collect this data.

All of this data would assist the Commission in evaluating the Rule's effectiveness and determining whether there is reason to believe that unfair or deceptive acts or practices in non-Rule covered negative option marketing are ''prevalent.'' Moreover, the requested short extension of the comment period will not substantially delay the rulemaking process. The Commission is mindful of the need to deal with this matter expeditiously; however, it also recognizes that its Notice requests comments on complex issues and believes that extending the comment period to facilitate the creation of a more complete record outweighs any harm that might result from any delay. The requests for an extension of the comment period were filed close to the comment deadline; therefore, there was insufficient time to extend the comment period. Accordingly, the Commission has decided to re-open the comment period for sixty (60) days, until October 13, 2009, to allow for additional comment.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E9–19123 Filed 8–10–09: 2:30 pm]

BILLING CODE 6750–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0311; FRL–8941–7]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Revised Motor Vehicle Emission Budgets for the Scranton/Wilkes-Barre 8-Hour Ozone Maintenance Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania for the purpose of amending the 8-hour ozone maintenance plan for the Scranton/Wilkes-Barre 8-Hour Ozone Maintenance Area. This revision amends the maintenance plan's 2009 and 2018 motor vehicle emissions budgets (MVEBs) by unequally dividing the overall MVEBs into three sub-regional MVEBs for each county comprising the area. In the Final Rules section of this **Federal Register,** EPA is approving the Commonwealth's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by September 10, 2009.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0311 by one of the following methods:

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

B. *E-mail*: *febbo.carol@epa.gov.*

C. *Mail:* EPA–R03–OAR–2009–0311, Carol Febbo, Chief, Energy, Radiation and Indoor Environment Branch, Mailcode 3AP23, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2009–0311. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an anonymous access system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the Commonwealth submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Martin Kotsch, (215) 814–3335, or by e-mail at *kotsch.martin@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the Rules and Regulations section of this **Federal Register** publication.

Dated: July 28, 2009.

William C. Early,

Acting Regional Administrator, Region III.

[FR Doc. E9–18868 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0693, EPA–R09–OAR–2009–0492, EPA–R09–OAR–2009–0344; FRL–8943–6]

Revisions to the California State Implementation Plan, California Air Resources Board and San Joaquin Valley Air Pollution Control District; Extensions of Comment Periods

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extensions of comment periods.

SUMMARY: The EPA is announcing extensions of the comment periods until August 31, 2009 for three actions proposed on July 10 and July 14, 2009. These proposed actions concern approval of California's Reformulated Gasoline and Diesel Fuels programs (74 FR 33196 (July 10, 2009), correction 74 FR 35838 (July 21, 2009)); limited approval and limited disapproval of San Joaquin Valley Air Pollution Control District's (SJVAPCD) Rule 4570 ''Confined Animal Facilities'' (74 FR 33948 (July 14, 2009); and partial approval and partial disapproval of the 1-Hour Ozone Extreme Area Plan for the San Joaquin Valley (74 FR 33933 (July 14, 2009).

DATES: Comments must be received on these proposals by August 31, 2009.

ADDRESSES: Submit comments, separately for each proposed action and identified by the correct docket number, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions.through

2. *E-mail:* See below under the **FOR FURTHER INFORMATION CONTACT** section.

3. *Mail or deliver:* Air Division, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901. Please mark your comments to the attention of the appropriate contact listed below under the **FOR FURTHER INFORMATION CONTACT** section.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the dockets for these actions are available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in these dockets are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available in either location (*e.g.*, CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT:

For the California fuels programs: Jeffrey Buss, AIR–2, EPA Region IX, (415) 415–947–4152, *buss.jeffrey@epa.gov*.

For SJVAPCD's Rule 4570: Andrew Steckel, AIR–4, EPA Region IX, 415–947–4115, *steckel.andrew@epa.gov*.

For the SJV 1-hour ozone plan: Frances Wicher, AIR–2, EPA Region IX, (415) 972–3957, *wicher.frances@epa.gov*.

SUPPLEMENTARY INFORMATION: On July 10 and 14, EPA proposed the following revisions to the California State Implementation Plan (SIP).

Agency	Rule, regulation or plan	Proposed action, **Federal Register** cite and docket number
Air Resources Board	Reformulated Gasoline and Diesel Fuels.	Approval; 74 FR 33196 (July 10, 2009), correction 74 FR 35838 (July 21, 2009); EPA–R09–OAR–2009–0344.
SJVAPCD	4570—Confined Animal Facilities	Limited Approval/Disapproval; 74 FR 33948 (July 14, 2009); EPA–R09–OAR–2009–0492.
SJVAPCD	1-Hour Ozone Extreme Area Plan	Partial Approval/Disapproval; 74 FR 33933 (July 14, 2009); EPA–R09–OAR–2008–0693.

The proposed actions each provided a 30-day public comment period. In response to a request submitted by e-mail on July 10, 2009, from Brent Newell, Center for Race, Poverty, and the Environment on behalf of the Association of Irritated Residents and the Natural Resources Defense Council, EPA is extending the comment periods on all three proposals until August 31, 2009.

Dated: July 29, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E9–19189 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2005–0011; FRL–8942–5]

National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Delilah Road Landfill Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 2 is issuing a Notice of Intent to Delete the Delilah Road Landfill Superfund Site (Site) located in Egg Harbor Township, New Jersey, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of New Jersey, through the New Jersey Department of Environmental Protection, have determined that all appropriate response actions under CERCLA, have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: Comments must be received by September 10, 2009.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–2005–0011, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *E-mail: loney.natalie@epa.gov.*
- *Fax:* [Enter fax number].
- *Mail:* Natalie Loney, Community Involvement Coordinator, U.S. Environmental Protection Agency, 290 Broadway, 26th Floor, New York, New York 10007–1866.
- *Hand delivery:* U.S. Environmental Protection Agency Records Center, Region 2, 290 Broadway, 18th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–2005–0011. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket

All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

United States Environmental Protection Agency Region 2 Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866, Building hours are Monday to Friday 9 a.m.—5 p.m., Telephone number is (212) 637–4308; or

The Atlantic County Library, Egg Harbor Township Branch, 1 Swift Avenue, Egg Harbor Township, New Jersey 08234, Building hours are Monday to Thursday 9 a.m. to 8 p.m., Friday and Saturday 9 a.m. to p.m., Telephone number is (609) 927–8664.

FOR FURTHER INFORMATION CONTACT: Tanya Mitchell, Remedial Project Manager, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, New York 10007–1866, (212) 637–4362, e-mail: *mitchell.tanya@epa.gov.*

SUPPLEMENTARY INFORMATION:

In the ''Rules and Regulations'' Section of today's **Federal Register**, we are publishing a direct final Notice of Deletion of Delilah Road Landfill Superfund Site without prior Notice of Intent to Delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final Notice of Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this deletion action, we will not take further action on this Notice of Intent to Delete. If we receive significant adverse comment(s), we will withdraw the direct final Notice of Deletion, and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Deletion based on this Notice of Intent to Delete. We will not institute a second comment period on this Notice of Intent to Delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Deletion which is located in the *Rules* section of this **Federal Register.**

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: July 27, 2009.

George Pavlou,

Acting Regional Administrator, Region II.

[FR Doc. E9–19065 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

[Docket ID FEMA–2008–0006]

RIN 1660–AA47

Disaster Assistance; Public Assistance Repetitive Damage

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements aspects of the Disaster Mitigation Act of 2000 by reducing the Federal cost share of FEMA Public Assistance to public and certain private nonprofit facilities repetitively damaged in the preceding 10 years by the same type of event and for which required hazard mitigation has not been

implemented. The Federal government should not repetitively reimburse eligible applicants for damage that could be prevented through mitigation efforts. The reduced Federal cost share of the proposed rule is intended to provide an incentive to mitigate repetitive damage, promote measures that reduce future loss to life and property, protect Federal investment in public infrastructure, and help build disaster-resistant communities.

DATES: Submit comments on or before October 13, 2009.

ADDRESSES: You may submit comments, identified by Docket ID FEMA–2008–0006, by one of the following methods:

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

E-mail: FEMA–RULES@dhs.gov. Include Docket ID FEMA–2008–0006 in the subject line of the message.

Fax: 703–483–2999.

Mail/Hand Delivery/Courier: Rules Docket Clerk, Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472–3100.

Instructions: All Submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov* and search for Federal Emergency Management Agency docket ID ''FEMA–2008–0006.'' Submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 835, 500 C Street, SW., Washington, DC 20472–3100.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Acting Director, Public Assistance Division, Federal Emergency Management Agency, 500 C Street, SW., Room 414, Washington, DC 20472–3100, (phone) 202–646–3936; (facsimile) 202–646–3304; or (e-mail) *Tod.Wells@dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Each year, disasters strike the United States, including natural events such as hurricanes, tornadoes, storms, earthquakes, volcanic eruptions, landslides, snowstorms, and droughts and events that occur from various other causes such as fires, floods, and explosions. When a disaster occurs and a locality has responded to the best of its ability and is, or will be, overwhelmed by the magnitude of the damage, the community turns to the State for help. If it is evident that the situation is or will be beyond the combined capabilities of the local and State resources, the Governor may request that the President declare that an emergency or major disaster exists in the State, under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [1] (Stafford Act).

If an emergency or major disaster is declared, the Federal Emergency Management Agency (FEMA) may award Public Assistance grants to assist State, Tribal, and local governments and certain private nonprofit entities (applicants), as defined in subpart H of 44 CFR part 206, with the response to and recovery from disasters. Specifically, the Public Assistance Program provides assistance for debris removal, emergency protective measures and permanent restoration of infrastructure. To obtain these Public Assistance grants for damaged facilities, the applicants must identify disaster-related damage which is documented on a Project Worksheet (PW), referenced at 44 CFR 206.201(i).

The PW is the basis for Public Assistance grants and FEMA uses the PW to document eligible costs. Federal funding is subject to the cost share provisions established in the Stafford Act (42 U.S.C. 5172(b)), and FEMA-State Agreement (44 CFR 206.47(a)). Typically, the Federal cost share is 75 percent of the eligible costs identified on the PW.

In 2000, the President signed into law the Disaster Mitigation Act of 2000 (DMA 2000), Public Law 106–390, 42 U.S.C. 5121 note. Subsection 205(b) of DMA 2000 amended section 406 of the Stafford Act by adding a new paragraph (b)(2) (42 U.S.C. 5172(b)(2)) which states:

> The President shall promulgate regulations to reduce the Federal share of assistance under this section to not less than 25 percent in the case of the repair, restoration, reconstruction, or replacement of any eligible public facility or private nonprofit facility following an event associated with a major disaster—(A) that has been damaged, on more than one occasion within the preceding10-year period, by the same type of event; and (B) the owner of which has failed to implement appropriate mitigation measures to address the hazard that caused the damage to the facility.

This cost share reduction adds to existing hazard mitigation authorities under sections 203, 404, and 406 of the Stafford Act.

II. Discussion of the Proposed Rule

In accordance with the amendment to section 406 of the Stafford Act, this proposed rule would reduce the Federal cost share to 25 percent of eligible costs if the applicant has not taken appropriate mitigation measures on a repetitively damaged facility. FEMA identified a number of key issues in drafting this proposed rule. These include: (A) Defining a ''facility'' as it relates to the new statutory provision; (B) determining when the requirements of the new provision will become effective; (C) determining what qualifies as ''more than one occasion;'' (D) defining the ''same type of event;'' (E) determining the amount of the cost share reduction; (F) defining an ''appropriate mitigation measure;'' and the process for identifying such mitigation measures; and (G) establishing a system to identify repetitively damaged facilities. FEMA discusses each of these issues individually below. FEMA invites comment on each of these issues as well as any other issues the public may find relevant.

A. Definition of ''Facility''

FEMA proposes to use the existing definition of a ''facility'' in 44 CFR 206.201(c). The existing definition states: ''Facility means any publicly or privately owned building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature. Land used for agricultural purposes is not a facility.'' Using the existing definition of ''facility'' in 44 CFR 206.201(c) will eliminate any potential confusion caused by a separate definition for the application of this rule and ensure programmatic consistency.

B. When Will the Requirements Become Effective?

FEMA would begin the process of counting events for eligible damaged facilities only after it issues an effective rule. While one might argue that FEMA should have begun tracking such events upon the enactment of the DMA 2000, FEMA proposes not to begin that process until it issues an effective rule, in order to give applicants ample time to implement appropriate mitigation

[1] Disaster Relief Act of 1974, Public Law 93–288, 88 Stat. 143 (May 22, 1974), as amended 42 U.S.C. 5121 *et seq.*

measures. FEMA believes this process is further justified because this proposed rule is still subject to change based upon public comments received.

C. Definition of ''More Than One Occasion''

FEMA would reduce the Federal cost share upon the third occurrence of damage to an eligible facility. In drafting the proposed rule, FEMA contemplated reducing the Federal cost share upon the second damaging event. However, the Stafford Act states that the reduction in benefits can only occur to a facility ''that has been damaged, on more than one occasion.'' A facility that is damaged on ''more than one occasion'' has suffered damage at least twice. Therefore, the benefit reduction would have to occur on or after the third occasion. Consistent with the statutory language, FEMA would reduce Federal assistance upon the third occurrence of the ''same type of event.''

D. Definition of ''Same Type of Event''

Another issue that FEMA addressed is the definition of the ''same type of event'' that will trigger the cost share reduction mandates. FEMA considered how precisely the term ''event'' should be defined. The proposed rule defines ''same type of event'' as one that is the same major disaster type (e.g., hurricane, tornado, flood, or earthquake). FEMA documents the major disaster type on every PW. By defining ''same type of event'' by major disaster type, FEMA can easily track and ensure consistent application of the proposed rule. For example, if a facility was damaged by a hurricane three times in a 10-year period, the facility would be considered a repetitively damaged facility. However, to trigger the cost share reduction under this rule, the applicant must have been required, and failed to take, ''appropriate mitigation measures,'' which are discussed below. ''Appropriate mitigation measures'' would address the type of damage that the facility sustained.

The new cost share reduction provision of the Stafford Act does not contain a damage threshold amount below which this provision does not apply. However, in situations where eligible facilities sustain less than $1,000 in damages during a major disaster, the damage is not eligible for FEMA assistance. See 44 CFR 206.202(d)(2). Therefore, FEMA would not consider the event that resulted in damage in an amount less than $1,000 as an ''event'' for the purposes of implementation of the new statutory provision. Similarly, under the proposed rule if an eligible applicant elects to pay 100 percent of the costs to repair a particular facility and those costs would otherwise have been eligible for FEMA assistance, FEMA would not count the disaster as an ''event'' with regard to that particular facility.

E. Determining Amount of Cost Share Reduction

This proposed rule also describes how FEMA proposes to calculate the cost share reduction. FEMA must define how it will ''reduce the Federal share of assistance under this section to not less than 25 percent'' of eligible costs for facilities that have been damaged repetitively and whose owners have not implemented appropriate hazard mitigation measures. Rather than imposing a cost share reduction on a gradual basis, the proposed rule imposes a cost share reduction to 25 percent of eligible costs immediately upon the occurrence of the third event.

FEMA drafted the proposed rule to effect a direct reduction in cost share from no less than 75 percent to 25 percent; i.e., FEMA would not make any variable cost share between 75 and 25 percent. FEMA reasoned that this is consistent with the Congressional desire that this type of concern be addressed aggressively and independent of FEMA's other hazard mitigation authorities. FEMA concluded that a ''sliding'' scale would subject FEMA to routine cost share negotiations and appeals whenever a facility met the repetitive loss criteria, and that the development of lengthy criteria to detail exactly how and when the sliding reduction would occur, as well as a resulting complex rule that would be difficult to implement consistently, would place undue administrative burdens on disaster assistance applicants and on FEMA. FEMA also considered a stepped cost share reduction, e.g., 75 percent ⇒50 percent ⇒25 percent, but concluded that this option would not result in mitigation against future losses as quickly as going directly to a 25 percent reduction immediately upon the third event. FEMA notes that Congress set 25 percent as the most stringent reduction and thus FEMA concludes that going directly to that percentage reduction is the most effective means to meet the objective of the statute, absent use of a sliding scale or stepped cost share reduction. Therefore, this proposed rule implements the 25 percent reduction immediately upon the third event.

F. Definition of Appropriate Mitigation Measures

In drafting this proposed rule, FEMA also considered the definition of the statutory language ''appropriate mitigation measures'' for the purpose of implementing the amendment to section 406 of the Stafford Act, (42 U.S.C. 5172(b)(2)). Sections 203, 322, 404, and 406 of the Stafford Act and their implementing regulations such as 44 CFR 201.2, 206.2, 206.111, 206.117, and 206.431 currently reference ''hazard mitigation measures,'' ''eligible hazard mitigation measures,'' ''hazard mitigation measures that are cost effective,'' and ''hazard mitigation criteria required by the President.'' However, the new provision of the Stafford Act, 42 U.S.C. 5172(b)(2), contains the first reference within the Stafford Act to ''appropriate mitigation measures'' and there is no legislative history that clarifies the meaning of this new statutory language.

In the proposed rule FEMA has defined ''appropriate mitigation measures'' using the same definition as ''hazard mitigation'' which is defined in 44 CFR 206.2(a)(14). Section 206.2(a)(14) defines ''hazard mitigation'' as: ''Any cost effective measure which will reduce the potential for damage to a facility from a disaster event.'' FEMA's policy to determine cost-effectiveness under the Public Assistance program includes mitigation measures that amount up to 15 percent of the total eligible cost of the eligible repair work on a particular project, certain mitigation measures that FEMA has pre-determined cost-effective, and an acceptable benefit/cost analysis methodology. See FEMA Public Assistance Guide FEMA 322 (June 2007), Disaster Assistance Policy 9526.1, ''Hazard Mitigation Funding Under Section 406 (Stafford Act)'' (available at: *http://www.fema.gov/government/grant/pa/9526_1.shtm*). The eligibility of hazard mitigation for Public Assistance applicants is further addressed in 44 CFR 206.226. In approving grant assistance for restoration of facilities, FEMA may require cost effective hazard mitigation measures not required by applicable standards pursuant to 44 CFR 206.226(e). Defining ''appropriate mitigation measures'' with the same criteria as ''hazard mitigation'' ensures a more consistent evaluation for determining required mitigation.

The applicant would have to perform the appropriate mitigation measure on the damaged component of the facility. The appropriate mitigation should be for the type of damage sustained (wind,

water, etc.). For example, if a roof was damaged by wind, FEMA may require mitigation against wind damage to the roof rather than requiring mitigation against fire or water damage to the roof.

FEMA examined several options for determining appropriate mitigation measures for a facility. FEMA considered linking an ''appropriate mitigation measure'' to compliance with current, local building codes applicable to certain hazards, such as earthquakes. However, such a definition would not be adequate for all hazards, such as floods, affecting all disaster-prone communities in the United States.

FEMA also considered defining ''appropriate mitigation measures'' in terms of probabilities, *e.g.,* measures designed to reduce the likelihood of damage from the flood event with a 1-percent annual chance of occurrence. However, one general probabilistic-based design may not work for all hazard scenarios. FEMA deemed this approach problematic for a number of reasons. First, these probabilistic design standards may have conflicted with local codes and design standards. Second, in some cases these probabilistic-based designs may have exacerbated the hazard that they were intended to mitigate. For example, culverts for storm drainage which handle intermittent flows are, in most cases, designed to handle significantly less than the 1-percent annual chance of a storm event; sizing them to handle the 1-percent flood flow would tend to increase downstream flood flows and increase costs and environmental impacts. Third, a probabilistic-based design standard for ''appropriate mitigation measures'' could result in inconsistencies with the State, Local and Indian Tribal Mitigation Plans required by section 322 of the Stafford Act, as well as inconsistencies in application because such a probabilistic design would require FEMA to approve the mitigation measures on a case-by-case basis.

Under section 322 of the Stafford Act and 44 CFR 201.4 and 201.7, a State or Indian Tribal government acting as a Grantee must have, at a minimum, a FEMA approved Standard State or Tribal Mitigation Plan in effect to receive certain types of non-emergency assistance under the Stafford Act. Under section 322 of the Stafford Act and 44 CFR 201.4, a local or Indian Tribal government must have an approved local or Indian Tribal plan in effect to receive assistance under the Hazard Mitigation Grant Program (HMGP). Since FEMA believes that it is important for its hazard mitigation programs to complement one another, FEMA proposes to require that any appropriate mitigation measure for an eligible facility be consistent with the State Mitigation Plan or Tribal Mitigation Plan, if the Indian Tribal government is the Grantee, as described at 44 CFR 201.4 through 44 CFR 201.6.

State Mitigation Plans provide general mitigation planning guidelines for mitigation measures throughout the State, while Local and/or Indian Tribal Mitigation Plans provide more specific criterion for appropriate mitigation measures for a facility. FEMA was concerned that, in the absence of a Local and/or Indian Tribal Mitigation Plan for a designated area, the State Mitigation Plan would not provide sufficient guidance regarding appropriate mitigation measures for a facility. FEMA considered requiring revision to, or creation of, a Local and/or Indian Tribal Mitigation Plan should a specific appropriate mitigation measure not be specified for a facility; however, the time required to do so could cause unacceptable delays in providing appropriate mitigation to the facility. Further, State Mitigation Plans as described under 44 CFR 201.4 already require the State to coordinate mitigation measures with Local or Tribal Mitigation Plans, where they exist.

G. Identifying Repetitively Damaged Facilities

To implement the proposed requirements in this rulemaking, FEMA needs to collect repetitive loss information. FEMA would track the history of the provision of disaster assistance following Presidentially-declared major disasters by applicant and facility through the use of its National Emergency Management Information System (NEMIS)/ Emergency Management Mission Integrated Environment (EMMIE) computer program and database in which all PW's are stored. FEMA would use the latitude and longitude documented on the PW and entered into NEMIS/EMMIE for the damaged facility to track repetitively damaged facilities. Tracking and recording this information in NEMIS/EMMIE would assist FEMA in correctly and consistently interpreting the requirements in this proposed rule, and if the Federal cost share is reduced it would serve as essential documentation for resolving appeals that may follow.

III. Regulatory Analysis

A. National Environmental Policy Act (NEPA)

The National Environmental Policy Act of 1969 (NEPA), Public Law 91–190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*), as amended, requires that agencies consider environmental impacts in their decision-making. Specifically, NEPA requires agencies to prepare an Environmental Impact Statement (EIS) for ''major federal actions significantly affecting the quality of the human environment.'' If an action may or may not have a significant impact, the agency must prepare an Environmental Assessment (EA). If, as a result of this study, the agency makes a Finding of No Significant Impact (FONSI), no further action is necessary. If the action will have a significant effect, the agency uses the EA to develop an EIS.

Pursuant to 44 CFR 10.8(c)(2), action taken or assistance provided under sections 402, 403, 407, or 502 of the Stafford Act and action taken or assistance provided under section 406 of the Stafford Act that has the effect of restoring facilities substantially as they existed before a major disaster or emergency are statutorily excluded from NEPA and the preparation of environmental impact statements and environmental assessments by section 316 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as amended, 42 U.S.C. 5159. Also, 44 CFR 10.8(d)(2)(xix) excludes hazard mitigation activities under the Stafford Act, and 44 CFR 10.8(d)(2)(ii) excludes the preparation, revision and adoption of regulations from the preparation of an EA or EIS where the rule relates to actions that qualify for categorical exclusions, FEMA has determined that this proposed rule is categorically excluded from the preparation of an EA or an EIS. Further, the changes proposed by this rule are administrative changes to the Public Assistance program that would have no effect on the environment. *See* 44 CFR 10.8(d)(1).

B. Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (PRA) Public Law 104–33 (44 U.S.C. 3501 *et seq.*), as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. This rulemaking involves the reduction in Federal assistance for public or private nonprofit facilities repetitively damaged by the same type of disaster when the

owner has failed to take appropriate mitigation measures. To identify repetitively damaged facilities, FEMA must be able to track damaged facilities.

In order to accurately record damaged facilities and, therefore, track repetitively damaged facilities, FEMA would use the latitude and longitude for the damaged facility. FEMA already collects the latitude and longitude of facilities on the PW and enters the latitude and longitude into NEMIS/EMMIE. The PW instructions currently require the latitude and longitude for all damaged facilities. The PW instructions fall under OMB Collection No. 1660–0017 ''Project Worksheets and Continuation Forms'' which expires December 31, 2011. There would be no additional burden to the approved collection as a result of the changes proposed in this rule.

C. Executive Order 12866, Regulatory Planning and Review

FEMA has prepared and reviewed this rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, a significant regulatory action is subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one 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.

This proposed rule does not meet the criteria under paragraph 2, 3, or 4 of the provision of the Executive Order. In addition, FEMA determined that it is not likely to have a significant economic impact of $100 million or more per year (under paragraph 1 of this provision). This proposed rule has not been reviewed by OMB.

As authorized by DMA 2000, this proposed rule would reduce the Federal cost share to 25 percent for eligible Public Assistance cost to repair, restore, reconstruct or replace an eligible public facility or private nonprofit facility that has been damaged twice within the preceding 10 years by the same type of event and the owner of the facility has not implemented appropriate mitigation measures before the third event of the same type. The proposed rule would not affect the Public Assistance eligibility requirements. Further, the proposed rule would only affect public facilities and eligible private nonprofit facilities. It would not affect grants made under the Individual Assistance program.

The statutory mandate imposed upon FEMA required the agency to reduce the Federal share to ''not less than 25 percent'' of eligible costs, and did not specifically mandate that FEMA establish the 25 percent rate chosen in this rule. Rather than imposing a cost share reduction on a gradual basis, the proposed rule imposes a cost share reduction to 25 percent of eligible costs immediately upon the occurrence of the third event. Developing objective criteria for an incremental cost share reduction from 75 percent to 25 percent (perhaps with a median reduction at 50 percent) would likely result in a complex rule that FEMA could not implement consistently without placing additional administrative burdens on disaster assistance applicants, as well as an undue burden on FEMA to develop and administer such a rule. Therefore, this proposed rule would implement the full 25 percent reduction immediately upon the third event.

FEMA cannot predict with certainty the future number of major disasters that will affect the nation in a given year or the number of facilities that will be repetitively damaged from those disasters. However, between January 1, 1998, and January 1, 2008, there was an average of 54 major disaster declarations made per year. Out of the approximately 88,060 Public Assistance applicants in the past 10 years, FEMA identified 1,756 of those applicants that suffered similar damage within the same damage category at least twice in that time period. These applicants would have, if this proposed rule had been in effect, undertaken mitigation efforts or risk a reduced cost share percentage should a disaster of the same type damage their facility a third time within 10 years of the first of those two disasters. This figure only amounts to 2 percent of all Public Assistance applicants. The total eligible cost for these 1,756 Public Assistance applicants was $1.32 billion (in 2008 dollars)[2] over the past 10 years, which amounts to approximately $132 million per year.

Under section 406 of the Stafford Act, 42 U.S.C. 5172(b)(1), the Federal share could not be less than 75 percent of eligible costs. Under the terms of this proposed rule which would implement the new paragraph 42 U.S.C. 5172(b)(2), if applicants failed to implement appropriate mitigation measures for these repetitively damaged facilities, the percentage of the Federal share would be reduced to 25 percent. Taking a conservative estimate and assuming that all 1,756 applicants failed to implement appropriate mitigation measures, the cost implication would be as follows: 75 percent of the eligible costs of $132 million is $99 million and 25 percent of $132 million is $33 million, so the potential reduction in Federal assistance would be approximately $66 million annually based on an analysis of the period January 1, 1998 through January 1, 2008.

Under the proposed rule, to be eligible for the full Federal cost share an applicant must implement required hazard mitigation measures prior to the third event of the same type. The required hazard mitigation will vary from facility to facility. However, typical mitigation measures include, but are not limited to, the relocation out of hazardous locations, slope stabilization, protection from high winds (shutters, hurricane clips, anchors), flood proofing of buildings (elevation, use of flood-resistant materials), flood protection of bridges and culverts (use clear spans instead of multiple spans, riprap), protecting against seismic changes (bracing, anchoring), and the protection of utilities (anchoring, use of disaster-resistant materials, elevation). In general, appropriate mitigation measures should be cost-effective.

The cost to mitigate these facilities may be eligible for the HMGP, so States, local and/or Tribal governments and some private nonprofit entities may be able to seek Federal funds to offset the cost of mitigation efforts. Although this proposed regulation would not affect the HMGP, additional information regarding the program may be found in FEMA's regulations in 44 CFR parts 78, 201, and 206 and at *http://www.fema.gov/government/grant/hmgp/index.shtm.*

This proposed rule could potentially have an impact of approximately $66 million per year. As a benefit, this reduced Federal cost share would provide an incentive to mitigate repetitive damage. Mitigation focuses on breaking the cycle of disaster damage, reconstruction, and repeated damage. Mitigation efforts provide value to the

[2] Data were adjusted for inflation based on Consumer Price Index (CPI) published by the Bureau of Labor Statistics (BLS).

American people by creating safer communities and reducing loss of life and property, enabling communities to recover more rapidly from disasters, and lessening the financial impact of disasters on individuals, the Treasury, State, local and Tribal communities.

D. Executive Order 13132, Federalism

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States and, to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has reviewed the proposed rule under Executive Order 13132 and has concluded that the proposed rule, which implements statutory requirements, does not have federalism implications as defined by Executive Order 13132. FEMA has determined that the rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion. This rulemaking amends a voluntary grant program that may be used by State, local and Tribal governments and eligible private nonprofit organizations to receive Federal grants to assist in the recovery from disasters. States are not required to seek grant funding, and this rulemaking does not limit their policymaking discretion. In addition, FEMA actively encourages and solicits comments on this proposed rule from interested parties.

E. Executive Order 12898, Environmental Justice

Under Executive Order 12898, as amended ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, Feb. 16, 1994), FEMA has undertaken to incorporate environmental justice into its policies and programs. Executive Order 12898 requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination because of their race, color, or national origin or income level.

The purpose of this rule is to reduce the Federal cost share for repetitively damaged facilities where the owner of the facility has not implemented appropriate mitigation measures. This reduced Federal cost share would provide an incentive to mitigate future damage. Mitigation focuses on breaking the cycle of repeated disaster damage. Mitigation efforts provide value to the American people by creating safer communities and reducing loss of life and property, enables communities to recover more rapidly from disasters, and lessens the financial impact of disasters on individuals, the United States Department of the Treasury, State, local and Tribal communities.

No action that FEMA can anticipate under the proposed rule will have a disproportionately high and adverse human health or environmental effect on any segment of the population. In accordance with Congressional mandates, the proposed rule implements the Federal cost share reduction for repetitively damaged facilities. Accordingly, the requirements of Executive Order 12898 do not apply to this proposed rule.

F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

FEMA has reviewed this proposed rule under Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, Nov. 9, 2000). Under Executive Order 13175, FEMA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute. In reviewing the proposed rule, FEMA finds that because Indian Tribal governments are potentially eligible applicants under the Public Assistance program, the proposed rule does have ''tribal implications'' as defined in the Executive Order. The implications of the proposed rule, however, 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. The proposed rule does not impose substantial direct compliance costs on Indian Tribal governments nor does it preempt tribal law, impair treaty rights nor limit the self-governing powers of Indian Tribal governments.

Furthermore, this regulatory change is required by statute. This proposed regulation would implement an amendment to 42 U.S.C. 5172(b), which mandates a reduction in the percentage of Federal funding provided after a public or private nonprofit facility has been damaged more than once within the preceding 10 years by the same type of event and the owner of the facility has not implemented appropriate mitigation measures before the third event of the same type.

G. Regulatory Flexibility Act Statement

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) and section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 847, 858–9 (March 29, 1996) (5 U.S.C. 601 note)), agencies must consider the impact of their rulemakings on ''small entities'' (small businesses, small organizations and local governments). The RFA applies to any proposed rulemaking subject to notice and comment under section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553). The RFA requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules.

FEMA used 2000 U.S. Census Bureau data to identify actual Public Assistance applicants that under the RFA could be considered small entities. FEMA identified 920 Public Assistance applicants with populations of 50,000 or less that suffered similar damage within the same damage category twice over the past 10 years. Therefore, these 920 Public Assistance applicants could be considered small entities under the RFA and could potentially meet the definition of repetitively damaged facilities if their facility is damaged a third time within that 10-year period. Out of the 920 Public Assistance applicants that are considered small entities, 914 are small governmental jurisdictions and 6 are private nonprofit (PNP) organizations. These 920 small entities amount to approximately 52 percent of the total 1,756 applicants that suffered similar damage at least twice over the past 10 years.

Assuming that all 920 Public Assistance applicants failed to implement required hazard mitigation and suffered damage a third time, so that they meet the definition of a repetitively damaged facility, this would only amount to one percent of all Public Assistance applicants. The total eligible cost was $429.32 million (in 2008

dollars)[3] for these 920 applicants over the past 10 years. This equals an annual average of approximately $42.93 million.

Under the terms of this proposed rule, if applicants failed to implement required hazard mitigation for these repetitively damaged facilities, FEMA would reduce the percentage of the Federal cost share to 25 percent. Under section 406 of the Stafford Act, 42 U.S.C. 5172(b)(1), the Federal share could not be less than 75 percent of eligible costs. Since 75 percent of $42.93 million is $32.20 million and 25 percent of $42.93 million is $10.73 million, the potential reduction would be $21.47 million in Federal assistance each year. As a result, the average impact to these 920 applicants is $23,337 per year (= 21,470,000/920).

FEMA measured the annual impact of this rule on each of these 914 small governmental jurisdictions[4] based on the estimated reduction in Federal assistance and annual revenues. Annual revenues for these 914 small governmental jurisdictions were estimated from the per capita revenue for local governments by State.[5] For example, the total revenue for all local governments in Alabama in 2005–06 was $18.41 billion (in 2008 dollars) and the population is 4.66 million, resulting in the per capita revenue of $3,951. Therefore, annual revenue for a small governmental jurisdiction in Alabama with a population size of 500 is estimated approximately at $1.98 million (= $3,951 × 500). FEMA compared the estimated reduction in Federal assistance with the estimated annual revenue for each of these 914 small governmental jurisdictions. Out of these 914 small governmental jurisdictions, only 19 (or 2 percent) are expected to have an impact higher than 1 percent of their annual revenues. Consequently, FEMA certifies that there is no significant economic impact on a substantial number of small entities.

H. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48 (March 22, 1995) (2 U.S.C. 1501 *et seq.*), requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency 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 one year. UMRA exempts from its definition of ''Federal intergovernmental mandate'' regulations that establish conditions of Federal assistance or provide for emergency assistance or relief at the request of any State, local, or Tribal government. Therefore, this proposed rule is not an unfunded Federal mandate under that Act.

I. Executive Order 12988, Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, Feb. 7, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

J. Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights

FEMA has reviewed this rule under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' (53 FR 8859, Mar. 18, 1988) as supplemented by Executive Order 13406, ''Protecting the Property Rights of the American People'' (71 FR 36973, June 28, 2006). This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

K. Congressional Review of Agency Rulemaking

FEMA will send this rule to Congress and to the Government Accountability Office under the Congressional Review of Agency Rulemaking Act (Congressional Review Act), Public Law 104–121, 110 Stat. 873 (March 29, 1996) (5 U.S.C. 804) before it is effective. This proposed rule is not a ''major rule'' within the meaning of the Congressional Review Act. This rulemaking would not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, nor would it have ''significant adverse effects'' on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.

List of Subjects in 44 CFR Part 206

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs—housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs—housing and community development, Natural resources, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Federal Emergency Management Agency proposes to amend 44 CFR part 206 as follows:

1. The authority citation of Part 206 is revised to read as follows:

Authority: 42 U.S.C. 5121 through 5207; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; 6 U.S.C. 101; EO 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

In § 206.226, add a new paragraph (l) to read as follows:

§ 206.226 Restoration of damaged facilities.

* * * * *

(l) *Repetitively damaged facilities.* A repetitively damaged facility is an eligible facility that has suffered damage from the same type of event for which Public Assistance has been approved twice within the past 10 years. If appropriate mitigation measures, required pursuant to paragraph (e) of this section, have not been made to the facility before a third event of the same type, the Federal share of eligible repair costs is 25 percent.

(1) ''Appropriate mitigation measures'' has the same meaning as ''hazard mitigation'' which is defined in § 206.2(a)(14). The appropriate mitigation measures for the facility must be consistent with the mitigation strategy identified in the State Mitigation Plan described in § 201.4 of this chapter, or the Tribal Mitigation Plan, if the Indian Tribal government is the Grantee as described in § 201.7 of this chapter.

(2) The 25 percent Federal cost share will not be applied to a facility that is damaged before the deadline to complete approved mitigation work in accordance with § 206.204(c) and (d).

(3) ''Same type of event'' means the same major disaster type, including but not limited to hurricane, tornado, flood, or earthquake.

(4) Damage to an eligible facility will not be counted as a repetitive damage ''event'' for that particular facility if the eligible applicant elects to pay 100 percent of the costs to repair the facility, or the facility sustains less than $1,000 in damage from the disaster event.

(5) Events will be counted toward repetitive status after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF

[3] Data were adjusted for inflation based on the Consumer Price Index (CPI) published by the Bureau of Labor Statistics (BLS).

[4] The 6 PNP organizations were not included as their annual revenues cannot be estimated.

[5] U.S. Census Bureau (2009), State and Local Government Finance, *http://ftp2.census.gov/govs/estimate/06slsstab1a.xls.*

THE FINAL RULE IN THE **FEDERAL REGISTER**].

Dated: August 4, 2009.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9–19156 Filed 8–10–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 12, 39, and 52

[FAR Case 2008–019; Docket 2009–0018; Sequence 2]

RIN 9000–AL11

Federal Acquisition Regulation; FAR Case 2008–019, Authentic Information Technology Products

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Advanced Notice of Proposed Rulemaking; notice of public meeting.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are hosting a public meeting to continue a dialogue with industry and Government agencies about ways to develop greater assurance around information technology (IT) products acquired by the Government. The public meeting will include dialogues on the impact of counterfeit IT products on matters of performance and security; contractor liability and consequential damages; the competition aspects of procuring IT products from the original manufacturer or authorized distributors; viable means of representing authenticity of IT products; and contractor supply chain risk management requirements as an evaluation factor in the procurement of IT products.

DATES: August 13, 2009, 9 a.m. to 2 p.m. EST.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for public meeting address.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR case 2008–019.

SUPPLEMENTARY INFORMATION:

A. Public Meeting Address

The meeting will be held at the General Services Administration (GSA), 1800 F Street, NW, Washington, DC 20405. The meeting will be held in the GSA Auditorium.

Interested parties are encouraged to arrive at least 30 minutes early to accommodate security procedures.

If you wish to make a presentation on any of the topics, please contact and submit a copy of your presentation prior to the meeting, to the General Services Administration, Contract Policy Division (VPC), 1800 F Street, NW, Room 4040, Attn: Ernest Woodson, Washington, DC 20405. Telephone: 202–501–3775.

Submit electronic materials via e-mail to *ernest.woodson@gsa.gov*. Please submit presentations only and cite Public Meeting IT Products Continued Dialogue in all correspondence related to the public meeting. The submitted presentations will be the only record of the public meeting.

Call-in Information: Parties interested in participating by phone may dial (877) 924–8049, passcode 5363978. Interested parties calling in will not be allowed to present or participate in the question and answer session during a public meeting. Phone lines have been reserved for the first 100 callers.

Special Accommodations: The public meeting is physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Ernest Woodson, at 202–501–3775, at least 2–working days prior to the meeting date.

B. Background

On December 11, 2008, the Councils conducted a public meeting (see **Federal Register** notice at 73 FR 68373–68375 on November 18, 2008) to seek comments from both Government and industry, on among other things, whether the Federal Acquisition Regulation (FAR) should be revised to include a requirement that contractors selling IT products (including computer hardware and software) represent that such products are authentic. The Councils were interested in comments regarding contractor liability if IT products sold to the Government by contractor are not authentic, and whether contractors who are resellers or distributors of computer hardware and software should represent to the Government that they are authorized by the original equipment manufacturer (OEM) to sell IT products to the Government. The comment period closed January 20, 2009.

While comments received will be considered in the preparation of a proposed rule, the public meeting contemplated by this notice and those conducted June 23, July 15 and 22, 2009 (see **Federal Register** notice at 74 FR 26646–26647 on June 3, 2009), will continue a dialogue with industry and Government agencies on the impact of counterfeit IT products on matters of performance and security; contractor liability and consequential damages; the competition aspects of procuring IT products from the original or authorized distributors; viable means of representing authenticity of IT products; and contractor supply chain risk management requirements as an evaluation factor in the procurement of IT products.

The public meeting is intended to provide for an exchange of information and ideas that may be used to assist in developing greater assurance around information technology products acquired by the Government. While the focus of this notice is IT products, public meeting comments/presentations are invited on (1) whether the measures proposed herein should be expanded to include other items sold to the Government, such as Electrical, Electronic, and Electromechanical parts; (2) whether the rule should apply when IT is a component of a system or assembled product; and (3) whether vendors, distributors, and manufacturers of IT products and other items sold to the Government should be prequalified based on specific standards of testing, quality, traceability, integrity, and etc., before they are allowed to sell to the Government.

The Councils are particularly interested in hearing how industry participants can maintain the integrity of the supply chain while providing Government customers with a variety of cost effective and reliable sources. Previous meetings initiated discussion of how various trade associations and other representative groups could propose to police member organizations or provide some auditable certification or declaration program that provides Government customers with uniform, reasonable assurance that purchased products and subcomponents are not counterfeit.

List of Subjects in 48 CFR Parts 2, 4, 12, 39, and 52

Government procurement.

Date: August 5, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–19171 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2009–0041] [MO–922105 0083–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Jemez Mountains Salamander (*Plethodon neomexicanus*) as Threatened or Endangered With Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90–day petition finding and initiation of a status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90–day finding on a petition to list the Jemez Mountains salamander (*Plethodon neomexicanus*) (salamander) as threatened or endangered and designate critical habitat under the Endangered Species Act of 1973, as amended. Following a review of the petition, we find that the petition provides substantial scientific or commercial information indicating that listing the Jemez Mountains salamander may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the species to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data and other information regarding this species. At the conclusion of this review, we will issue a 12–month finding to determine if the petitioned action is warranted. We will make a determination on critical habitat for this species if we initiate a listing action.

DATES: We made the finding announced in this document on August 11, 2009. To allow us adequate time to conduct this review, we request that we receive information on or before October 13, 2009.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Search for docket FWS–R2–ES–2009–0041 and then follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS–R2–ES–2009–0041; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Wally ''J'' Murphy, Field Supervisor, New Mexico Ecological Services Office, 2105 Osuna NE, Albuquerque, NM 87113, by telephone (505–346–2525) or by facsimile (505–346–2542). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the status of the Jemez Mountains salamander. We request information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the salamander. We are seeking information regarding:

(1) The historical and current status and distribution of the Jemez Mountains salamander, its biology and ecology, and ongoing conservation measures for the species and its habitat;

(2) The species' population size and population trend;

(3) Its taxonomy; and

(4) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence and threats to the species or its habitat.

In this finding, we have identified gaps in the information provided in the petition to help to focus the public on areas where we would like relevant data submitted. If we determine that listing the Jemez Mountains salamander is warranted, we intend to propose critical habitat to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, with regard to areas within the geographical range currently occupied by the salamander, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the species that are essential to the conservation of the species. Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of the Act.

We will base our 12–month finding on a review of the best scientific and commercial information available, including all information received during this public comment period. Please note that submissions merely stating support for or opposition to the action under consideration, without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' Based on the status review, we will issue a 12–month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this finding by one of the methods listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot

guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90–day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that the petition presented substantial information, we are required to promptly commence a review of the status of the species.

On October 15, 2008, we received a petition dated October 9, 2008, from WildEarth Guardians requesting that the Jemez Mountains salamander be listed as threatened or endangered under the Act, and critical habitat be designated. The petition clearly identified itself as such, and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). In a November 26, 2008, letter to the petitioner, we responded that we had reviewed the petition and determined that an emergency listing was not necessary. We also stated that, to the maximum extent practicable, we would address their petition within 90 days.

Previous Federal Actions

We initially considered the Jemez Mountains salamander for listing under the Act in the early 1980s (GAO August 1993, p. 30). In December 1982, we published a notice of review classifying the salamander as a Category 2 species (47 FR 58454, December 30, 1982). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule. On February 21, 1990, we received a petition to list the salamander as threatened. Subsequently, we published a positive 90–day finding, indicating that the petition contained sufficient information to suggest that listing may be warranted (55 FR 38342, September 18, 1990). In the candidate notice of review (CNOR) published on November 21, 1991, we announced the salamander as a Category 1 species with a ''declining'' status (56 FR 58814). Category 1 status included those species for which the Service had on file substantial information regarding the species' biological vulnerability and threat(s) to support proposals to list them as endangered or threatened species. The ''declining'' status indicated decreasing numbers and/or increasing threats.

On May 30, 1991, the Service, the USDA Forest Service (Forest Service), and the New Mexico Department of Game and Fish (NMDGF) signed a Memorandum of Agreement (MOA) outlining actions to be taken to protect the salamander and its habitat on Forest Service lands, including the formation of a team of agency biologists to immediately implement the MOA and to develop a management plan for the species. The management plan was to be incorporated into the Santa Fe National Forest Plan. On April 3, 1992, we published a 12–month finding that listing the salamander was not warranted because of the conservation measures and commitments within the MOA (59 FR 11469). In the November 15, 1994, CNOR, we included the salamander as a Category 2 species, with a trend status of ''improving'' (59 FR 58982). A status of ''improving'' indicated those species known to be increasing in numbers and/or whose threats to their continued existence were lessening in the wild.

In the CNOR published on February 28, 1996, we announced a revised list of animal and plant taxa that were regarded as candidates for possible addition to the Lists of Endangered and Threatened Wildlife and Plants (61 FR 7596). The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list in order to reduce confusion about the conservation status of these species, and to clarify that the Service no longer regarded these species as candidates for listing. Because the salamander was a Category 2 species, it was no longer recognized as a candidate species as of the February 28, 1996, CNOR.

In January 2000, the New Mexico Endemic Salamander Team (NMEST), a group of interagency biologists representing NMDGF, the Service, the U.S. Geological Survey, and the Forest Service, finalized a Cooperative Management Plan for the salamander on lands administered by the Forest Service (Management Plan), and the agencies signed an updated Conservation Agreement that superseded the MOA. The stated purpose of the Conservation Agreement and the Management Plan was to provide for the long-term conservation of salamanders by reducing or removing threats to the species and by proactively managing their habitat (NMEST 2000 Conservation Agreement, p. 1).

In a Decision Notice and Finding of No Significant Impact for the Forest Plan Amendment for Managing Special Status Species Habitat, signed on December 8, 2004, the Management Plan was incorporated into the Santa Fe National Forest Plan.

Species Information

The Jemez Mountains salamander is a member of the family of lungless salamanders (Plethodontidae), the largest family of salamanders. The salamander is uniformly dark brown above, with occasional fine gold/brassy stippling dorsally (on the back and sides) and is sooty gray ventrally (underside). The body form is slender and elongate. The salamander possesses foot webbing and a reduced fifth toe. The salamander was originally reported as *Spelerpes multiplicatus* (=*Eurycea multiplicata*) in 1913 (Degenhardt *et al.* 1996, p. 27); however, it was described as a new and distinct species (*Plethodon neomexicanus*) in 1950 (Stebbins and Riemer, pp. 73-80).

Two species of plethodontid salamanders occur in New Mexico: The Jemez Mountains salamander and the Sacramento Mountains salamander (*Aneides hardii*). Molecular studies on plethodontid salamanders in North America indicate that western species of the genus *Plethodon* (the woodland salamanders) may be more closely related to species of the genus *Aneides* (the climbing salamanders) than to eastern species of *Plethodon* (Larson *et al.*, 1981, p. 419; Mahoney 2001, p. 174). The relationship of the Jemez

Mountains salamander to other western plethodontids is not completely understood, but the salamander is considered basal (the earliest grouping that branches to larger groupings of relative relatedness) (Mahoney 2001, p. 184). No subspecies of the salamander are recognized.

The Jemez Mountains salamander is strictly terrestrial, does not possess lungs, and does not require standing surface water for any life stage. Respiration occurs through the skin and requires a moist microclimate for gas exchange. Reproduction in the wild remains unobserved, but it is presumed that the salamander lays eggs in spaces underground. Fully-formed salamanders hatch from the eggs. Based on examination of 57 female salamanders, Williams (1978, p. 475) concluded that females likely lay 7 or 8 eggs every other year, either in mid-August or, more likely, the spring after mating occurs in late July and August. Sexual maturity is reached at 3 to 4 years in females and 3 years in males (Degenhardt *et al.* 1996, p. 28).

The salamander occurs in the Jemez Mountains in northern New Mexico in Los Alamos, Rio Arriba, and Sandoval Counties. The species predominantly occurs in mixed-conifer forest at an elevation between 2,200 and 2,900 meters (7,220 and 9,510 feet), consisting mainly of Douglas fir (*Pseudotsuga menziesii*), blue spruce (*Picea pungens*), Engelman spruce (*Picea engelmannii*), white fir (*Abies concolor*), limber pine (*Pinus flexilis*), and aspen (*Populus tremuloides*) (Degenhardt *et al.* 1996, p. 28), but occasionally can be found in Ponderosa pine (*Pinus ponderosa*) stands. The microhabitat is characterized by deep, igneous, subsurface rock with high soil moisture (NMEST 2000, p. 2). The salamander spends much of its life underground, and can be found at the surface when conditions are warm and wet, which is typically July through September, but the period may extend from May through October depending on conditions. When surface-active, the species is usually found under rocks, bark, logs, moss mats, or inside decomposing logs. The species is restricted to the moist habitats of the Jemez Mountains.

A feeding habits study for the Jemez Mountains salamander was conducted by NMDGF in 1992. Salamander prey items were diverse in size and type; however, there were three categories of prey that were recognized as more important than the remaining groups: ants, mites, and beetles (Cummer 2005, p. 43). Cummer (2005, pp. 45–50) stated that prey specialization on any particular species of invertebrate was unlikely in the salamander; however, she did observe that selection of food appeared to not be random.

Although the petitioner believes that the number of salamanders likely exceeds 10,000, we are not aware of any current information from which a population estimate can be made. The petitioner's population estimate was derived from survey efforts conducted from 1967 through 2003; however, the petitioner acknowledges, and we agree, that these surveys are potentially unreliable because salamander observations are dependent on multiple factors, such as environmental conditions (e.g., temperature or moisture), detection probabilities, and time when the observations were made. Because of these variables, it is difficult to determine population size or trends. Based upon the information presented in the petition and in our files, we believe that a comprehensive assessment of all of the survey and population information is needed.

Five-Factor Evaluation

Section 4 of the Act (16 U.S.C. 1533), and implementing regulations at 50 CFR 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90–day finding, we evaluated whether information regarding threats to the salamander, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

Information Provided in the Petition

The petitioner asserts that the Jemez Mountains salamander or its habitat is threatened by the following conditions or actions: habitat loss and fragmentation, climate change, stand-replacing fires, fire suppression and rehabilitation, salvage logging, slash removal, forest thinning treatment projects, use and construction of roads and dams, chemical use, trail construction, and mining. We will address climate change and chemical use under Factor E.

The petitioner contends that the main threat and cause of Jemez Mountains salamander habitat loss is extensive, stand-replacing fires (severe fires in which most mature trees are destroyed). The petitioner reports on land area burned during the Dome (1996), Cerro Grande (2000), and BMG/Lakes (2002) wildfires. Information in our files indicates that these stand-replacing fires overlapped with salamander habitat; however the petition did not contain, nor we do have, a complete analysis of the extent or degree of salamander habitat that burned. The NMEST (2000, p. 9) stated that, ''the greatest threat to this species is thought to be the potential for extensive stand-replacing fires.'' The petitioner contends that there were negative effects to the salamander and its habitat from the Cerro Grande Fire, such as removal of canopy cover and increased soil temperatures (WildEarth Guardians 2008, pp. 23–24). Cummer and Painter (2007, p. 26) reported significant changes in microhabitat temperatures following the Cerro Grande Fire. The petitioner asserts that impacts on the salamander and its habitat from other stand-replacing wildfires (e.g. Dome Fire, BMG/Lakes Fires) was likely the same as effects from the Cerro Grande fire. We agree; however, we are not aware of an analysis that estimates the amount of salamander habitat affected by other wildfires. Finally, our files indicate that future stand-replacing wildfires in salamander habitat remain a threat.

The petitioner also claims that the effects of fire suppression and rehabilitation activities following wildfire threaten the Jemez Mountains salamander. For example, the petitioner indicates that, during the Cerro Grande Fire, suppression activities included the construction of 26 kilometers (km) (16 miles (mi)) of hand line (hand-dug trenches 1.5 to 3 meters (m) (5 to 10 feet (ft)) wide from which all combustible material was removed), 63 km (39 mi) of bulldozer line (larger fire breaks with vegetation removed by bulldozing), and safety zones; release of 514,000 liters (135,800 gallons) of fire retardant; and 53 km (32 mi) of road improvement resulting in vegetation removal within 30 m (100 ft) of either side of the roads (WildEarth Guardians 2008, p. 26). However, while information in our files

indicates that some of these activities occurred in salamander habitat and corroborate some of the claims of the petitioner on fire suppression and rehabilitation, the petitioner does not provide, nor are we aware of, a complete assessment of the extent of these activities in salamander habitat. Please note that chemical use resulting from fire suppression activities is addressed separately in Factor E.

The petitioner describes how historical grazing and fire suppression have contributed to changes in forest structure and composition in the Jemez Mountains. Scientific literature (e.g., Allen 1989; Touchan *et al.* 1996) supports this conclusion; however, we are not aware of an assessment of how such changes may affect the salamander or its habitat.

The petitioner believes that salvage logging after wildfire and associated thinning with removal of snags and slash in Jemez Mountains salamander habitat has had negative impacts to salamanders and their habitat. Logging can interrupt the development of salamander habitat by removing the requisite habitat components of canopy cover and dead and downed logs, while increasing temperature, erosion, runoff, and soil compaction (NMEST 2000, p. 5). Additionally, if these activities occur when salamanders are surface active, salvage logging could result in direct injury or mortality to individuals. The petitioner identifies that salvage logging and forest thinning have been proposed within salamander habitat, but we have no estimate on the amount of salamander habitat that has been impacted by these activities. Nevertheless, we found substantial information indicating that the Forest Service has conducted, and will likely continue to conduct, salvage logging in salamander habitat.

The petitioner asserts that habitat alteration due to road and trail building in salamander habitat has deleterious effects to the Jemez Mountains salamander and its habitat. The petitioner believes that construction of roads and trails fragments habitat, and high vehicular traffic or heavy equipment could cause excessive vibration resulting in settling of the subsurface rock and elimination of the underground spaces, presumed necessary as subterranean habitat. The petitioner provides information on the length of roads that were re-opened during and subsequent to wildfire. These roads likely affected the salamander and its habitat through vegetation removal, soil compaction, and the elimination of subsurface spaces. Roads are known to fragment terrestrial salamander habitat and act as partial barriers to movement (deMaynadier and Hunter 2000, p. 56; Marsh *et al.* 2005, p. 2004). Moreover, roads can reduce the quality of adjacent habitat by increasing light and wind penetration, exposure to pollutants, and the spread of invasive species (Marsh *et al.* 2005, pp. 2004–2005). Although the petitioner does not quantify the amount of salamander habitat impacted by roads, information in our files supports the claim that roads may have led, and may continue to contribute in the future, to the degradation of salamander habitat.

The petitioner asserts that the improvement and realignment of New Mexico State Highway 126 (also called Forest Highway 12) has threatened, and will continue to threaten, the Jemez Mountains salamander. Information concerning the project provided by the petitioner was found to be reliable. For example, our files indicate that portions of the Highway 126 project resulted in the removal of salamander habitat as well as the destruction of individual salamanders and fragmentation of a relatively isolated population of salamanders.

The petitioner also notes that construction and maintenance of log skidder trails, while not likely to be as destructive as road construction and maintenance, still has similar effects on the Jemez Mountains salamander. The petitioner believes that trail construction and salvage logging operations are a threat to the salamander. The petitioner correctly indicates that approximately 4 km (2.5 mi) of trail were constructed by bulldozer in occupied salamander habitat.

The petitioner asserts that one of the common techniques used to survey for the presence or absence of the salamander destroys habitat because it involves destructive sampling by rearranging cover objects such as rocks and logs as well as tearing apart decayed logs. We have no information regarding the effects to salamander habitat from survey techniques (NMEST 2000, pp. 27–36); however, we will examine this claim more closely in our status review, and we request any additional information the public may have on this potential threat.

The petitioner asserts that the construction of dams and mining modify Jemez Mountains salamander habitat. Information in our files supports the claim that dams or water retention structures may have been constructed in salamander habitat. Specifically, the petitioner contends that an extension of the El Cajete Mine in the Jemez Mountains affects the salamander. Our files indicate that the Forest Service determined that the mine would not impact the salamander because the project was not located on northerly or moist slopes greater than 35 to 40 percent that support mature or old growth mixed conifer (Forest Service 1995a, pp. 12–13; Forest Service 1995b, p. 2). At the time of the project, steep slopes (greater than 30 percent) were thought to be a critical element of salamander habitat (Ramotnik 1988, p. 50). However, salamanders have been documented in areas of no significant slope (less than 5 percent) (NMDGF 2000, p. 8), and steep slopes are no longer considered a requirement of occupied habitat. Based on this more recent information, this project may have affected the salamander and its habitat, and there is potential for future mining activities to affect the salamander and its habitat. We find that the petition and information in our files indicate that construction of dams and future mining activities may result in adverse modifications to salamander habitat.

Evaluation of Information Provided in the Petition and Available in Service Files

The petitioner provides substantial and reliable information that the salamander and its habitat may be threatened from stand-replacing fires; salvage logging; fire suppression; construction, maintenance, and use of roads and trails; construction of dams; and mining activities. The information presented in the petition is supported by information in our files, and presents substantial information indicating that the petitioned action may be warranted due to the present or threatened destruction, modification, or curtailment of the habitat or range of the salamander.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Information Provided in the Petition

The petitioner asserts that the salamander is threatened by loss of individuals through collection of specimens and surveying. The petition cites a report by the NMEST (2000) that summarizes the history of collection of the species. According to the petition, 977 Jemez Mountains salamanders were collected for scientific purposes from 1910 to 1999. The petitioner cites the report (NMEST 2000) in concluding that such collecting has likely reduced populations in localized areas. The petitioner also cites the report (NMEST

2000) in asserting that a 2 person-hour survey protocol was developed to search for Jemez Mountains salamanders. Following this protocol, likely cover objects (rocks, bark, and decayed logs) are searched for salamanders (NMEST 2000). The petition cites a NMDGF (2000) report in claiming that this technique can destroy habitat and that continual searches in the same habitat have been shown to result in a decrease in salamander populations.

Evaluation of Information Provided in the Petition and Available in Service Files

We find that the petition presents substantial information indicating that the petitioned action may be warranted due to overutilization for scientific purposes.

C. Disease or Predation

Information Provided in the Petition

The petitioner states that disease is affecting the salamander. Information in our files indicates that the amphibian pathogenic fungus, *Batrachochytrium dendrobatidis* (*Bd*), was found in one salamander in 2003 (Cummer *et al.* 2005, p. 248). The individual salamander was collected and sent to the U.S. Geological Survey National Wildlife Health Center in Madison, Wisconsin, for diagnostic analysis. Results from the analysis included a dual infection of *Bd* and a bacterial species (*Cladosporium* spp). The virulence of *Bd* relative to the Jemez Mountains salamander remains unknown. However, because in formation in our files indicates that *Bd* can be highly infectious and lethal in other species of amphibians, we believe there is substantial information that the petitioned action may be warranted due to the threat of disease.

The petitioner provides no information addressing predation. Cummer (2005, p. 30) speculated that predation could increase subsequent to stand-replacing wildfire because of lack of sufficient cover objects while salamanders are surface active; however, we are not aware of any information to support this.

Evaluation of Information Provided in the Petition and Available in Service Files

Because of the presence of Bd in the Jemez Mountains salamander's range and the deleterious effect of *Bd* on other species of amphibians, we believe the threat of disease to the Jemez Mountains salamander may be substantial. On the other hand, neither the information in our files nor that presented by the petitioner is substantial to suggest that predation on the salamander is a significant threat to the species. In summary, we have information in our files indicating that the petitioned action may be warranted due to disease, but not due to predation.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petitioner asserts that the salamander is threatened by inadequacy of existing regulatory mechanisms. The petitioner states that the regulatory mechanisms in place—the 2000 Conservation Agreement, the Management Plan, the Forest Plan and its amendments, and State law—are ineffective and unenforceable. The Management Plan was prepared by NMEST biologists ''to provide guidance for the conservation and management of sufficient habitat to maintain viable populations of the species'' (NMEST 2000, p. i.). Known and potential threats to the species were identified and detailed; management areas based on habitat zones were identified; potential management actions in salamander habitat and their potential impacts were identified; and guidelines were set forth pertaining to certain management actions relative to habitat categories (NMEST 2000, pp. 4–22). The intent of the Conservation Agreement, the Management Plan, and amendment of the Forest Plan was to protect the Jemez Mountains salamander and its habitat on lands administered by the Forest Service. However, the petitioner identifies multiple projects, both on and off Forest Service lands, that were counter to guidelines set forth in the Management Plan and recommendations by the NMEST (WildEarth Guardians 2008, pp. 28–54).

The petitioner provides examples of projects that they claim demonstrate the inadequacy of existing regulatory mechanisms and ongoing threats to the Jemez Mountains salamander and its habitat. Examples provided by the petitioner include actions following the 1996 Dome Fire, the 2000 Cerro Grande Fire, and the 2003 BMG/Lakes Fires; actions relative to the Valles II project (forest thinning and fuel reduction activities in areas adjacent to residential development); the Highway 126 project; dams at Los Alamos National Laboratory; and the El Cajete mine extension (WildEarth Guardians 2008, pp. 28–54). Our files support the claim that the Cooperative Agreement, Management Plan, and Federal or State laws have been ineffective at preventing actions that may threaten the salamander and its habitat.

The petitioner acknowledges that because the Jemez Mountains salamander was uplisted in New Mexico in 2005 from State threatened to endangered (NMDGF 2005, p. 2), it gained the protection of the Wildlife Conservation Act. The Wildlife Conservation Act prohibits direct take of the species except under issuance of a scientific collecting permit. However, this law only conveys protection from collection or intentional harm; no New Mexico State statutes address habitat protection, indirect effects, or other threats to the species identified by the State as endangered. NMDGF has the authority to consider and recommend actions to mitigate potential adverse effects to the salamander during its review of development proposals. The petitioner pointed out that the New Mexico State Game Commission, a part of the NMDGF, received financial reimbursement and provided easements for construction of the Highway 126 project (New Mexico Game Commission, 2006, p. 13). We could not find that any measures were incorporated to limit impacts to the salamander or its habitat (New Mexico Game Commission, 2006, pp. 12–13). Information in our files indicates that the Highway 126 project directly impacted salamanders and destroyed habitat.

Additionally, the petitioner asserts that threats to the species are not addressed on lands where the salamander occurs outside of the Santa Fe National Forest. Populations of salamanders have been observed on Tribal lands, Los Alamos National Laboratory lands, the Valles Caldera National Preserve, and private lands. Information in our files demonstrates that outside of State protection from collection and intentional harm, there are no State or Federal regulations providing specific protections for the salamander or its habitat beyond those populations within the Santa Fe National Forest.

Evaluation of Information Provided in the Petition and Available in Service Files

The information provided by the petitioner was found reliable and was corroborated by information in our files. Consequently, we find that the petition contains substantial information that listing the salamander due to the inadequacy of existing regulatory mechanisms may be warranted.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Information Provided in the Petition

The petitioner asserts that fire suppression, chemical use, and climate change threaten the salamander. Fire suppression is addressed under Factor A. Chemical use in salamander habitat includes fire suppression retardant and insecticides to prevent tree loss. Although information in our files indicates that fire retardant has been used in salamander habitat, it is unknown how much salamander habitat has been affected. Prior to 2006 (71 FR 42798, July 28, 2006) fire retardant used by the Forest Service contained sodium ferrocyanide, which is highly toxic to fish and amphibians (Pilliod *et al.* 2003, p. 175). Because the salamander breathes and carries out physiological functions through its skin, chemicals that are toxic to fish and other amphibians may have had negative effects to the salamander. It is unclear whether the chemicals used in current fire retardants or insecticides affect the salamander. Thus, the information provided by the petition and in our files is not substantial to indicate adverse effects of fire retardant or insecticides on the salamander or its habitat.

The petitioner asserts that climate change is likely an increasing threat to the salamander due to overall habitat drying and the species' requirement of moist microhabitats. In addition, the petitioner states that warmer springs and summers, earlier snowmelt, and increased forest fire severity, frequency, and duration will likely impact the salamander. The petitioner provides citations on climate change (Wildearth Guardians 2008, p. 55) and references Enquist and Gori (2008) to provide information regarding climate change in the Jemez Mountains. Enquist and Gori (2008, p. iii) report the Jemez Mountains as one of three areas in New Mexico that may be most vulnerable to climate change, in part, due to warmer-drier conditions or greater vulnerability in temperature and precipitation. The petitioner contends that the identified threats are exacerbated by the salamander's restricted distribution.

Evaluation of Information Provided in the Petition and Available in Service Files

In general, the information currently available on the effects of climate change does not make sufficiently precise estimates of the location and magnitude of the effects in order to predict impacts to specific wildlife. However, given a specific prediction in scientific literature of warmer and drier conditions for the Jemez Mountains, and that such change would likely have a negative impact on the salamander, which requires moist microclimates, we find that the petitioned action may be warranted due to climate change.

Regarding the potential threat of chemical use, even though fire retardants and insecticides are currently being used, we did not find any substantial information that chemical use is actually affecting the salamander. We will investigate this potential threat further in our status review, and request any additional information the public may have on this potential threat.

We reviewed the petition and readily available supporting information and find that the petition presents substantial information for this factor under the threat of climate change, but not under the threat of chemical use.

Finding

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our process for making this 90–day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents ''substantial scientific and commercial information,'' which is interpreted in our regulations as ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). We have reviewed the petition and the literature cited in the petition, and evaluated the information to determine whether the sources cited support the petitioned actions. We also reviewed reliable information that was readily available in our files to clarify and verify information in the petition. Based on our evaluation of the information provided in the petition, we find that the petition presents substantial scientific or commercial information indicating that listing the Jemez Mountains salamander may be warranted. The petitioner presents substantial information indicating that the salamander may be threatened by Factor A (the present or threatened destruction, modification, or curtailment of its habitat or range), Factor C (disease), Factor D (inadequacy of existing regulatory mechanisms), and Factor E (other natural or manmade factors affecting its continued existence) throughout the entire range of the Jemez Mountains salamander. The petitioner does not present substantial information that Factor B (overutilization for commercial, recreational, scientific, or educational purposes) is currently, or in the future may be, considered a threat to the salamander.

Based on this review and evaluation, we find that the petition has presented substantial scientific or commercial information that listing the salamander throughout all or a portion of its range may be warranted due to current and future threats under Factors A, C, D, and E. Therefore, we are initiating a status review to determine whether listing the Jemez Mountains salamander under the Act is warranted. We will issue a 12–month finding as to whether any of the petitioned actions are warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding the salamander.

The ''substantial information'' standard for a 90–day finding is in contrast to the Act's ''best scientific and commercial data'' standard that applies to a 12–month finding to determine whether a petitioned action is warranted. A 90–day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination of whether a petitioned action is warranted is not made until we have completed a thorough status review of the species, as part of the 12–month finding on a petition, which is conducted following a positive 90–day finding. Because the Act's standards for 90–day and 12–month findings are different, as described above, a positive 90–day finding does not mean that the 12–month finding also will be positive.

We encourage interested parties to continue gathering data that will assist with the conservation and monitoring of the salamander. The petitioner requests that critical habitat be designated for this species. If we determine in our 12–month finding that listing the salamander is warranted, we will address the designation of critical habitat at the time of the proposed rulemaking.

References Cited

A complete list of all references cited in this finding is available upon request from the New Mexico Ecological

Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this rule are the staff members of the New Mexico Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 31, 2009.

James J. Slack,

Acting Deputy Director, Fish and Wildlife Service.

[FR Doc. E9–19024 Filed 8–10– 09; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

[FWS–R9–MB–2008–0124; 91200–1231–9BPP–L2]

RIN 1018–AW31

Migratory Bird Hunting; Proposed Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 2009–10 Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (hereinafter, Service or we) proposes special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2009–10 migratory bird hunting season.

DATES: We will accept all comments on the proposed regulations that are postmarked or received in our office by August 21, 2009.

ADDRESSES: You may submit comments on the proposals by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: 1018–AW31, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (*see* the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Ron W. Kokel, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, (703) 358–1714.

SUPPLEMENTARY INFORMATION: In the April 10, 2009, **Federal Register** (74 FR 16339), we requested proposals from Indian Tribes wishing to establish special migratory bird hunting regulations for the 2009–10 hunting season, under the guidelines described in the June 4, 1985, **Federal Register** (50 FR 23467). In this supplemental proposed rule, we propose special migratory bird hunting regulations for 29 Indian Tribes, based on the input we received in response to the April 10, 2009, proposed rule. As described in that proposed rule, the promulgation of annual migratory bird hunting regulations involves a series of rulemaking actions each year. This proposed rule is part of that series.

We developed the guidelines for establishing special migratory bird hunting regulations for Indian Tribes in response to Tribal requests for recognition of their reserved hunting rights and, for some Tribes, recognition of their authority to regulate hunting by both Tribal and nontribal hunters on their reservations. The guidelines include possibilities for:

(1) On-reservation hunting by both Tribal and nontribal hunters, with hunting by nontribal hunters on some reservations to take place within Federal frameworks but on dates different from those selected by the surrounding State(s);

(2) On-reservation hunting by Tribal members only, outside of the usual Federal frameworks for season dates and length, and for daily bag and possession limits; and

(3) Off-reservation hunting by Tribal members on ceded lands, outside of usual framework dates and season length, with some added flexibility in daily bag and possession limits.

In all cases, the regulations established under the guidelines must be consistent with the March 10 to September 1 closed season mandated by the 1916 Convention between the United States and Great Britain (for Canada) for the Protection of Migratory Birds (Treaty). The guidelines apply to those Tribes having recognized reserved hunting rights on Federal Indian reservations (including off-reservation trust lands) and on ceded lands. They also apply to establishing migratory bird hunting regulations for nontribal hunters on all lands within the exterior boundaries of reservations where Tribes have full wildlife management authority over such hunting or where the Tribes and affected States otherwise have reached agreement over hunting by nontribal hunters on lands owned by non-Indians within the reservation.

Tribes usually have the authority to regulate migratory bird hunting by nonmembers on Indian-owned reservation lands, subject to Service approval. The question of jurisdiction is more complex on reservations that include lands owned by non-Indians, especially when the surrounding States have established or intend to establish regulations governing hunting by non-Indians on these lands. In such cases, we encourage the Tribes and States to reach agreement on regulations that would apply throughout the reservations. When appropriate, we will consult with a Tribe and State with the aim of facilitating an accord. We also will consult jointly with Tribal and State officials in the affected States where Tribes wish to establish special hunting regulations for Tribal members on ceded lands. Because of past questions regarding interpretation of what events trigger the consultation process, as well as who initiates it, we provide the following clarification. We routinely provide copies of **Federal Register** publications pertaining to migratory bird management to all State Directors, Tribes, and other interested parties. It is the responsibility of the States, Tribes, and others to notify us of any concern regarding any feature(s) of any regulations. When we receive such notification, we will initiate consultation.

Our guidelines provide for the continued harvest of waterfowl and other migratory game birds by Tribal members on reservations where such harvest has been a customary practice. We do not oppose this harvest, provided it does not take place during the closed season defined by the Treaty, and does not adversely affect the status of the migratory bird resource. Before developing the guidelines, we reviewed available information on the current status of migratory bird populations, reviewed the current status of migratory bird hunting on Federal Indian reservations, and evaluated the potential impact of such guidelines on migratory birds. We concluded that the impact of migratory bird harvest by Tribal members hunting on their reservations is minimal.

One area of interest in Indian migratory bird hunting regulations relates to hunting seasons for nontribal hunters on dates that are within Federal frameworks, but which are different from those established by the State(s)

where the reservation is located. A large influx of nontribal hunters onto a reservation at a time when the season is closed in the surrounding State(s) could result in adverse population impacts on one or more migratory bird species. The guidelines make this unlikely, however, because Tribal proposals must include: (a) Harvest anticipated under the requested regulations; (b) methods that will be employed to measure or monitor harvest (such as bag checks, mail questionnaires, *etc.*); (c) steps that will be taken to limit level of harvest, where it could be shown that failure to limit such harvest would adversely impact the migratory bird resource; and (d) Tribal capabilities to establish and enforce migratory bird hunting regulations. We may modify regulations or establish experimental special hunts, after evaluation and confirmation of harvest information obtained by the Tribes.

We believe the guidelines provide appropriate opportunity to accommodate the reserved hunting rights and management authority of Indian Tribes while ensuring that the migratory bird resource receives necessary protection. The conservation of this important international resource is paramount. The guidelines should not be viewed as inflexible. In this regard, we note that they have been employed successfully since 1985. We believe they have been tested adequately and, therefore, we made them final beginning with the 1988–89 hunting season. We should stress here, however, that use of the guidelines is not mandatory and no action is required if a Tribe wishes to observe the hunting regulations established by the State(s) in which the reservation is located.

Service Migratory Bird Regulations Committee Meetings

Participants at the June 24–25, 2009, meetings reviewed information on the current status of migratory shore and upland game birds and developed 2009–10 migratory game bird regulation recommendations for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the U.S. Virgin Islands; special September waterfowl seasons in designated States; special sea duck seasons in the Atlantic Flyway; and extended falconry seasons. In addition, we reviewed and discussed preliminary information on the status of waterfowl. Participants at the previously announced July 29–30, 2009, meetings reviewed information on the current status of waterfowl and developed recommendations for the 2009–10 regulations pertaining to regular waterfowl seasons and other species and seasons not previously discussed at the early-season meetings. In accordance with Department of the Interior policy, these meetings were open to public observation and you may submit comments to the Service as discussed in the Public Comments section below.

Population Status and Harvest

The following paragraphs provide preliminary information on the status of waterfowl and information on the status and harvest of migratory shore and upland game birds excerpted from various reports. For more detailed information on methodologies and results, you may obtain complete copies of the various reports at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our Web site at *http://www.fws.gov/migratorybirds/NewsPublicationsReports.html*.

Waterfowl Breeding and Habitat Survey

Federal, provincial, and State agencies conduct surveys each spring to estimate the size of breeding populations and to evaluate the conditions of the habitats. These surveys are conducted using fixed-wing aircraft, helicopters, and ground crews and encompass principal breeding areas of North America, covering an area over 2.0 million square miles. The traditional survey area comprises Alaska, Canada, and the northcentral United States, and includes approximately 1.3 million square miles. The eastern survey area includes parts of Ontario, Quebec, Labrador, Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, New York, and Maine, an area of approximately 0.7 million square miles.

Overall, habitat conditions were characterized as near normal for most of the traditional survey area during the 2009 Waterfowl Breeding Population and Habitat Survey, with greatly improved wetlands conditions in portions of the prairies. Adequate moisture and good habitat conditions characterized much of the eastern survey area. The northernmost survey areas in both the traditional and eastern survey areas experienced an extremely late spring.

Traditional Survey Area (U.S. and Canadian Prairies)

Major improvements in wetlands conditions occurred across much of the traditional survey area in 2009. The prairie pothole region of southern Manitoba, most of the Dakotas and eastern Montana benefitted primarily from above average fall and winter precipitation. These areas were classified as good to excellent, with mostly fair habitat conditions confined to west-central Montana and southeastern South Dakota. Above average precipitation improved wetlands conditions in the southern grasslands of Saskatchewan but the habitats along the Alberta and Saskatchewan border are suffering under drought conditions.

The parklands continued to receive below normal precipitation in 2009. Fortunately, habitat conditions remain classified as fair to good because of the holdover water that resulted during the extremely wet year in 2007.

Bush (Alaska, Northern Manitoba, Northern Saskatchewan, Northwest Territories, Yukon Territory, Western Ontario)

In the boreal forest, spring breakup was extremely late over most of the survey area in 2009. Most large lakes remained frozen into early June. Many smaller wetland habitats, such as beaver ponds, were open during the survey and those in northern Alberta and into the Northwest Territories were rated as good. Habitat conditions were drier across northern Saskatchewan and Manitoba but improved nearer to Hudson Bay. The majority of Alaska was rated as good.

Eastern Survey Area

From Maine through most of the Maritimes, an above average snowfall was experienced and average spring temperatures were recorded, resulting in fully charged wetlands with little flooding, which is in contrast to flooding in 2008. Despite below average snowfall and winter temperatures for Newfoundland and Labrador, habitat conditions are rated as fair to excellent, with poorer conditions found at higher elevation habitat. Through New York and much of Quebec and Ontario, generally good to excellent waterfowl habitat exists but a series of major storms during mid-May in southwest Ontario could hamper production because of flooding. The Nickel and Clay belts of east-central Ontario and points farther west were supporting good habitat at the time of the survey following average winter and spring precipitation. Good habitat conditions remained moving farther north but deteriorated approaching the James and Hudson Bay lowlands due to deep snows and a very late spring, while lowland habitats on the Quebec side were much drier than normal.

Status of Teal

The estimate of blue-winged teal numbers from the Traditional Survey Area is 7.4 million. This represents an

11.0 percent increase from 2008 and is 60 percent above the 1955–2008 average.

Sandhill Cranes

Compared to increases recorded in the 1970s, annual indices to abundance of the Mid-Continent Population (MCP) of sandhill cranes have been relatively stable since the early 1980s. The Central Platte River Valley, Nebraska, spring index for 2009, uncorrected for visibility bias, was 460,000 sandhill cranes. The photo-corrected, 3-year average for 2006–08 was 382,271, which is within the established population-objective range of 349,000–472,000 cranes.

All Central Flyway States, except Nebraska, allowed crane hunting in portions of their States during 2008–09. An estimated 10,293 hunters participated in these seasons, which was similar to the number that participated in the previous season. Hunters harvested a record-high 22,989 MCP cranes in the U.S. portion of the Central Flyway during the 2008–09 seasons, which was 24 percent higher than the estimated harvest for the previous year. The retrieved harvest of MCP cranes in hunt areas outside of the Central Flyway (Arizona, Pacific Flyway portion of New Mexico, Alaska, Canada, and Mexico combined) was 15,024 during 2008–09. The preliminary estimate for the North American MCP sport harvest, including crippling losses, was 42,536 birds, which was a record high and is 7 percent higher than the previous year's estimate. The long-term (1982–2004) trends for the MCP indicate that harvest has been increasing at a higher rate than population growth.

The fall 2008 pre-migration survey for the Rocky Mountain Population (RMP) resulted in a count of 21,156 cranes. The 3-year average for 2005, 2007, and 2008 (no survey was conducted in 2006) was 21,614 sandhill cranes, which is above the established population objective of 17,000–21,000 for the RMP. Hunting seasons during 2008–09 in portions of Arizona, Idaho, Montana, New Mexico, Utah, and Wyoming resulted in a record-high harvest of 936 RMP cranes, a 14 percent increase from the harvest of 820 in 2007–08. The Lower Colorado River Valley Population (LCRVP) survey results indicate an increase from 1,900 birds in 1998 to 2,401 birds in 2009. The 3-year average of 2,981 LCRVP cranes is based on counts from 2006, 2007 and 2009 (survey was not complete in 2008) and is above the population objective of 2,500.

Woodcock

Singing-ground and Wing-collection Surveys were conducted to assess the population status of the American woodcock (*Scolopax minor*). The Singing-ground Survey is intended to measure long-term changes in woodcock population levels. Singing-ground Survey data for 2009 indicate that the number of displaying woodcock in the Eastern and Central Management Regions was unchanged from 2008. There was no significant 10-year trend in woodcock heard in both management regions during 1999–2009. This represents the sixth consecutive year that the 10-year trend estimate for the Eastern Region did not indicate a significant decline. The 10-year trend in the Central Region returned to stability after showing a significant decline last year. There were long-term (1968–2009) declines of 1.1 percent per year in both management regions.

Wing-collection Survey data indicate that the 2008 recruitment index for the U.S. portion of the Eastern Region (1.8 immatures per adult female) was 11 percent higher than the 2007 index, and 8 percent higher than the long-term average. The recruitment index for the U.S. portion of the Central Region (1.6 immatures per adult female) was 6 percent higher than the 2007 index and 1 percent below the long-term average.

Band-tailed Pigeons and Doves

Information on the abundance and harvest of band-tailed pigeons is collected annually in the western United States and British Columbia. Annual counts of Interior band-tailed pigeons seen and heard per route have not changed significantly since implementation of the Breeding Bird Survey (BBS) in 1966; however, they decreased significantly over the last 10 years. The 2008 harvest was estimated to be 4,700 birds. For Pacific Coast band-tailed pigeons, annual BBS counts of birds seen and heard per route have not changed significantly since 1966, but they have increased significantly over the last 10 years. According to the Pacific Coast Mineral Site Survey, annual counts of Pacific Coast band-tailed pigeons seen at each mineral site have increased significantly since the survey was experimentally implemented in 2001, but counts over the last 5 years appear stable. The 2008 estimate of harvest was 30,200 birds.

The status report summarizes information on the abundance and harvest of mourning doves collected annually in the United States. The focus is on results from the Mourning Dove Call-count Survey, but also includes results from the BBS and Migratory Bird Harvest Information Program. According to the Call-count survey, over the most recent 10 years (2000–09), there was no significant trend in doves heard for either the Eastern or Western Management Units while the Central Unit declined significantly. Over the 44-year period (1966–2009), there was no significant change in doves heard for the Eastern Unit while the Central and Western Units declined significantly. Based on the mean number of doves seen per route, however, there was no significant change for any of the three Management Units during the recent 10-year period. Over 44 years, there was no change in doves seen for the Eastern and Central Units while the Western Unit declined significantly. The preliminary 2008 harvest estimate for the United States was 17,402,400 doves. A banding program is underway to obtain current information in order to develop mourning dove population models for each Management Unit to provide guidance for improving our decision-making process with respect to harvest management.

The two key States with a white-winged dove population are Arizona and Texas. California and New Mexico have much smaller populations.

The Arizona Game and Fish Department (AGFD) has monitored white-winged dove populations by means of a call-count survey to provide an annual index to population size. It runs concurrently with the Service's Mourning Dove Call-count Survey. The index peaked at 52.3 mean number doves heard per route in 1968, but fell precipitously in the late 1970s. The index has stabilized to around 25 doves per route in the last few years; in 2009, the mean number of doves heard per route was 27.9. AGFD also monitors harvest. Harvest during the 15-day season (September 1–15) peaked in the late 1960s at approximately 740,000 birds (1968 AGFD estimate) and has since stabilized at around 100,000 birds; the preliminary 2008 Migratory Bird Harvest Information Program (HIP) estimate of harvest was 95,300 birds. In 2007, AGFD redesigned their dove harvest survey to sample only from hunters registered under HIP so that results from the AGFD survey would be comparable to those from HIP. The preliminary 2008 Arizona harvest estimate was 79,488.

In Texas, white-winged doves continue to expand their breeding range. Nesting by whitewings has been recorded in most counties, except for the northeastern part of the State. Nesting is essentially confined to urban areas, but appears to be expanding to exurban areas. Concomitant with this range expansion has been a continuing increase in whitewing abundance. A new DISTANCE sampling protocol was

implemented for central and south Texas for 2007, and expanded in 2008 so that coverage is almost Statewide. Once fully implemented, biologists should have the ability to obtain a good estimate of white-winged dove abundance in Texas. While 2008 and 2009 data are not available at this time, 2007 surveys indicated an estimated abundance throughout surveyed areas (representing about 20 percent of the State) of about 2,300,000 whitewings. Total Statewide harvest has averaged about 2 million birds annually.

The Texas Parks and Wildlife Department is working to improve management of white-winged doves in Texas in the following ways: (1) Expanding current surveys of spring populations to encompass areas throughout the State that now have breeding populations; (2) Completing the Tamaulipas-Texas White-winged Dove Strategic Plan so that there are consistent and comparable harvest management strategies, surveys, research, and data collection across the breeding range of the species; (3) Expanding operational banding in 2009 that was begun in 2007 to derive estimates of survival and harvest rates; (4) Implementing a wing-collection survey for recruitment rates in lieu of the feeding flight and production surveys; (5) Estimating probability of detection for more accurate estimates of breeding populations within urban environments; and (6) Evaluating and estimating reproductive success in urban areas to better estimate population increases.

In California, BBS data (although imprecise due to a small sample size) indicate that there has been a significant increase in the population between 1968 and 2008. According to HIP surveys, the preliminary harvest estimate for 2008 was 83,300. In New Mexico, BBS data (very imprecise due to a small sample size) also showed a significant increase over the long term. In 2008, the estimated harvest was 49,100.

White-tipped doves are believed to be maintaining a relatively stable population in the Lower Rio Grande Valley (LRGV) of Texas. DISTANCE sampling procedures in the LRGV include whitetips. However, until the sampling frame includes rural Rio Grande corridor habitats, not many whitetips will be reported. Sampling frame issues are expected to be resolved by next year. However, annual white-tipped dove harvest during the special season is only averaging 3,000–4,000 birds.

Hunting Season Proposals From Indian Tribes and Organizations

For the 2009–10 hunting season, we received requests from 29 Tribes and Indian organizations. We actively solicit regulatory proposals from other Tribal groups that are interested in working cooperatively for the benefit of waterfowl and other migratory game birds. We encourage Tribes to work with us to develop agreements for management of migratory bird resources on Tribal lands.

It should be noted that this proposed rule includes generalized regulations for both early- and late-season hunting. A final rule will be published in a late-August 2009 **Federal Register** that will include Tribal regulations for the early-hunting season. Early seasons generally begin around September 1 each year and most commonly include such species as American woodcock, sandhill cranes, mourning doves, and white-winged doves. Late seasons generally begin on or around September 24 and most commonly include waterfowl species.

In this current rulemaking, because of the compressed timeframe for establishing regulations for Indian Tribes and because final framework dates and other specific information are not available, the regulations for many Tribal hunting seasons are described in relation to the season dates, season length, and limits that will be permitted when final Federal frameworks are announced for early- and late-season regulations. For example, daily bag and possession limits for ducks on some areas are shown as the same as permitted in Pacific Flyway States under final Federal frameworks, and limits for geese will be shown as the same permitted by the State(s) in which the Tribal hunting area is located.

The proposed frameworks for early-season regulations were published in the **Federal Register** on July 24, 2009 (74 FR 43290); early-season final frameworks will be published in late August. Proposed late-season frameworks for waterfowl and coots will be published in mid-August, and the final frameworks for the late seasons will be published in mid-September. We will notify affected Tribes of season dates, bag limits, *etc.,* as soon as final frameworks are established. As previously discussed, no action is required by Tribes wishing to observe migratory bird hunting regulations established by the State(s) where they are located. The proposed regulations for the 29 Tribes that have submitted proposals that meet the established criteria are shown below.

(a) Colorado River Indian Tribes, Colorado River Indian Reservation, Parker, Arizona (Tribal Members and Nontribal Hunters)

The Colorado River Indian Reservation is located in Arizona and California. The Tribes own almost all lands on the reservation, and have full wildlife management authority.

In their 2009–10 proposal, the Colorado River Indian Tribes requested split dove seasons. They propose that their early season begin September 1 and end September 15, 2009. Daily bag limits would be 10 mourning or white-winged doves in the aggregate. The late season for doves is proposed to open November 14, 2009, and close December 28, 2009. The daily bag limit would be 10 mourning doves. The possession limit would be twice the daily bag limit after the first day of the season. Shooting hours would be from one-half hour before sunrise to noon in the early season and until sunset in the late season. Other special *Tribally* set regulations would apply.

The Tribes also propose duck hunting seasons. The season would open October 10, 2009, and run until January 24, 2010. The Tribes propose the same season dates for mergansers, coots, and common moorhens. The daily bag limit for ducks, including mergansers, would be seven, except that the daily bag limits could contain no more than two hen mallards, two redheads, two Mexican ducks, two goldeneye, three scaup, one pintail, and two cinnamon teal. The season on canvasback is closed. The possession limit would be twice the daily bag limit after the first day of the season. The daily bag and possession limit for coots and common moorhens would be 25, singly or in the aggregate.

For geese, the Colorado River Indian Tribes propose a season of October 17, 2009, through January 24, 2010. The daily bag limit for geese would be three light geese and three dark geese. The possession limit would be six light geese and six dark geese after opening day.

In 1996, the Tribes conducted a detailed assessment of dove hunting. Results showed approximately 16,100 mourning doves and 13,600 white-winged doves were harvested by approximately 2,660 hunters who averaged 1.45 hunter-days. Field observations and permit sales indicate that fewer than 200 hunters participate in waterfowl seasons. Under the proposed regulations described here and, based upon past seasons, we and the Tribes estimate harvest will be similar.

Hunters must have a valid Colorado River Indian Reservation hunting permit and a Federal Migratory Bird Stamp in their possession while hunting. Other special *Tribally* set regulations would apply. As in the past, the regulations would apply both to Tribal and nontribal hunters, and nontoxic shot is required for waterfowl hunting.

We propose to approve the Colorado River Indian Tribes regulations for the 2009–10 hunting season, given the seasons dates fall within final flyway frameworks (applies to nontribal hunters only).

(b) Confederated Salish and Kootenai Tribes, Flathead Indian Reservation, Pablo, Montana (Tribal and Nontribal Hunters)

For the past several years, the Confederated Salish and Kootenai Tribes and the State of Montana have entered into cooperative agreements for the regulation of hunting on the Flathead Indian Reservation. The State and the Tribes are currently operating under a cooperative agreement signed in 1990 that addresses fishing and hunting management and regulation issues of mutual concern. This agreement enables all hunters to utilize waterfowl hunting opportunities on the reservation.

As in the past, Tribal regulations for nontribal hunters would be at least as restrictive as those established for the Pacific Flyway portion of Montana. Goose season dates would also be at least as restrictive as those established for the Pacific Flyway portion of Montana. Shooting hours for waterfowl hunting on the Flathead Reservation are sunrise to sunset. Steel shot or other Federally approved nontoxic shots are the only legal shotgun loads on the reservation for waterfowl or other game birds.

For Tribal members, the Tribe proposes outside frameworks for ducks and geese of September 1, 2009, through March 9, 2010. Daily bag and possession limits were not proposed for Tribal members.

The requested season dates and bag limits are similar to past regulations. Harvest levels are not expected to change significantly. Standardized check station data from the 1993–94 and 1994–95 hunting seasons indicated no significant changes in harvest levels and that the large majority of the harvest is by nontribal hunters.

We propose to approve the Tribes' request for special migratory bird regulations for the 2009–10 hunting season.

(c) Fond du Lac Band of Lake Superior Chippewa Indians, Cloquet, Minnesota (Tribal Members Only)

Since 1996, the Service and the Fond du Lac Band of Lake Superior Chippewa Indians have cooperated to establish special migratory bird hunting regulations for Tribal members. The Fond du Lac's May 19, 2009, proposal covers land set apart for the band under the Treaties of 1837 and 1854 in northeast and east-central Minnesota.

The band's proposal for 2009–10 is essentially the same as that approved last year except the Tribe has separate regulations for the 1854 and 1837 ceded territories and reservation lands. The proposed 2009–10 waterfowl hunting season regulations for Fond du Lac are as follows:

Ducks

A. 1854 and 1837 Ceded Territories

Season Dates: Begin September 19 and end November 29, 2009.

Daily Bag Limit: 18 ducks, including no more than 12 mallards (only 3 of which may be hens), 3 black ducks, 6 scaup, 6 wood ducks, 6 redheads, 3 pintails, and 3 canvasbacks.

B. Reservation

Season Dates: Begin September 5 and end November 29, 2009.

Daily Bag Limit: 12 ducks, including no more than 8 mallards (only 2 of which may be hens), 2 black ducks, 4 scaup, 4 redheads, 2 pintails, 4 wood ducks, and 2 canvasbacks.

Mergansers

A. 1854 and 1837 Ceded Territories

Season Dates: Begin September 19 and end November 29, 2009.

Daily Bag Limit: 15 mergansers, including no more than 6 hooded mergansers.

B. Reservation

Season Dates: Begin September 5 and end November 29, 2009.

Daily Bag Limit: 10 mergansers, including no more than 4 hooded mergansers.

Canada Geese

All Areas

Season Dates: Begin September 1 and end November 29, 2009.

Daily Bag Limit: 20 geese.

Coots and Common Moorhens (Common Gallinules)

A. 1854 and 1837 Ceded Territories

Season Dates: Begin September 19 and end November 29, 2009.

Daily Bag Limit: 20 coots and common moorhens, singly or in the aggregate.

B. Reservation

Season Dates: Begin September 5 and end November 29, 2009.

Daily Bag Limit: 20 coots and common moorhens, singly or in the aggregate.

Sora and Virginia Rails

A. 1854 and 1837 Ceded Territories

Season Dates: Begin September 1 and end November 29, 2009.

Daily Bag Limit: 25 sora and Virginia rails, singly or in the aggregate.

B. Reservation

Season Dates: Begin September 1 and end December 2, 2009.

Daily Bag Limit: 25 sora and Virginia rails, singly or in the aggregate.

Common Snipe

All Areas

Season Dates: Begin September 1 and end November 29, 2009.

Daily Bag Limit: Eight common snipe.

Woodcock

All Areas

Season Dates: Begin September 1 and end November 29, 2009.

Daily Bag Limit: Three woodcock.

Mourning Dove

All Areas

Season Dates: Begin September 1 and end October 30, 2009.

Daily Bag Limit: 30 mourning dove.

The following general conditions apply:

1. While hunting waterfowl, a Tribal member must carry on his/her person a valid Ceded Territory License.

2. Shooting hours for migratory birds are one-half hour before sunrise to one-half hour after sunset.

3. Except as otherwise noted, Tribal members will be required to comply with Tribal codes that will be no less restrictive than the provisions of Chapter 10 of the Model Off-Reservation Code. Except as modified by the Service rules adopted in response to this proposal, these amended regulations parallel Federal requirements in 50 CFR part 20 as to hunting methods, transportation, sale, exportation, and other conditions generally applicable to migratory bird hunting.

4. Band members in each zone will comply with State regulations providing for closed and restricted waterfowl hunting areas.

5. There are no possession limits on any species, unless otherwise noted

above. For purposes of enforcing bag limits, all migratory birds in the possession or custody of band members on ceded lands will be considered to have been taken on those lands unless tagged by a Tribal or State conservation warden as having been taken on-reservation. All migratory birds that fall on reservation lands will not count as part of any off-reservation bag or possession limit.

The band anticipates harvest will be fewer than 500 ducks and geese.

We propose to approve the request for special migratory bird hunting regulations for the Fond du Lac Band of Lake Superior Chippewa Indians.

(d) Grand Traverse Band of Ottawa and Chippewa Indians, Suttons Bay, Michigan (Tribal Members Only)

In the 1995–96 migratory bird seasons, the Grand Traverse Band of Ottawa and Chippewa Indians and the Service first cooperated to establish special regulations for waterfowl. The Grand Traverse Band is a self-governing, Federally recognized Tribe located on the west arm of Grand Traverse Bay in Leelanau County, Michigan. The Grand Traverse Band is a signatory Tribe of the Treaty of 1836. We have approved special regulations for Tribal members of the 1836 treaty's signatory Tribes on ceded lands in Michigan since the 1986–87 hunting season.

For the 2009–10 season, the Tribe requests that the Tribal member duck season run from September 20, 2009, through January 18, 2010. A daily bag limit of 15 would include no more than 3 pintail, 2 canvasback, 1 hooded merganser, 3 black ducks, 5 wood ducks, 3 redheads, and 7 mallards (only 3 of which may be hens).

For Canada and snow geese, the Tribe proposes a September 1 through November 30, 2009, and a January 1 through February 8, 2010, season. For white-fronted geese and brant, the Tribe proposes a September 20 through November 30, 2009, season. The daily bag limit for Canada and snow geese would be 10 and the daily bag limit for white-fronted geese and including brant would be 5 birds. We further note that based on available data (of major goose migration routes), it is unlikely that any Canada geese from the Southern James Bay Population will be harvested by the Tribe.

For woodcock, the Tribe proposes a September 1 through November 14, 2009, season. The daily bag limit will not exceed five birds. For mourning doves, snipe, and rails, the Tribe proposes a September 1 through November 14, 2009, season. The daily bag limit would be 10 per species.

All other Federal regulations contained in 50 CFR part 20 would apply. The Tribe proposes to monitor harvest closely through game bag checks, patrols, and mail surveys. Harvest surveys from the 2006–07 hunting season indicated that approximately 15 Tribal hunters harvested an estimated 112 ducks and 50 Canada geese.

We propose to approve the Grand Traverse Band of Ottawa and Chippewa Indians requested 2009–10 special migratory bird hunting regulations.

(e) Great Lakes Indian Fish and Wildlife Commission, Odanah, Wisconsin (Tribal Members Only)

Since 1985, various bands of the Lake Superior Tribe of Chippewa Indians have exercised judicially recognized off-reservation hunting rights for migratory birds in Wisconsin. The specific regulations were established by the Service in consultation with the Wisconsin Department of Natural Resources and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC, which represents the various bands). Beginning in 1986, a Tribal season on ceded lands in the western portion of the State's Upper Peninsula was developed in coordination with the Michigan Department of Natural Resources, and we have approved special regulations for Tribal members in both Michigan and Wisconsin since the 1986–87 hunting season. In 1987, the GLIFWC requested, and we approved, special regulations to permit Tribal members to hunt on ceded lands in Minnesota, as well as in Michigan and Wisconsin. The States of Michigan and Wisconsin originally concurred with the regulations, although Wisconsin has raised concerns in the past and Michigan now annually raises objections. Minnesota did not concur with the original regulations, stressing that the State would not recognize Chippewa Indian hunting rights in Minnesota's treaty area until a court with jurisdiction over the State acknowledges and defines the extent of these rights. We acknowledge all of the States' concerns, but point out that the U.S. Government has recognized the Indian hunting rights decided in the *Lac Courte Oreilles* v. *State of Wisconsin (Voigt)* case, and that acceptable hunting regulations have been negotiated successfully in both Michigan and Wisconsin even though the Voigt decision did not specifically address ceded land outside Wisconsin. We believe this is appropriate because the treaties in question cover ceded lands in Michigan (and Minnesota), as well as in Wisconsin.

Consequently, in view of the above, we have approved special regulations since the 1987–88 hunting season on ceded lands in all three States. In fact, this recognition of the principle of reserved treaty rights for band members to hunt and fish was pivotal in our decision to approve a special 1991–92 season for the 1836 ceded area in Michigan.

For 2009, the GLIFWC proposed off-reservation special migratory bird hunting regulations on behalf of the member Tribes of the Voigt Intertribal Task Force of the GLIFWC (for the 1837 and 1842 Treaty areas) and the Bay Mills Indian Community (for the 1836 Treaty area). Member Tribes of the Task Force are: The Bad River Band of the Lake Superior Tribe of Chippewa Indians, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Lac du Flambeau Band of Lake Superior Chippewa Indians, the Red Cliff Band of Lake Superior Chippewa Indians, the St. Croix Chippewa Indians of Wisconsin, the Sokaogon Chippewa Community (Mole Lake Band), all in Wisconsin; the Mille Lacs Band of Chippewa Indians in Minnesota; the Lac Vieux Desert Band of Chippewa Indians and the Keweenaw Bay Indian Community in Michigan.

The GLIFWC 2009 proposal is generally similar to last year's regulations, except that it includes minor season date adjustment to the woodcock season to keep the opening day after Labor Day.

GLIFWC is still completing a waterfowl harvest survey for the 2008 season; however, the Tribe expects harvest would likely remain below 5,000 ducks and 1,000 geese, which is similar to anticipated levels in previous years.

Recent GLIFWC harvest surveys (1996–98, 2001, and 2004) indicate that Tribal off-reservation waterfowl harvest has averaged less than 1,000 ducks and 120 geese annually. In the latest survey year (2004), an estimated 53 hunters took an estimated 421 trips and harvested 645 ducks (1.5 ducks per trip) and 84 geese (0.2 geese per trip). Further, in the last 5 years of harvest surveys, only 1 hunter reported harvesting 20 ducks in a single day. Analysis of hunter survey data over the period in question (1996–2004) indicates a general downward trend in both harvest and hunter participation.

The proposed 2009–10 waterfowl hunting season regulations for GLIFWC are as follows:

Ducks

A. Wisconsin and Minnesota 1837 and 1842 Treaty Areas

Season Dates: Begin September 15 and end December 31, 2009.

Daily Bag Limit: 30 ducks, including no more than 5 black ducks, 5 pintails, and 5 canvasbacks.

B. Michigan 1836 Treaty Area

Season Dates: Begin September 15 and end December 31, 2009.

Daily Bag Limit: 20 ducks, including no more than 5 black ducks, 5 pintails, and 5 canvasbacks.

Mergansers

All Ceded Areas

Season Dates: Begin September 15 and end December 31, 2009.

Daily Bag Limit: 10 mergansers.

Geese

All Ceded Areas

Season Dates: Begin September 1 and end December 31, 2009. In addition, any portion of the ceded territory that is open to State-licensed hunters for goose hunting outside of these dates will also be open concurrently for Tribal members.

Daily Bag Limit: 20 geese in aggregate.

Other Migratory Birds

A. Coots and Common Moorhens (Common Gallinules)

Season Dates: Begin September 15 and end December 31, 2009.

Daily Bag Limit: 20 coots and common moorhens (common gallinules), singly or in the aggregate.

B. Sora and Virginia Rails

Season Dates: Begin September 15 and end December 31, 2009.

Daily Bag Limit: 20, singly or in the aggregate.

C. Common Snipe

Season Dates: Begin September 15 and end December 31, 2009.

Daily Bag Limit: 16 common snipe.

D. Woodcock

Season Dates: Begin September 8 and end December 1, 2009.

Daily Bag Limit: 10 woodcock.

E. Mourning Dove

1837 and 1842 Ceded Territories.

Season Dates: Begin September 1 and end November 9, 2009.

Daily Bag Limit: 15.

General Conditions

A. All Tribal members will be required to obtain a valid Tribal waterfowl hunting permit.

B. Except as otherwise noted, Tribal members will be required to comply with Tribal codes that will be no less restrictive than the model ceded territory conservation codes approved by Federal courts in the *Lac Courte Oreilles* v. *State of Wisconsin (Voigt)* and *Mille Lacs Band* v. *State of Minnesota* cases. Chapter 10 in each of these model codes regulates ceded territory migratory bird hunting. Both versions of Chapter 10 parallel Federal requirements as to hunting methods, transportation, sale, exportation and other conditions generally applicable to migratory bird hunting. They also automatically incorporate by reference the Federal migratory bird regulations adopted in response to this proposal.

C. Particular regulations of note include:

1. Nontoxic shot will be required for all off-reservation waterfowl hunting by Tribal members.

2. Tribal members in each zone will comply with Tribal regulations providing for closed and restricted waterfowl hunting areas. These regulations generally incorporate the same restrictions contained in parallel State regulations.

3. Possession limits for each species are double the daily bag limit, except on the opening day of the season, when the possession limit equals the daily bag limit, unless otherwise noted above. Possession limits are applicable only to transportation and do not include birds that are cleaned, dressed, and at a member's primary residence. For purposes of enforcing bag and possession limits, all migratory birds in the possession and custody of Tribal members on ceded lands will be considered to have been taken on those lands unless tagged by a Tribal or State conservation warden as taken on reservation lands. All migratory birds that fall on reservation lands will not count as part of any off-reservation bag or possession limit.

4. The baiting restrictions included in the respective sections 10.05(2)(h) of the model ceded territory conservation codes will be amended to include language which parallels that in place for nontribal members as published at 64 FR 29799, June 3, 1999.

5. The shell limit restrictions included in the respective sections 10.05(2)(b) of the model ceded territory conservation codes will be removed.

6. Hunting hours shall be from a half hour before sunrise to 15 minutes after sunset.

D. Michigan—Duck Blinds and Decoys. Tribal members hunting in Michigan will comply with Tribal codes that contain provisions parallel to Michigan law regarding duck blinds and decoys.

We propose to approve the GLIFWC regulations for the 2009–10 hunting season.

(f) Jicarilla Apache Tribe, Jicarilla Indian Reservation, Dulce, New Mexico (Tribal Members and Nontribal Hunters)

The Jicarilla Apache Tribe has had special migratory bird hunting regulations for Tribal members and nonmembers since the 1986–87 hunting season. The Tribe owns all lands on the reservation and has recognized full wildlife management authority. In general, the proposed seasons would be more conservative than allowed by the Federal frameworks of last season and by States in the Pacific Flyway.

The Tribe proposed a 2009–10 waterfowl and Canada goose season beginning October 10, 2009, and a closing date of November 30, 2009. Daily bag and possession limits for waterfowl would be the same as Pacific Flyway States. The Tribe proposes a daily bag limit for Canada geese of two. Other regulations specific to the Pacific Flyway guidelines for New Mexico would be in effect.

During the Jicarilla Game and Fish Department's 2008–09 season, estimated duck harvest was 548, which is within the historical harvest range. The species composition in the past has included mainly mallards, gadwall, wigeon, and teal. Northern pintail comprised 2 percent of the total harvest in 2008. The estimated harvest of geese was 12 birds.

The proposed regulations are essentially the same as were established last year. The Tribe anticipates the maximum 2009–10 waterfowl harvest would be around 550–600 ducks and 25–30 geese.

We propose to approve the Tribe's requested 2009–10 hunting seasons.

(g) Kalispel Tribe, Kalispel Reservation, Usk, Washington (Tribal Members and Nontribal Hunters)

The Kalispel Reservation was established by Executive Order in 1914, and currently comprises approximately 4,600 acres. The Tribe owns all Reservation land and has full management authority. The Kalispel Tribe has a fully developed wildlife program with hunting and fishing codes. The Tribe enjoys excellent wildlife management relations with the State. The Tribe and the State have an operational Memorandum of Understanding with emphasis on fisheries but also for wildlife.

The nontribal member seasons described below pertain to a 176-acre waterfowl management unit and 800

acres of reservation land with a guide for waterfowl hunting. The Tribe is utilizing this opportunity to rehabilitate an area that needs protection because of past land use practices, as well as to provide additional waterfowl hunting in the area. Beginning in 1996, the requested regulations also included a proposal for Kalispel-member-only migratory bird hunting on Kalispel-ceded lands within Washington, Montana, and Idaho.

For the 2009–10 migratory bird hunting seasons, the Kalispel Tribe proposed Tribal and nontribal member waterfowl seasons. The Tribe requests that both duck and goose seasons open at the earliest possible date and close on the latest date under Federal frameworks.

For nontribal hunters on reservation, the Tribe requests the seasons open at the earliest possible date and remain open, for the maximum amount of open days. Specifically, the Tribe requests that the season for ducks begin September 18, 2009, and end January 31, 2010. In that period, nontribal hunters would be allowed to hunt approximately 101 days. Hunters should obtain further information on specific hunt days from the Kalispel Tribe.

The Tribe also requests the season for geese run from September 1 to September 13, 2009, and from October 2, 2009, to January 31, 2010. Total number of days should not exceed 107. Nontribal hunters should obtain further information on specific hunt days from the Tribe. Daily bag and possession limits would be the same as those for the State of Washington.

The Tribe reports a 2007–08 nontribal harvest of 55 ducks. Under the proposal, the Tribe expects harvest to be similar to last year and less than 100 geese and 200 ducks.

All other State and Federal regulations contained in 50 CFR part 20, such as use of nontoxic shot and possession of a signed migratory bird hunting stamp, would be required.

For Tribal members on Kalispel-ceded lands, the Kalispel propose season dates consistent with Federal flyway frameworks. Specifically, the Tribe requests outside frameworks for ducks of October 1, 2009, through January 31, 2010, and geese of September 1, 2009, through January 31, 2010. The Tribe requests that both duck and goose seasons open at the earliest possible date and close on the latest date under Federal frameworks. During that period, the Tribe proposes that the season run continuously. Daily bag and possession limits would be concurrent with the Federal rule.

The Tribe reports that there was no Tribal harvest. Under the proposal, the Tribe expects harvest to be less than 200 birds for the season with less than 100 geese. Tribal members would be required to possess a signed Federal migratory bird stamp and a Tribal ceded lands permit.

We propose to approve the regulations requested by the Kalispel Tribe, provided that the nontribal seasons conform to Treaty limitations and final Federal frameworks for the Pacific Flyway.

(h) Klamath Tribe, Chiloquin, Oregon (Tribal Members Only)

The Klamath Tribe currently has no reservation, per se. However, the Klamath Tribe has reserved hunting, fishing, and gathering rights within its former reservation boundary. This area of former reservation, granted to the Klamaths by the Treaty of 1864, is over 1 million acres. Tribal natural resource management authority is derived from the Treaty of 1864, and carried out cooperatively under the judicially enforced Consent Decree of 1981. The parties to this Consent Decree are the Federal Government, the State of Oregon, and the Klamaths. The Klamath Indian Game Commission sets the seasons. The Tribal biological staff and Tribal Regulatory Enforcement Officers monitor Tribal harvest by frequent bag checks and hunter interviews.

For the 2009–10 season, the Tribe requests proposed season dates of October 1, 2009, through January 31, 2010. Daily bag limits would be 9 for ducks, 9 for geese, and 25 for coot, with possession limits twice the daily bag limit. Shooting hours would be one-half hour before sunrise to one-half hour after sunset. Steel shot is required.

Based on the number of birds produced in the Klamath Basin, this year's harvest would be similar to last year's. Information on Tribal harvest suggests that more than 70 percent of the annual goose harvest is local birds produced in the Klamath Basin.

We propose to approve the Klamath Tribe's requested 2009–10 special migratory bird hunting regulations.

(i) Leech Lake Band of Ojibwe, Cass Lake, Minnesota (Tribal Members Only)

The Leech Lake Band of Ojibwe is a Federally recognized Tribe located in Cass Lake, Minnesota. The reservation employs conservation officers to enforce conservation regulations. The Service and the Tribe have cooperatively established migratory bird hunting regulations since 2000.

For the 2009–10 season, the Tribe requests a duck season starting on September 19 and ending December 31, 2009, and a goose season to run from September 1 through December 31, 2009. Daily bag limits for both ducks and geese would be 10. Possession limits would be twice the daily bag limit. Shooting hours are one-half hour before sunrise to one-half hour after sunset.

The annual harvest by Tribal members on the Leech Lake Reservation is estimated at 500–1,000 birds.

We propose to approve the Leech Lake Band of Ojibwe's special migratory bird hunting season.

(j) Little River Band of Ottawa Indians, Manistee, Michigan (Tribal Members Only)

The Little River Band of Ottawa Indians is a self-governing, Federally recognized Tribe located in Manistee, Michigan, and a signatory Tribe of the Treaty of 1836. We have approved special regulations for Tribal members of the 1836 treaty's signatory Tribes on ceded lands in Michigan since the 1986–87 hunting season. Ceded lands are located in Lake, Mason, Manistee, and Wexford Counties. The Band proposes the following regulations to govern the hunting of migratory birds by Tribal members within the 1836 Ceded Territory as well as on the Band's Reservation.

For the 2009–10 season, we assume the Little River Band of Ottawa Indians would propose a duck and merganser season from September 15, 2009, through January 20, 2010. A daily bag limit of 12 ducks would include no more than 2 pintail, 2 canvasback, 3 black duck, 3 wood ducks, 3 redheads, 6 mallards (only 2 of which may be a hen), and 1 hooded merganser. Possession limits would be twice the daily bag limit.

For white-fronted geese, snow geese, and brant, the Tribe usually proposes a September 20 through November 30, 2009, season. Daily bag limits would be five geese.

For Canada geese only, the Tribe usually proposes a September 1, 2009, through February 8, 2010, season with a daily bag limit of five Canada geese. The possession limit would be twice the daily bag limit.

For snipe, woodcock, rails, and mourning doves, the Tribe usually proposes a September 1 to November 14, 2009, season. The daily bag limit would be 10 common snipe, 5 woodcock, 10 rails, and 10 mourning doves. Possession limits for all species would be twice the daily bag limit.

The Tribe monitored harvest through mail surveys. General Conditions were as follows:

A. All Tribal members will be required to obtain a valid Tribal resource card and 2009–10 hunting license.

B. Except as modified by the Service rules adopted in response to this proposal, these amended regulations parallel all Federal regulations contained in 50 CFR part 20.

C. Particular regulations of note include:

(1) Nontoxic shot will be required for all waterfowl hunting by Tribal members.

(2) Tribal members in each zone will comply with Tribal regulations providing for closed and restricted waterfowl hunting areas. These regulations generally incorporate the same restrictions contained in parallel State regulations.

D. Tribal members hunting in Michigan will comply with Tribal codes that contain provisions parallel to Michigan law regarding duck blinds and decoys.

We plan to approve Little River Band of Ottawa Indians' special migratory bird hunting seasons upon receipt of their proposal based on the provisions described above.

(k) The Little Traverse Bay Bands of Odawa Indians, Petoskey, Michigan (Tribal Members Only)

The Little Traverse Bay Bands of Odawa Indians is a self-governing, Federally recognized Tribe located in Petoskey, Michigan, and a signatory Tribe of the Treaty of 1836. We have approved special regulations for Tribal members of the 1836 treaty's signatory Tribes on ceded lands in Michigan since the 1986–87 hunting season.

For the 2009–10 season, the Little Traverse Bay Bands of Odawa Indians propose regulations similar to those of other Tribes in the 1836 treaty area. The Tribal member duck, merganser, coot, and gallinule season would run from September 15, 2009, through December 31, 2009. A daily bag limit of 20 would include no more than 5 pintail, 5 canvasback, 5 hooded merganser, 5 black ducks, 5 wood ducks, and 5 redheads.

For Canada geese, the Tribe proposes a September 1, 2009, through February 8, 2010, season. The daily bag limit for Canada geese would be 20 birds. We further note that based on available data (of major goose migration routes), it is unlikely that any Canada geese from the Southern James Bay Population would be harvested by the Tribe. Possession limits are twice the daily bag limit.

For woodcock, the Tribe proposes a September 1, 2009, to December 1, 2009, season. The daily bag limit will not exceed 10 birds. For snipe the Tribe proposes a September 1 to December 31, 2009, season. The daily bag limit will not exceed 16 birds per species. For mourning doves, the Tribe proposes a September 1 to November 9, 2009, season. The daily bag limit will not exceed 15 birds per species. For Virginia and sora rail, the Tribe proposes a September 1 to December 31, 2009, season. The daily bag limit will not exceed 20 birds per species. For coots and gallinules, the Tribe proposes a September 1 to December 31, 2009, season. The daily bag limit will not exceed 20 birds per species. The possession limit will not exceed two days' bag limit for all birds.

All other Federal regulations contained in 50 CFR part 20 would apply.

The Tribe proposes to monitor harvest closely through game bag checks, patrols, and mail surveys. In particular, the Tribe proposes monitoring the harvest of Southern James Bay Canada geese to assess any impacts of Tribal hunting on the population.

We propose to approve the Little Traverse Bay Bands of Odawa Indians' requested 2009–10 special migratory bird hunting regulations.

(l) Lower Brule Sioux Tribe, Lower Brule Reservation, Lower Brule, South Dakota (Tribal Members and Nontribal Hunters)

The Lower Brule Sioux Tribe first established Tribal migratory bird hunting regulations for the Lower Brule Reservation in 1994. The Lower Brule Reservation is about 214,000 acres in size and is located on and adjacent to the Missouri River, south of Pierre. Land ownership on the reservation is mixed, and until recently, the Lower Brule Tribe had full management authority over fish and wildlife via an MOA with the State of South Dakota. The MOA provided the Tribe jurisdiction over fish and wildlife on reservation lands, including deeded and Corps of Engineers-taken lands. For the 2009–10 season, the two parties have come to an agreement that provides the public a clear understanding of the Lower Brule Sioux Wildlife Department license requirements and hunting season regulations. The Lower Brule Reservation waterfowl season is open to Tribal and nontribal hunters.

For the 2009–10 migratory bird hunting season, the Lower Brule Sioux Tribe proposes a nontribal member duck, merganser, and coot season length of 97 days, or the maximum number of days allowed by Federal frameworks in the High Plains Management Unit for this season. The Tribe proposes a season from October 10, 2009, through January 14, 2010. The daily bag limit would be five birds, including no more than five mallards (only one of which may be a hen), one pintail, two redheads, one canvasback, two wood ducks, two scaup, and one mottled duck. The daily bag limit for mergansers would be five, only one of which could be a hooded merganser. The daily bag limit for coots would be 15. Possession limits would be twice the daily bag limits.

The Tribe's proposed nontribal member Canada goose season would run from October 24, 2009, through February 7, 2010 (107-day season length), with a daily bag limit of three Canada geese. The Tribe's proposed nontribal member white-fronted goose season would run from October 10, 2009, through December 20, 2009, with a daily bag limit of two white-fronted geese. The Tribe's proposed nontribal member light goose season would run from October 10, 2009, through January 10, 2010, and February 26 through March 10, 2010. The light goose daily bag limit would be 20. Possession limits would be twice the daily bag limits.

For Tribal members, the Lower Brule Sioux Tribe proposes a duck, merganser, and coot season from September 19, 2009, through March 10, 2010. The daily bag limit would be five birds, including no more than five mallards (only one of which may be a hen), one pintail, two redheads, one canvasback, two wood ducks, two scaup, and one mottled duck. The daily bag limit for mergansers would be five, only two of which could be hooded mergansers. The daily bag limit for coots would be 15. Possession limits would be twice the daily bag limits.

The Tribe's proposed Canada goose season for Tribal members would run from October 10, 2009, through March 10, 2010, with a daily bag limit of three Canada geese. The Tribe's proposed white-fronted goose Tribal season would run from October 3, 2009, through March 10, 2010, with a daily bag limit of two white-fronted geese. The Tribe's proposed light goose Tribal season would run from October 10, 2009, through March 10, 2010. The light goose daily bag limit would be 20. Possession limits would be twice the daily bag limits.

In the 2007–08 season, hunters harvested an estimated 810 geese and 550 ducks. In the 2007–08 season, duck harvest species composition was primarily mallard (88 percent), gadwall (5 percent), green-winged teal (3 percent), blue-winged teal (1 percent), and wigeon (2 percent).

Goose harvest species composition in 2007–08 at Mni Sho Sho was approximately 96 percent Canada geese,

3 percent snow geese, and 1 percent white-fronted geese. Harvest of geese harvested by other hunters was approximately 97 percent Canada geese and 3 percent snow geese.

The Tribe anticipates a duck harvest similar to those of the previous 3 years and a goose harvest below the target harvest level of 3,000 to 4,000 geese. All basic Federal regulations contained in 50 CFR part 20, including the use of non-toxic shot, Migratory Waterfowl Hunting and Conservation Stamps, *etc.,* would be observed by the Tribe's proposed regulations. In addition, the Lower Brule Sioux Tribe has an official Conservation Code that was established by Tribal Council Resolution in June 1982 and updated in 1996.

We plan to approve the Tribe's requested regulations for the Lower Brule Reservation given the seasons dates fall within final Federal flyway frameworks (applies to nontribal hunters only).

(m) Lower Elwha Klallam Tribe, Port Angeles, Washington (Tribal Members Only)

Since 1996, the Service and the Point No Point Treaty Tribes, of which Lower Elwha was one, have cooperated to establish special regulations for migratory bird hunting. The Tribes are now acting independently and the Lower Elwha Klallam Tribe would like to establish migratory bird hunting regulations for Tribal members for the 2009–10 season. The Tribe has a reservation on the Olympic Peninsula in Washington State and is a successor to the signatories of the Treaty of Point No Point of 1855.

For the 2009–10 season, the Lower Elwha Klallam Tribe requests a duck and coot season from September 19, 2009, to December 31, 2009. The daily bag limit will be seven ducks including no more than two hen mallards, one pintail, one canvasback, and two redheads. The daily bag and possession limit on harlequin duck will be one per season. The coot daily bag limit will be 25. The possession limit will be twice the daily bag limit, except as noted above.

For geese, the Tribe requests a season from September 19, 2009, to December 31, 2009. The daily bag limit will be four, including no more than four light geese. The season on Aleutian Canada geese will be closed.

For brant, the Tribe proposes a season from November 1, 2009, to February 15, 2010, with a daily bag limit of two. The possession limit will be twice the daily bag limit.

For mourning doves, band-tailed pigeon, and snipe, the Tribe requests a season from September 19, 2009, to December 31, 2009, with a daily bag limit of 10, 2, and 8, respectively. The possession limit will be twice the daily bag limit.

All Tribal hunters authorized to hunt migratory birds are required to obtain a Tribal hunting permit from the Lower Elwha Klallam Tribe pursuant to Tribal law. Hunting hours would be from one-half hour before sunrise to sunset. Only steel, tungsten-iron, tungsten-polymer, tungsten-matrix, and tin shot are allowed for hunting waterfowl. It is unlawful to use or possess lead shot while hunting waterfowl.

The Tribe typically anticipates harvest to be fewer than 20 birds. Tribal reservation police and Tribal Fisheries enforcement officers have the authority to enforce these migratory bird hunting regulations.

The Service proposes to approve the request for special migratory bird hunting regulations for the Lower Elwha Klallam Tribe.

(n) Makah Indian Tribe, Neah Bay, Washington (Tribal Members Only)

The Makah Indian Tribe and the Service have been cooperating to establish special regulations for migratory game birds on the Makah Reservation and traditional hunting land off the Makah Reservation since the 2001–02 hunting season. Lands off the Makah Reservation are those contained within the boundaries of the State of Washington Game Management Units 601–603 and 607.

The Makah Indian Tribe usually proposes a duck and coot hunting season from September 27, 2009, to January 25, 2010. The daily bag limit is seven ducks, including no more than one canvasback, one pintail, three scaup, and one redhead. The daily bag limit for coots is 25. The Tribe has a year-round closure on wood ducks and harlequin ducks. Shooting hours for all species of waterfowl are one-half hour before sunrise to sunset.

For geese, the Tribe usually proposes the season open on September 27, 2009, and close January 25, 2010. The daily bag limit for geese is four and one brant. The Tribe notes that there is a year-round closure on Aleutian and Dusky Canada geese.

For band-tailed pigeons, the Tribe usually proposes the season open September 20, 2009, and close October 31, 2009. The daily bag limit for band-tailed pigeons is two.

The Tribe usually anticipates that harvest under this regulation will be relatively low since there are no known dedicated waterfowl hunters and any harvest of waterfowl or band-tailed pigeons is usually incidental to hunting for other species, such as deer, elk, and bear. The Tribe expects fewer than 50 ducks and 10 geese to be harvested during the 2009–10 migratory bird hunting season.

All other Federal regulations contained in 50 CFR part 20 would apply. The following restrictions are also usually proposed by the Tribe:

(1) As per Makah Ordinance 44, only shotguns may be used to hunt any species of waterfowl. Additionally, shotguns must not be discharged within 0.25 miles of an occupied area;

(2) Hunters must be eligible, enrolled Makah Tribal members and must carry their Indian Treaty Fishing and Hunting Identification Card while hunting. No tags or permits are required to hunt waterfowl;

(3) The Cape Flattery area is open to waterfowl hunting, except in designated wilderness areas, or within 1 mile of Cape Flattery Trail, or in any area that is closed to hunting by another ordinance or regulation;

(4) The use of live decoys and/or baiting to pursue any species of waterfowl is prohibited;

(5) Steel or bismuth shot only for waterfowl is allowed; the use of lead shot is prohibited; and

(6) The use of dogs is permitted to hunt waterfowl.

We plan to approve the Makah Indian Tribe's requested 2009–10 special migratory bird hunting regulations, upon receipt of their proposal based on the provisions described above.

(o) Point No Point Treaty Council Tribes, Kingston, Washington (Tribal Members Only)

We are establishing uniform migratory bird hunting regulations for Tribal members on behalf of the Point No Point Treaty Council Tribes, consisting of the Port Gamble S'Klallam and Jamestown S'Klallam Tribes. The two Tribes have reservations and ceded areas in northwestern Washington State and are the successors to the signatories of the Treaty of Point No Point of 1855. These proposed regulations will apply to Tribal members both on and off reservations within the Point No Point Treaty Areas.

For the 2009–10 season, the Point No Point Treaty Council requests special migratory bird hunting regulations for the 2009–10 hunting season for a duck and coot hunting season from September 1, 2009, to March 10, 2010. The daily bag limit is seven ducks, including no more than two hen mallards, one canvasback, one pintail, two redhead, and four scoters. The daily bag limit for coots is 25. The daily bag

limit and possession limit on harlequin ducks is one per season. The daily possession limits are double the daily bag limits except where noted.

For geese, the Tribe proposes the season open on September 15, 2009, and close March 10, 2010. The daily bag limit for geese is four, not to include more than 3 light geese. The Tribe notes that there is a year-round closure on Aleutian and Cackling Canada geese. For brant, the Tribe proposes the season open on November 1, 2009, and close March 10, 2010. The daily bag limit for brant is two.

For band-tailed pigeons, the Tribe proposes the season open September 1, 2009, and close March 10, 2010. The daily bag limit for band-tailed pigeons is two. For mourning dove, the Tribe proposes the season open September 1, 2009, and close January 31, 2010. The daily bag limit for mourning dove is 10.

The Tribe anticipates a total harvest of fewer than 200 birds for the 2009–10 season. The Tribal Fish and Wildlife enforcement officers have the authority to enforce these Tribal regulations.

We propose to approve the Point No Point Treaty Council Tribes special migratory bird seasons.

(p) Oneida Tribe of Indians of Wisconsin, Oneida, Wisconsin (Tribal Members Only)

Since 1991–92, the Oneida Tribe of Indians of Wisconsin and the Service have cooperated to establish uniform regulations for migratory bird hunting by Tribal and nontribal hunters within the original Oneida Reservation boundaries. Since 1985, the Oneida Tribe's Conservation Department has enforced the Tribe's hunting regulations within those original reservation limits. The Oneida Tribe also has a good working relationship with the State of Wisconsin and the majority of the seasons and limits are the same for the Tribe and Wisconsin.

In a May 28, 2009, letter, the Tribe proposed special migratory bird hunting regulations. For ducks, the Tribe described the general outside dates as being September 19 through December 6, 2009, with a closed segment of November 21 to 29, 2009. The Tribe proposes a daily bag limit of six birds, which could include no more than six mallards (three hen mallards), six wood duck, one redhead, two pintail, and one hooded merganser.

For geese, the Tribe requests a season between September 1 and December 31, 2009, with a daily bag limit of three Canada geese. Hunters will be issued three Tribal tags for geese in order to monitor goose harvest. An additional three tags will be issued each time birds are registered. The Tribe will close the season November 21 to 29, 2009. If a quota of 300 geese is attained before the season concludes, the Tribe will recommend closing the season early.

For woodcock, the Tribe proposes a season between September 5 and November 8, 2009, with a daily bag and possession limit of 5 and 10, respectively.

For mourning dove, the Tribe proposes a season between September 1 and November 8, 2009, with a daily bag and possession limit of 10 and 20, respectively.

The Tribe proposes shooting hours be one-half hour before sunrise to one-half hour after sunset. Nontribal hunters hunting on the Reservation or on lands under the jurisdiction of the Tribe must comply with all State of Wisconsin regulations, including shooting hours of one-half hour before sunrise to sunset, season dates, and daily bag limits. Tribal members and nontribal hunters hunting on the Reservation or on lands under the jurisdiction of the Tribe must observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, with the following exceptions: Oneida members would be exempt from the purchase of the Migratory Waterfowl Hunting and Conservation Stamp (Duck Stamp); and shotgun capacity is not limited to three shells. Tribal member shooting hours will be from one-half hour before sunset to one-half hour after sunset.

The Service proposes to approve the request for special migratory bird hunting regulations for the Oneida Tribe of Indians of Wisconsin.

(q) Sault Ste. Marie Tribe of Chippewa Indians, Sault Ste. Marie, Michigan (Tribal Members Only)

The Sault Ste. Marie Tribe of Chippewa Indians is a Federally recognized self-governing Indian Tribe, distributed throughout the eastern Upper Peninsula and northern Lower Peninsula of Michigan. The Tribe has retained the right to hunt, fish, trap, and gather on the lands ceded in Treaty of Washington (1836).

In a May 29, 2009, letter, the Tribe proposed special migratory bird hunting regulations. For ducks, mergansers, and common snipe, the Tribe proposes outside dates as September 15 through December 31, 2009. The Tribe proposes a daily bag limit of 20 ducks, which could include no more than 10 mallards (5 hen mallards), 5 wood duck, 5 black duck, and 5 canvasback. The merganser daily bag limit is 10 in the aggregate and common snipe of 16.

For geese, coot, gallinule, sora and Virginia rail, the Tribe requests a season from September 1 to December 31, 2009. The daily bag limit for geese is 20, in the aggregate. The daily bag limit for coot, gallinule, sora and Virginia rail is 20 in the aggregate.

For woodcock, the Tribe proposes a season between September 2 and December 1, 2009, with a daily bag and possession limit of 10 and 20, respectively.

For mourning dove, the Tribe proposes a season between September 1 and November 14, 2009, with a daily bag and possession limit of 10 and 20, respectively.

All Sault Tribe members exercising hunting treaty rights within the 1836 Ceded Territory are required to submit annual harvest reports including date of harvest, number and species harvested, and location of harvest. Hunting hours would be from one-half hour before sunrise to 15 minutes after sunset. Only non-toxic shot are allowed for hunting waterfowl.

The Service proposes to approve the request for special migratory bird hunting regulations for the Sault Ste. Marie Tribe of Chippewa Indians.

(r) Shoshone-Bannock Tribes, Fort Hall Indian Reservation, Fort Hall, Idaho (Nontribal Hunters)

Almost all of the Fort Hall Indian Reservation is Tribally owned. The Tribes claim full wildlife management authority throughout the reservation, but the Idaho Fish and Game Department has disputed Tribal jurisdiction, especially for hunting by nontribal members on reservation lands owned by non-Indians. As a compromise, since 1985, we have established the same waterfowl hunting regulations on the reservation and in a surrounding off-reservation State zone. The regulations were requested by the Tribes and provided for different season dates than in the remainder of the State. We agreed to the season dates because they would provide additional protection to mallards and pintails. The State of Idaho concurred with the zoning arrangement. We have no objection to the State's use of this zone again in the 2009–10 hunting season, provided the duck and goose hunting season dates are the same as on the reservation.

In a proposal for the 2009–10 hunting season, the Shoshone-Bannock Tribes requested a continuous duck (including mergansers) season, with the maximum number of days and the same daily bag and possession limits permitted for Pacific Flyway States under the final Federal frameworks. The Tribes propose that, if the same number of hunting days is permitted as last year, the season

would have an opening date of October 3, 2009, and a closing date of January 17, 2010. Coot and snipe season dates would be the same as for ducks, with the same daily bag and possession limits permitted for Pacific Flyway States. The Tribes anticipate harvest will be between 2,000 and 5,000 ducks.

The Tribes also requested a continuous goose season with the maximum number of days and the same daily bag and possession limits permitted in Idaho under Federal frameworks. The Tribes propose that, if the same number of hunting days is permitted as in previous years, the season would have an opening date of October 3, 2009, and a closing date of January 17, 2010. The Tribes anticipate harvest will be between 4,000 and 6,000 geese.

The Tribe requests a common snipe season with the maximum number of days and the same daily bag and possession limits permitted in Idaho under Federal frameworks. The Tribes propose that, if the same number of hunting days is permitted as in previous years, the season would have an opening date of October 3, 2009, and a closing date of January 17, 2010.

Nontribal hunters must comply with all basic Federal migratory bird hunting regulations in 50 CFR part 20 pertaining to shooting hours, use of steel shot, and manner of taking. Special regulations established by the Shoshone-Bannock Tribes also apply on the reservation.

We note that the requested regulations are nearly identical to those of last year and propose they be approved for the 2009–10 hunting season given the seasons dates fall within the final Federal flyway frameworks (applies to nontribal hunters only).

(s) Skokomish Tribe, Shelton, Washington (Tribal Members Only)

Since 1996, the Service and the Point No Point Treaty Tribes, of which the Skokomish Tribe was one, have cooperated to establish special regulations for migratory bird hunting. The Tribes have been acting independently since 2005, and the Skokomish Tribe would like to establish migratory bird hunting regulations for Tribal members for the 2009–10 season. The Tribe has a reservation on the Olympic Peninsula in Washington State and is a successor to the signatories of the Treaty of Point No Point of 1855.

The Skokomish Tribe requests a duck and coot season from September 16, 2009, to February 28, 2010. The daily bag limit is seven ducks, including no more than two hen mallards, one pintail, one canvasback, and two redheads. The daily bag and possession limit on harlequin duck is one per season. The coot daily bag limit is 25. The possession limit is twice the daily bag limit except as noted above.

For geese, the Tribe requests a season from September 16, 2009, to February 28, 2010. The daily bag limit is four, including no more than three light geese. The season on Aleutian Canada geese is closed. For brant, the Tribe proposes a season from November 1, 2009, to February 15, 2010, with a daily bag limit of two. The possession limit is twice the daily bag limit.

For mourning doves, band-tailed pigeon, and snipe, the Tribe requests a season from September 16, 2009, to February 28, 2010, with a daily bag limit of 10, 2, and 8, respectively. The possession limit is twice the daily bag limit.

All Tribal hunters authorized to hunt migratory birds are required to obtain a Tribal hunting permit from the Skokomish Tribe pursuant to Tribal law. Hunting hours would be from one-half hour before sunrise to sunset. Only steel, tungsten-iron, tungsten-polymer, tungsten-matrix, and tin shot are allowed for hunting waterfowl. It is unlawful to use or possess lead shot while hunting waterfowl.

The Tribe anticipates harvest to be fewer than 150 birds. The Skokomish Public Safety Office enforcement officers have the authority to enforce these migratory bird hunting regulations.

We propose to approve the Skokomish Tribe's requested migratory bird hunting season.

(t) Spokane Tribe of Indians, Spokane Indian Reservation, Wellpinit, Washington (Tribal Members Only)

The Spokane Tribe of Indians wishes to establish waterfowl seasons on their respective reservation for its membership to access to an additional resource. An established waterfowl season on the reservation will allow access to a resource for members to continue practicing a subsistence lifestyle.

The Spokane Indian Reservation is located in northeastern Washington State. The reservation comprises approximately 157,000 acres. The boundaries of the Reservation are the Columbia River to the west, the Spokane River to the south (now Lake Roosevelt), Tshimikn Creek to the east, and the 48th Parallel as the north boundary. Tribal membership comprises approximately 2,300 enrolled Spokane Tribal Members. Prior to 1939, the Spokane Tribe was primarily a salmon people; upon completion of Grand Coulee Dam creating Lake Roosevelt, the development of hydroelectricity without passage ultimately removed salmon access from historical fishing areas for the Spokane Tribe for the past 70 years.

These proposed regulations would allow Tribal Members, spouses of a Spokane Tribal Member and first-generation descendants of a Spokane Tribal Member with a Tribal permit and Federal Waterfowl stamps an opportunity to utilize the reservation and ceded lands. It will also benefit Tribal membership through access to this resource throughout Spokane Tribal ceded lands in eastern Washington. By Spokane Tribal Referendum, spouses of Spokane Tribal Members and children of Spokane Tribal Members not enrolled are allowed to harvest game animals within the Spokane Indian Reservation with the issuance of hunting permits.

For the 2009–10 season, the Tribe requests to establish duck seasons that would run from September 1, 2009, through January 31, 2010. The Tribe is requesting the daily bag limit for ducks to be consistent with the State of Washington. The possession limit is twice the daily bag limit.

The Tribe proposes a season on geese starting September 1, 2009, and ending on January 31, 2010. The Tribe is requesting the daily bag limit for geese to be consistent with the State of Washington. The possession limit is twice the daily bag limit.

Based on the quantity of requests the Spokane Tribe of Indians has received, the Tribe anticipates harvest levels for the 2009–10 season for both ducks and geese to be below 300 total birds with goose harvest at less than 100. Hunter success will be monitored through mandatory harvest reports returned within 30 days of the season closure.

We propose to approve the Spokane Tribe's requested 2009–10 special migratory bird hunting regulations.

(u) Squaxin Island Tribe, Squaxin Island Reservation, Shelton, Washington (Tribal Members Only)

The Squaxin Island Tribe of Washington and the Service have cooperated since 1995 to establish special Tribal migratory bird hunting regulations. These special regulations apply to Tribal members on the Squaxin Island Reservation, located in western Washington near Olympia, and all lands within the traditional hunting grounds of the Squaxin Island Tribe.

For the 2009–10 season, the Tribe requests to establish duck and coot seasons that would run from September 1, 2009, through January 15, 2010. The daily bag limit for ducks is five per day and could include only one canvasback. The season on harlequin ducks is

closed. For coots, the daily bag limit is 25. For snipe, the Tribe proposes the season start on September 15, 2009, and end on January 15, 2010. The daily bag limit for snipe is eight. For band-tailed pigeon, the Tribe proposes the season start on September 1, 2009, and end on December 31, 2009. The daily bag limit is five. The possession limit is twice the daily bag limit.

The Tribe proposes a season on geese starting September 15, 2009, and ending on January 15, 2010. The daily bag limit for geese is four, including no more than two snow geese. The season on Aleutian and Cackling Canada geese is closed. For brant, the Tribe proposes the season start on September 1, 2009, and end on December 31, 2009. The daily bag limit for brant is two. The possession limit is twice the daily bag limit.

We propose to approve the Squaxin Island Tribe's requested 2009–10 special migratory bird hunting regulations.

(v) Stillaguamish Tribe of Indians, Arlington, Washington (Tribal Members Only)

The Stillaguamish Tribe of Indians and the Service have cooperated to establish special regulations for migratory game birds since 2001. The Tribe is proposing regulations to hunt all open and unclaimed lands under the Treaty of Point Elliott of January 22, 1855, including their main hunting grounds around Camano Island, Skagit Flats, and Port Susan to the border of the Tulalip Tribes Reservation. Ceded lands are located in Whatcom, Skagit, Snohomish, and Kings Counties, and a portion of Pierce County, Washington. The Stillaguamish Tribe of Indians is a Federally recognized Tribe and reserves the Treaty Right to hunt (*U.S.* v. *Washington*).

The Tribe proposes that duck (including mergansers) and goose seasons run from October 1, 2009, to February 15, 2010. The daily bag limit on ducks (including sea ducks and mergansers) is 10 and must include no more than 7 mallards (only 3 of which can be hens), 3 pintail, 3 redhead, 3 scaup, and 3 canvasback. For geese, the daily bag limit is six. Possession limits are totals of these two daily bag limits.

The Tribe proposes that coot, brant, and snipe seasons run from October 1, 2009, to January 31, 2010. The daily bag limit for coot is 25. The daily bag limit on brant is three. The daily bag limit for snipe is 10. Possession limits are twice the daily bag limit.

Harvest is regulated by a punch card system. Tribal members hunting on lands under this proposal will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, which will be enforced by the Stillaguamish Tribal Law Enforcement. Tribal members are required to use steel shot or a nontoxic shot as required by Federal regulations.

The Tribe anticipates a total harvest of 200 ducks, 100 geese, 50 mergansers, 100 coots, and 100 snipe. Anticipated harvest needs include subsistence and ceremonial needs. Certain species may be closed to hunting for conservation purposes, and consideration for the needs of certain species will be addressed.

The Service proposes to approve the request for special migratory bird hunting regulations for the Stillaguamish Tribe of Indians.

(w) Swinomish Indian Tribal Community, LaConner, Washington (Tribal Members Only)

In 1996, the Service and the Swinomish Indian Tribal Community began cooperating to establish special regulations for migratory bird hunting. The Swinomish Indian Tribal Community is a Federally recognized Indian Tribe consisting of the Suiattle, Skagit, and Kikialos. The Swinomish Reservation was established by the Treaty of Point Elliott of January 22, 1855, and lies in the Puget Sound area north of Seattle, Washington.

For the 2009–10 season, the Tribe usually requests to establish a migratory bird hunting season on all areas that are open and unclaimed and consistent with the meaning of the treaty. The Tribe usually requests to establish duck, merganser, Canada goose, brant, and coot seasons opening on the earliest possible date allowed by the final Federal frameworks for the Pacific Flyway and closing 30 days after the State of Washington closes its season. The Swinomish Tribe requests an additional three birds of each species over that allowed by the State for daily bag and possession limits.

The Community normally anticipates that the regulations will result in the harvest of approximately 300 ducks, 50 Canada geese, 75 mergansers, 100 brant, and 50 coot. The Swinomish utilize a report card and permit system to monitor harvest and will implement steps to limit harvest where conservation is needed. All Tribal regulations will be enforced by Tribal fish and game officers.

On reservation, the Tribal Community usually proposes a hunting season for the abovementioned species beginning on the earliest possible opening date and closing March 9, 2010. The Swinomish manage harvest by a report card and permit system, and we anticipate harvest will be similar to that expected off reservation.

We believe the estimated harvest by the Swinomish will be minimal and will not adversely affect migratory bird populations. Upon receipt of the 2009–10 Swinomish hunting proposal, we propose to approve the Tribe's requested 2009–10 special migratory bird hunting regulations.

(x) The Tulalip Tribes of Washington, Tulalip Indian Reservation, Marysville, Washington (Tribal Members and Nontribal Hunters)

The Tulalip Tribes are the successors in interest to the Tribes and bands signatory to the Treaty of Point Elliott of January 22, 1855. The Tulalip Tribes' government is located on the Tulalip Indian Reservation just north of the City of Everett in Snohomish County, Washington. The Tribes or individual Tribal members own all of the land on the reservation, and they have full wildlife management authority. All lands within the boundaries of the Tulalip Tribes Reservation are closed to nonmember hunting unless opened by Tulalip Tribal regulations.

For the 2009–10 season, the Tribe proposes Tribal and nontribal hunting regulations for the 2009–10 season. Migratory waterfowl hunting by Tulalip Tribal members is authorized by Tulalip Tribal Ordinance No. 67. For ducks, mergansers, coot, and snipe, the proposed season for Tribal members would be from September 15, 2009, through February 28, 2010. In the case of nontribal hunters hunting on the reservation, the season would be the latest closing date and the longest period of time allowed under the final Pacific Flyway Federal frameworks. Daily bag and possession limits for Tulalip Tribal members would be 7 and 14 ducks, respectively, except that for blue-winged teal, canvasback, harlequin, pintail, and wood duck, the bag and possession limits would be the same as those established in accordance with final Federal frameworks. For nontribal hunters, bag and possession limits would be the same as those permitted under final Federal frameworks. For coot, daily bag and possession limits are 25 and 50, respectively, and for snipe 8 and 18, respectively. Nontribal hunters should check with the Tulalip Tribal authorities regarding additional conservation measures that may apply to specific species managed within the region. Ceremonial hunting may be authorized by the Department of Natural Resources at any time upon application of a qualified Tribal member. Such a hunt must have a bag limit designed to

limit harvest only to those birds necessary to provide for the ceremony.

For geese, Tribal members propose a season from September 15, 2009, through February 28, 2010. Nontribal hunters would be allowed the longest season and the latest closing date permitted by the Pacific Flyway Federal frameworks. For Tribal hunters, the goose daily bag and possession limits would be 7 and 14, respectively, except that the bag limits for brant, cackling Canada geese, and dusky Canada geese would be those established in accordance with final Federal frameworks. For nontribal hunters hunting on reservation lands, the daily bag and possession limits would be those established in accordance with final Federal frameworks for the Pacific Flyway. The Tulalip Tribes also set a maximum annual bag limit for those Tribal members who engage in subsistence hunting of 365 ducks and 365 geese.

All hunters on Tulalip Tribal lands are required to adhere to shooting hour regulations set at one-half hour before sunrise to sunset, special Tribal permit requirements, and a number of other Tribal regulations enforced by the Tribe. Each nontribal hunter 16 years of age and older hunting pursuant to Tulalip Tribes' Ordinance No. 67 must possess a valid Federal Migratory Bird Hunting and Conservation Stamp and a valid State of Washington Migratory Waterfowl Stamp. Each hunter must validate stamps by signing across the face.

Although the season length requested by the Tulalip Tribes appears to be quite liberal, harvest information indicates a total take by Tribal and nontribal hunters under 1,000 ducks and 500 geese annually.

We propose approval of the Tulalip Tribe's request to have a special season.

(y) Upper Skagit Indian Tribe, Sedro Woolley, Washington (Tribal members only)

The Upper Skagit Indian Tribe and the Service have cooperated to establish special regulations for migratory game birds since 2001. The Tribe has jurisdiction over lands within Skagit, Island, and Whatcom Counties, Washington. The Tribe issues Tribal hunters a harvest report card that will be shared with the State of Washington.

For the 2009–10 season, the Tribe requests a duck season starting October 1, 2009, and ending February 28, 2010. The Tribe proposes a daily bag limit of 15 with a possession limit of 20. The Tribe requests a coot season starting October 15, 2009, and ending February 15, 2010. The coot daily bag limit is 20 with a possession limit of 30.

The Tribe proposes a goose season from October 15, 2009, to February 28, 2010, with a daily bag limit of seven geese and five brant. The possession limit for geese and brant are 10 and 7, respectively.

The Tribe proposes a mourning dove season between September 1 to December 31, 2009, with a daily bag limit of 12 and possession limit of 15.

The anticipated migratory bird harvest under this proposal would be 100 ducks, 5 geese, 2 brant, and 10 coots. Tribal members must have the Tribal identification and Tribal harvest report card on their person to hunt. Tribal members hunting on the Reservation will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, except shooting hours would be 15 minutes before official sunrise to 15 minutes after official sunset.

The Service proposes to approve the request for special migratory bird hunting regulations for the Upper Skagit Indian Tribe.

(z) Wampanoag Tribe of Gay Head, Aquinnah, Massachusetts (Tribal Members Only)

The Wampanoag Tribe of Gay Head is a Federally recognized Tribe located on the island of Martha's Vineyard in Massachusetts. The Tribe has approximately 560 acres of land, which it manages for wildlife through its natural resources department. The Tribe also enforces its own wildlife laws and regulations through the natural resources department.

For the 2009–10 season, the Tribe proposes a duck season of October 29, 2009, through February 25, 2010. The Tribe proposes a daily bag limit of six birds, which could include no more than two hen mallards, six drake mallards, two black ducks, two mottled ducks, one fulvous whistling duck, four mergansers, three scaup, one hooded merganser, two wood ducks, one canvasback, two redheads, one pintail, and four of all other species not listed. The season for harlequins would be closed. The Tribe proposes a teal (green-winged and blue) season of October 13, 2009, through January 26, 2010. A daily bag limit of six teal would be in addition to the daily bag limit for ducks.

For sea ducks, the Tribe proposes a season between October 12, 2009, and February 28, 2010, with a daily bag limit of seven, which could include no more than one hen eider and four of any one species unless otherwise noted above.

For Canada geese, the Tribe requests a season between September 14 to September 28, 2009, and October 29, 2009, through February 25, 2010, with a daily bag limit of 5 Canada geese during the first period, 3 Canada geese during the second period. For snow geese, the Tribe requests a season between September 8 to September 22, 2009, and October 29, 2009, to February 25, 2010, with a daily bag limit of 15 snow geese.

For woodcock, the Tribe proposes a season between October 13 and November 28, 2009, with a daily bag limit of three.

Prior to 2009, the Tribe had 22 registered Tribal hunters, and estimates harvest to be no more than 15 geese, 25 mallards, 25 teal, 50 black ducks, and 50 of all other species combined. Tribal members hunting on the Reservation will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20. The Tribe requires hunters to register with the Harvest Information Program.

The Service proposes to approve the request for special migratory bird hunting regulations for the Wampanoag Tribe of Gay Head.

(aa) White Earth Band of Ojibwe, White Earth, Minnesota (Tribal Members Only)

The White Earth Band of Ojibwe is a Federally recognized Tribe located in northwest Minnesota and encompasses all of Mahnomen County and parts of Becker and Clearwater Counties. The reservation employs conservation officers to enforce migratory bird regulations. The Tribe and the Service first cooperated to establish special Tribal regulations in 1999.

For the 2009–10 migratory bird hunting season, the White Earth Band of Ojibwe usually requests a duck and merganser season to start September 20 and end December 19, 2009. For ducks, they usually request a daily bag limit of 10, including no more than 2 mallards and 1 canvasback. The merganser daily bag limit would be five with no more than two hooded mergansers. For geese, the Tribe usually proposes an early season from September 1 through September 26, 2009, and a late season from September 27, 2009, through December 19, 2009. The early season daily bag limit is eight geese and the late season daily bag limit is five geese.

For coots, dove, rail, woodcock, and snipe, the Tribe usually proposes a September 1 through November 30, 2009, season with daily bag limits of 20 coots, 25 doves, 25 rails, 10 woodcock, and 10 snipe. Shooting hours are one-half hour before sunrise to one-half hour after sunset. Nontoxic shot is required.

Based on past harvest surveys, the Tribe anticipates harvest of 1,000 to

2,000 Canada geese and 1,000 to 1,500 ducks. The White Earth Reservation Tribal Council employs four full-time Conservation Officers to enforce migratory bird regulations.

We propose to approve the White Earth Band of Ojibwe's request to have a special season upon receipt of the 2009–10 proposal.

(bb) White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona (Tribal Members and Nontribal Hunters)

The White Mountain Apache Tribe owns all reservation lands, and the Tribe has recognized full wildlife management authority. The White Mountain Apache Tribe has requested regulations that are essentially unchanged from those agreed to since the 1997–98 hunting year.

The hunting zone for waterfowl is restricted and is described as: The length of the Black River west of the Bonito Creek and Black River confluence and the entire length of the Salt River forming the southern boundary of the reservation; the White River, extending from the Canyon Day Stockman Station to the Salt River; and all stock ponds located within Wildlife Management Units 4, 5, 6, and 7. Tanks located below the Mogollon Rim, within Wildlife Management Units 2 and 3, will be open to waterfowl hunting during the 2009–10 season. The length of the Black River east of the Black River/Bonito Creek confluence is closed to waterfowl hunting. All other waters of the reservation would be closed to waterfowl hunting for the 2009–10 season.

For nontribal and Tribal hunters, the Tribe proposes a continuous duck, coot, merganser, gallinule, and moorhen hunting season, with an opening date of October 10, 2009, and a closing date of January 31, 2010. The Tribe proposes a separate scaup season, with an opening date of October 10, 2009, and a closing date of December 6, 2009. The Tribe proposes a daily duck (including mergansers) bag limit of seven, which may include no more than two redheads, one pintail, and seven mallards (including no more than two hen mallards). The season on canvasback is closed. The daily bag limit for coots, gallinules, and moorhens would be 25, singly or in the aggregate. For geese, the Tribe is proposing a season from October 10, 2009, through January 31, 2010. Hunting would be limited to Canada geese, and the daily bag limit would be three.

Season dates for band-tailed pigeons and mourning doves would run concurrently from September 1 through September 15, 2009, in Wildlife Management Unit 10 and all areas south of Y–70 and Y–10 in Wildlife Management Unit 7, only. Proposed daily bag limits for band-tailed pigeons and mourning doves would be 3 and 10, respectively.

Possession limits for the above species are twice the daily bag limits. Shooting hours would be from one-half hour before sunrise to sunset. There would be no open season for sandhill cranes, rails, and snipe on the White Mountain Apache lands under this proposal. A number of special regulations apply to Tribal and nontribal hunters, which may be obtained from the White Mountain Apache Tribe Game and Fish Department.

We propose to approve the regulations requested by the Tribe for the 2009–10 season.

(cc) Yankton Sioux Tribe, Marty, South Dakota (Tribal Members and Nontribal Hunters)

The Yankton Sioux Tribe has yet to submit a waterfowl hunting proposal for the 2009–10 season. The Yankton Sioux Tribal waterfowl hunting season usually would be open to both Tribal members and nontribal hunters. The waterfowl hunting regulations would apply to Tribal and trust lands within the external boundaries of the reservation.

For ducks (including mergansers) and coots, the Yankton Sioux Tribe usually proposes a season starting October 9, 2009, and running for the maximum amount of days allowed under the final Federal frameworks. Daily bag and possession limits would be 6 ducks, which may include no more than 5 mallards (no more than 2 hens), 1 canvasback (when open), 2 redheads, 3 scaup, 1 pintail, or 2 wood ducks. The bag limit for mergansers is 5, which would include no more than 1 hooded merganser. The coot daily bag limit is 15.

For geese, the Tribe usually requests a dark goose (Canada geese, brant, white-fronts) season starting October 29, 2009, and closing January 31, 2010. The daily bag limit would be three geese (including no more than one white-fronted goose or brant). Possession limits would be twice the daily bag limit. For white geese, the proposed hunting season would start October 29, 2009, and run for the maximum amount of days allowed under the final Federal frameworks for the State of South Dakota. Daily bag and possession limits would equal the maximum allowed under Federal frameworks.

All hunters would have to be in possession of a valid Tribal license while hunting on Yankton Sioux trust lands. Tribal and nontribal hunters must comply with all basic Federal migratory bird hunting regulations in 50 CFR part 20 pertaining to shooting hours and the manner of taking. Special regulations established by the Yankton Sioux Tribe also apply on the reservation.

During the 2005–06 hunting season, the Tribe reported that 90 nontribal hunters took 400 Canada geese, 75 light geese, and 90 ducks. Forty-five Tribal members harvested fewer than 50 geese and 50 ducks.

We plan to approve the Yankton Sioux 2009–10 hunting seasons upon receipt of their proposal based on the provisions described above.

Public Comments

The Department of the Interior's policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations. Before promulgation of final migratory game bird hunting regulations, we will take into consideration all comments received. Such comments, and any additional information received, may lead to final regulations that differ from these proposals.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management, Room 4107, 4501 North Fairfax Drive, Arlington, VA 22203.

For each series of proposed rulemakings, we will establish specific comment periods. We will consider, but

possibly may not respond in detail to, each comment. As in the past, we will summarize all comments received during the comment period and respond to them after the closing date in any final rules.

NEPA Consideration

NEPA considerations are covered by the programmatic document ''Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14),'' filed with the Environmental Protection Agency on June 9, 1988. We published a notice of availability in the **Federal Register** on June 16, 1988 (53 FR 22582). We published our record of decision on August 18, 1988 (53 FR 31341). In addition, an August 1985 environmental assessment entitled ''Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands'' is available from the address indicated under the caption **FOR FURTHER INFORMATION CONTACT**.

In a notice published in the September 8, 2005, **Federal Register** (70 FR 53376), we announced our intent to develop a new Supplemental Environmental Impact Statement for the migratory bird hunting program. Public scoping meetings were held in the spring of 2006, as detailed in a March 9, 2006, **Federal Register** (71 FR 12216). We have prepared a scoping report summarizing the scoping comments and scoping meetings. The report is available by either writing to the address indicated under **FOR FURTHER INFORMATION CONTACT** or by viewing on our Web site at *http://www.fws.gov/migratorybirds/*.

Endangered Species Act Consideration

Prior to issuance of the 2009–10 migratory game bird hunting regulations, we will comply with provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543; hereinafter, the Act), to ensure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened, or modify or destroy its critical habitat, and is consistent with conservation programs for those species. Consultations under section 7 of the Act may cause us to change proposals in this and future supplemental rulemaking documents.

Executive Order 12866

The Office of Management and Budget has determined that this rule is significant and has reviewed this rule under Executive Order 12866. A regulatory cost-benefit analysis has been prepared and is available at *http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/SpecialTopics.html#HuntingRegs or at http://www.regulations.gov*. OMB bases its determination of regulatory significance upon the following four criteria:

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

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

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

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

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, *etc.*

Regulatory Flexibility Act

The regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We analyzed the economic impacts of the annual hunting regulations on small business entities in detail as part of the 1981 cost-benefit analysis. This analysis was revised annually from 1990–95. In 1995, the Service issued a Small Entity Flexibility Analysis (Analysis), which was subsequently updated in 1996, 1998, 2004, and 2008. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The 2008 Analysis was based on the 2006 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns, from which it was estimated that migratory bird hunters would spend approximately $1.2 billion at small businesses in 2008. Copies of the Analysis are available upon request from the address indicated under **ADDRESSES** or from our Web site at *http://www.fws.gov/migratorybirds/NewReportsPublications/SpecialTopics/SpecialTopics.html#HuntingRegs* or at *http://www.regulations.gov*.

Small Business Regulatory Enforcement Fairness Act

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule has an annual effect on the economy of $100 million or more.

Paperwork Reduction Act

We examined these regulations under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The various recordkeeping and reporting requirements imposed under regulations established in 50 CFR part 20, subpart K, are utilized in the formulation of migratory game bird hunting regulations. Specifically, OMB has approved the information collection requirements of our Migratory Bird Surveys and assigned control number 1018–0023 (expires 2/28/2011). This information is used to provide a sampling frame for voluntary national surveys to improve our harvest estimates for all migratory game birds in order to better manage these populations. OMB has also approved the information collection requirements of the Alaska Subsistence Household Survey, an associated voluntary annual household survey used to determine levels of subsistence take in Alaska, and assigned control number 1018–0124 (expires 1/31/2010). A Federal 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.

Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities.

Therefore, this rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Civil Justice Reform—Executive Order 12988

The Department, in promulgating this proposed rule, has determined that this proposed rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings Implication Assessment

In accordance with Executive Order 12630, this proposed rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules allow hunters to exercise otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

Energy Effects—Executive Order 13211

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this proposed rule is a significant regulatory action under Executive Order 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated possible effects on Federally-recognized Indian Tribes and have determined that there are no effects on Indian trust resources. However, in the April 10 **Federal Register**, we solicited proposals for special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2009–10 migratory bird hunting season. The resulting proposals will be contained in a separate proposed rule. By virtue of these actions, we have consulted with Tribes affected by this rule.

Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and Tribes to determine which seasons meet their individual needs. Any State or Indian Tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in accordance with Executive Order 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Based on the results of migratory game bird studies, and having due consideration for any data or views submitted by interested parties, this proposed rulemaking may result in the adoption of special hunting regulations for migratory birds beginning as early as September 1, 2009, on certain Federal Indian reservations, off-reservation trust lands, and ceded lands. Taking into account both reserved hunting rights and the degree to which Tribes have full wildlife management authority, the regulations only for Tribal members or for both Tribal and nontribal hunters may differ from those established by States in which the reservations, off-reservation trust lands, and ceded lands are located. The regulations will specify open seasons, shooting hours, and bag and possession limits for rails, coot, gallinules, woodcock, common snipe, band-tailed pigeons, mourning doves, white-winged doves, ducks, mergansers, and geese.

The rules that eventually will be promulgated for the 2009–10 hunting season are authorized under the Migratory Bird Treaty Act (MBTA) of July 3, 1918 (40 Stat. 755; 16 U.S.C. 703 *et seq.*), as amended. The MBTA authorizes and directs the Secretary of the Interior, having due regard for the zones of temperature and for the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory game birds, to determine when, to what extent, and by what means such birds or any part, nest, or egg thereof may be taken, hunted, captured, killed, possessed, sold, purchased, shipped, carried, exported, or transported.

Dated: August 4, 2009.

Jane Lyder,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9–19202 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 74, No. 153

Tuesday, August 11, 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.

RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD

Privacy Act of 1974; System of Records

AGENCY: Recovery Accountability and Transparency Board.

ACTION: Notice of new Privacy Act systems of records.

SUMMARY: The Recovery Accountability and Transparency Board (Board) proposes two new systems of records subject to the Privacy Act of 1974, as amended (Privacy Act or the Act), entitled ''FederalReporting.gov Section 1512 Data System'' (1512 Data System) and ''FederalReporting.gov Recipient Registration System'' (FRRS). The 1512 Data System will contain information on recipients of funding from the American Recovery and Reinvestment Act, Public Law 111–5 (Recovery Act). Under section 1512 of the Recovery Act, as well as implementing guidance promulgated by the Office of Management and Budget (OMB), recipients are required to report certain data elements relating to their receipt of funds. The 1512 Data System will include data collected from recipients reporting data pursuant to the Recovery Act, and that data will then flow to and be posted publicly on the Web site Recovery.gov, which was also established by the Recovery Act. The FRRS will contain information on individuals who have registered and established accounts to access FederalReporting.gov, the Board's Web-based inbound reporting system. The information maintained by the FRRS includes the first name, last name, phone number, extension, agency code (for individuals associated with a Federal agency), and DUNS number. This information is used to retrieve additional recipient organizational information from the Central Contractor Registry (CCR), Federal Procurement Data System (FPDS), and Dun and Bradstreet database systems. This information will be used to protect and manage access to the individual's account on FederalReporting.gov. In this notice, the Board provides the required information on the systems of records.

ADDRESSES: Comments may be submitted:

By Mail or Hand Delivery: Jennifer Dure, Office of General Counsel, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006;

By Fax: (202) 254–7970; or

By E-mail to the Board: comments@ratb.gov.

All comments on the proposed new systems of records should be clearly identified as such.

FOR FURTHER INFORMATION CONTACT: Jennifer Dure, General Counsel, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006, (202) 254–7900.

SUPPLEMENTARY INFORMATION: Title 5 U.S.C. 552a(e)(4) and (11) provide that the public be given a 30-day period in which to comment on any new routine use of a system of records. OMB, which has oversight responsibilities under the Act, requires a 40-day period in which to conclude its review of the new systems. Therefore, please submit any comments by September 21, 2009.

In accordance with 5 U.S.C. 552a(r), the Board has provided a report to OMB and the Congress on the proposed systems of records.

Recovery Accountability and Transparency Board

Table of Contents

RATB–9—FederalReporting.gov Section 1512 Data System.

RATB–10—FederalReporting.gov Recipient Registration System.

RATB–9

SYSTEM NAME:

FederalReporting.gov Section 1512 Data System (1512 Data System).

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

The principal management entity for the system is the Recovery Accountability and Transparency Board, located at 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006. The physical location for the system will be the CGI Phoenix Data Center, located at 10007 South 51st Street, Phoenix, AZ 85044. The system will be operated at this facility.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records that all recipients of Recovery funds, as defined by section 1512(b)(1) of the Recovery Act, are required to report. This system includes information on individuals who are sole proprietors.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains records described in OMB's June 22, 2009, Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009. The record description in this document includes data on prime recipients, subrecipients, and vendors receiving funding under the Recovery Act. The system will also store other system-generated data such as the recipient's report submission date and time and other identifiers for internal tracking.

AUTHORITY FOR MAINTENANCE OF SYSTEM:

The Recovery Act was enacted on February 17, 2009, in order to make supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization.

PURPOSE(S):

FederalReporting.gov is the Board's inbound Recovery reporting solution. Recipients of Recovery funds are required to disclose certain information, which must then be posted on the public-facing Web site, Recovery.gov. The purpose of collecting this information is to provide the public with information as to how the government spends money, and also to assist with the prevention of fraud, waste, and mismanagement of Recovery funds.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1512 Data System records will be used to collect information about recipients' use of Recovery funds, as well as to populate the public-facing Web site Recovery.gov. The records may

also be used for auditing or other internal purpose of the Board, including but not limited to: investigation of possible fraud, waste, abuse, and mismanagement of Recovery funds; litigation purposes related to information reported to the Board; and contacting the recipient in the event of a system modification or change to FederalReporting.gov, including the data elements required to be reported.

The Board may disclose information contained in a record in this system of records under the routine uses listed in this notice without the consent of the recipient if the disclosure is compatible with the purposes for which the record was collected.

The general routine uses for the Board's 1512 Data System records are listed as follows:

A. As set forth above, and pursuant to the Recovery Act, 1512 Data System records will be used to collect information about recipients' use of Recovery funds, as well as to populate the public-facing Web site Recovery.gov, where disclosure of the specified data elements will be made to the public.

B. Information may be disclosed to the appropriate Federal, State, local, or Tribal agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, if the information is relevant to a violation or potential violation of civil or criminal law or regulation within the jurisdiction of the receiving entity.

C. Disclosure may be made to a Federal, State, local, or Tribal or other public authority of the fact that this system of records contains information relevant to the retention of an employee, the retention of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit. That entity, authority or licensing organization may then make a request supported by the written consent of the individual for the entire record if it so chooses.

D. Information may be disclosed to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of the individual.

E. Information may be disclosed to the Department of Justice (DOJ), or in a proceeding before a court, adjudicative body, or other administrative body before which the Board is authorized to appear, when:

1. The Board, or any component thereof; or

2. Any employee of the Board in his or her official capacity; or

3. Any employee of the Board in his or her individual capacity where the DOJ or the Board has agreed to represent the employee; or

4. The United States, if the Board determines that litigation is likely to affect the Board or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the DOJ or the Board is deemed by the Board to be relevant and necessary to the litigation, provided, however, that in each case it has been determined that the disclosure is compatible with the purpose for which the records were collected.

F. Information may be disclosed to the National Archives and Records Administration in records management inspections.

G. Information may be disclosed to contractors, grantees, consultants, or volunteers performing or working on a contract, service, grant, cooperative agreement, job, or other activity for the Board and who have a need to have access to the information in the performance of their duties or activities for the Board.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM: STORAGE:

The 1512 Data System records will be stored in digital format on a digital storage device. Long-term 1512 Data System records will be stored on magnetic tape format. All record storage procedures are in accordance with current applicable regulations.

RETRIEVABILITY:

Records are retrievable by database management systems software designed to retrieve recipient reporting elements based upon role-based user access privileges.

SAFEGUARDS:

The Board has minimized the risk of unauthorized access to the system by establishing a secure environment for exchanging electronic information. Physical access uses a defense in-depth approach restricting access at each layer closest to where the actual system resides. The entire complex is patrolled by security during non-business hours. Physical access to the data system housed within the facility is controlled by a computerized badge-reading system. Multiple levels of security are maintained via dual factor authentication for access using biometrics. The computer system offers a high degree of resistance to tampering and circumvention. This system limits data access to Board and contract staff on a need-to-know basis, and controls individuals' ability to access and alter records within the system. All users of the system of records are given a unique user identification (ID) with personal identifiers. All interactions between the system and the authorized individual users are recorded.

RETENTION AND DISPOSAL:

The Board will retain and dispose of these records in accordance with National Archives and Records Administration General Records Schedule 20, Item 1.c. This schedule provides disposal authorization for electronic files and hard copy printouts created to monitor system usage, including but not limited to log-in files, audit trail files, system usage files, and cost-back files used to access charges for system use. Records will be deleted or destroyed when the Board determines they are no longer needed for administrative, legal, audit, or other program purposes.

SYSTEM MANAGER AND ADDRESS:

Michael Wood, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006.

NOTIFICATION PROCEDURE:

Any individual who wants to know whether this system of records contains a record about him or her, who wants access to his or her record, or who wants to contest the contents of a record should make a written request to the system manager.

RECORD ACCESS PROCEDURES:

A request for record access shall follow the directions described under Notification Procedure and will be addressed to the system manager at the address listed above.

CONTESTING RECORDS PROCEDURES:

If you wish to contest a record in the system of records, contact the system manager and identify the record to be changed, identify the corrective action sought, and provide a written justification.

RECORD SOURCE CATEGORIES:

Information is obtained from individuals who have had or seek to have their identity authenticated except that a password and a username are explicitly self-assigned by the user registering to gain access to the 1512 Data System.

RATB–10

SYSTEM NAME:

FederalReporting.gov Recipient Registration System (FRRS).

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

The principal management entity for the FRRS system is the Recovery Accountability and Transparency Board, located at 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006. The physical location for the system will be the CGI Phoenix Data Center, located at 10007 South 51st Street, Phoenix, AZ 85044. The system will be operated at this facility.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records on all individuals that have either attempted to register or have registered to obtain an account to use FederalReporting.gov to report recipient data elements related to Recovery funds.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains records including individual's name, self-assigned user name and security question, work address and related contact information (*e.g.*, phone and fax numbers, e-mail address), organizational point of contact, and related contact information. The individual registering for FederalReporting.gov will generate a self-assigned password that will be stored on the FRRS, but will only be accessible to the registering individual. The system will also store other system-generated data such as the registration date, time, and other identifiers for internal tracking. Upon assignment of the password and ID code, the user may subsequently access FederalReporting.gov by entering these data.

AUTHORITY FOR MAINTENANCE OF SYSTEM:

The Recovery Act was enacted on February 17, 2009, in order to make supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization.

PURPOSE(S):

FederalReporting.gov is the Board's inbound Recovery reporting solution. Recipients of Recovery funds are required to disclose certain information, which must then be posted on the public-facing Web site, Recovery.gov. The purpose of collecting this information is to provide the public with information as to how the government spends money, and also to assist with the prevention of fraud, waste, and mismanagement of Recovery funds. FRRS was developed to protect the Board and FederalReporting.gov users from individuals seeking to gain unauthorized access to user accounts on FederalReporting.gov. FederalReporting.gov is the sole source for reporting Recovery Act information.

The information contained in records maintained in the FRRS is used for the purposes of verifying the identity of the individual, allowing individual users to establish an account on FederalReporting.gov, providing individual users access to their FederalReporting.gov account for reporting data, allowing individual users to customize, update or terminate their account with FederalReporting.gov, renewing or revoking an individual user's account on FederalReporting.gov, supporting the FederalReporting.gov help desk functions, investigating possible fraud and verifying compliance with program regulations, and initiating legal action against an individual involved in program fraud, abuse, or noncompliance. The information is also used to provide authenticated protected access to FederalReporting.gov, thereby protecting FederalReporting.gov and FederalReporting.gov users from potential harm caused by individuals with malicious intentions gaining unauthorized access to the system.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

FRRS records will be used to facilitate registering FederalReporting.gov system users, issuing a username and password, and subsequently, verifying an individual's identity as he/she seeks to gain routine access to his/her account. In some cases, the organizational point of contact has the ability to deny access or reporting privileges for the organization, based on the registration information provided by the user. The system has secondary uses that include: using the established username to facilitate tracking service calls or e-mails from the user in the event that there is a change in registration status or a problem the user has with FederalReporting.gov; facilitating the retrieval of user actions (*e.g.*, historical submissions and help tickets) and events while on the FederalReporting.gov system. The records may also be subsequently used for auditing or other internal purpose of the Board, including but not limited to: Instances where enforcement of the conditions of using FederalReporting.gov are necessary; investigation of possible fraud involving a registered user; litigation purposes related to information reported to the Board; contacting the individual in the event of a system modification; a change to FederalReporting.gov; or modification, revocation or termination of user's access privileges to FederalReporting.gov.

The Board may disclose information contained in a record in this system of records under the routine uses listed in this notice without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected.

The general routine uses for the Board's FRRS are listed as follows:

A. Information may be disclosed to the appropriate Federal, State, local, or Tribal agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, if the information is relevant to a violation or potential violation of civil or criminal law or regulation within the jurisdiction of the receiving entity.

B. Disclosure may be made to a Federal, State, local, or Tribal or other public authority of the fact that this system of records contains information relevant to the retention of an employee, the retention of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit. That entity, authority or licensing organization may then make a request supported by the written consent of the individual for the entire record if it so chooses.

C. Information may be disclosed to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of the individual.

D. Information may be disclosed to the Department of Justice (DOJ), or in a proceeding before a court, adjudicative body, or other administrative body before which the Board is authorized to appear, when:

1. The Board, or any component thereof; or

2. Any employee of the Board in his or her official capacity; or

3. Any employee of the Board in his or her individual capacity where the DOJ or the Board has agreed to represent the employee; or

4. The United States, if the Board determines that litigation is likely to affect the Board or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the DOJ or the Board is deemed by the Board to be relevant and necessary to the litigation, provided, however, that in each case it has been determined that the disclosure is compatible with the purpose for which the records were collected.

E. Information may be disclosed to the National Archives and Records

Administration in records management inspections.

F. Information may be disclosed to contractors, grantees, consultants, or volunteers performing or working on a contract, service, grant, cooperative agreement, job, or other activity for the Board and who have a need to have access to the information in the performance of their duties or activities for the Board.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The FRRS records will be stored in digital format on a digital storage device. Long-term FRRS Data System records will be stored on magnetic tape format. All record storage procedures are in accordance with current applicable regulations.

RETRIEVABILITY:

Records are retrievable by database management systems software designed to retrieve FRRS elements based upon role-based user access privileges. Records are retrievable by the FRRS user name.

SAFEGUARDS:

The Board has minimized the risk of unauthorized access to the system by establishing a secure environment for exchanging electronic information. Physical access uses a defense in-depth approach restricting access at each layer closest to where the actual system resides. The entire complex is patrolled by security during non-business hours. Physical access to the data system housed within the facility is controlled by a computerized badge reading system. Multiple levels of security are maintained via dual factor authentication for access using biometrics. The computer system offers a high degree of resistance to tampering and circumvention. This system limits data access to Board and contract staff on a need-to-know basis, and controls individuals' ability to access and alter records within the system. All users of the system of records are given a unique user identification (ID) with personal identifiers. All interactions between the system and the authorized individual users are recorded.

RETENTION AND DISPOSAL:

The Board will retain and dispose of these records in accordance with National Archives and Records Administration General Records Schedule 20, Item 1.c. This schedule provides disposal authorization for electronic files and hard copy printouts created to monitor system usage, including but not limited to log-in files, audit trail files, system usage files, and cost-back files used to access charges for system use. Records will be deleted or destroyed when the Board determines they are no longer needed for administrative, legal, audit, or other program purposes.

SYSTEM MANAGERS AND ADDRESS:

Michael Wood, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue, NW., Suite 700, Washington, DC 20006.

NOTIFICATION PROCEDURE:

Any individual who wants to know whether this system of records contains a record about him or her, who wants access to his or her record, or who wants to contest the contents of a record should make a written request to the system manager.

RECORD ACCESS PROCEDURES:

A request for record access shall follow the directions described under Notification Procedure and will be addressed to the system manager at the address listed above.

CONTESTING RECORDS PROCEDURES:

If you wish to contest a record in the system of records, contact the system manager and identify the record to be changed, identify the corrective action sought, and provide a written justification.

RECORD SOURCE CATEGORIES:

Information is obtained from individuals who have had or seek to have their identity authenticated except that a password and a username are explicitly self-assigned by the user registering to gain access to FederalReporting.gov.

Ivan J. Flores,

Paralegal Specialist, Recovery Accountability and Transparency Board.

[FR Doc. E9–19160 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–GA–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2009–0050]

Notice of Request for Extension of Approval of an Information Collection; Importation of Live Swine, Pork and Pork Products, and Swine Semen From the European Union

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of live swine, pork and pork products, and swine semen from the European Union.

DATES: We will consider all comments that we receive on or before October 13, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0050* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2009–0050, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2009–0050.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on regulations for the importation of live swine, pork and pork products, and swine semen from the European Union, contact Dr. James Davis, Senior Staff Veterinarian, Technical Trade Services—Animals, National Center for Import and Export, VS, APHIS, 4700 River Road, Unit 39, Riverdale, MD 20737; (301) 734–0694. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Live Swine, Pork and Pork Products, and Swine Semen from the European Union.

OMB Number: 0579–0218.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. The regulations are contained in title 9, parts 92 through 98, of the Code of Federal Regulations.

Under 9 CFR 94.24 and 98.38, breeding swine, pork and pork products, and swine semen from a defined region of the European Union (''the APHIS-defined EU CSF region'') must be accompanied by certificates stating that certain requirements related to origin, movement, testing, and other matters specified in the regulations have been met.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.9996361 hours per response.

Respondents: Importers of breeding swine, pork and products, and swine semen; foreign national government officials and salaried veterinary officers.

Estimated annual number of respondents: 25.

Estimated annual number of responses per respondent: 329.80.

Estimated annual number of responses: 8,245.

Estimated total annual burden on respondents: 8,242 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 5th day of August 2009.

William H. Clay,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–19206 Filed 8–10–09; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2009–0060]

Notice of Request for Extension of Approval of an Information Collection; Tuberculosis Testing of Imported Cattle

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for tuberculosis testing of imported cattle.

DATES: We will consider all comments that we receive on or before October 13, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0060* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2009–0060, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2009–0060.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information regarding regulations for tuberculosis testing of imported cattle, contact Dr. Betzaida Lopez, Staff Veterinarian, Technical Trade Services Team—Animals, National Center for Import and Export, VS, APHIS, 4700 River Road, Unit 39, Riverdale, MD 20737; (301) 734–5677. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Tuberculosis Testing of Imported Cattle.

OMB Number: 0579–0224.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. Regulations concerning the importation of animals are contained in 9 CFR part 93. Subpart D of part 93 pertains to the importation of ruminants, including cattle.

The regulations in subpart D include requirements to ensure that cattle imported into the United States are free of bovine tuberculosis. Among other things, subpart D requires an import permit for cattle from Mexico and certain other countries, and requires that the application for the import permit list the specific location of all premises that the cattle to be imported have been on. Additionally, subpart D requires certification regarding the tuberculosis history of the herds from

which a group of cattle is assembled for export to the United States. This information is necessary to allow APHIS to ensure that the cattle to be imported are free of tuberculosis, thereby protecting the health of U.S. livestock.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.8258331 hours per response.

Respondents: Officials of the national government of regions from which the cattle originate and salaried veterinary officials of exporting regions.

Estimated annual number of respondents: 80,075.

Estimated annual number of responses per respondent: 1.253512.

Estimated annual number of responses: 100,375.

Estimated total annual burden on respondents: 82,893 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 5th day of August 2009.

William H. Clay,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–19209 Filed 8–10–09; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2009–0052]

Notice of Revision and Request for Extension of Approval of an Information Collection; Importation of Fruits and Vegetables

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to revise an information collection associated with regulations to allow importation of certain fruits and vegetables into the United States and to request extension of approval of the information collection.

DATES: We will consider all comments that we receive on or before October 13, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0052* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2009–0052, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2009–0052.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

FOR FURTHER INFORMATION CONTACT: For information on the importation of fruits and vegetables, contact Ms. Donna L. West, Senior Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 734–5298. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Fruits and Vegetables.

OMB Number: 0579–0316.

Type of Request: Revision and extension of approval of an information collection.

Abstract: As authorized by the Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS). APHIS regulations authorized by the PPA concerning the importation of fruits and vegetables are contained in ''Subpart—Fruits and Vegetables'' (319.56–1 through 319.56–49).

Under these regulations, certain fruits and vegetables may be imported into the United States under specific conditions to prevent the introduction of plant pests into the United States. These conditions involve the use of information collection activities, including the issuance of permits and phytosanitary certificates, trapping surveys, labeling of boxes, and recordkeeping.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

This information collection includes information collection requirements currently approved by OMB control numbers 0579–0293, ''Revision of Fruits and Vegetables Import Regulations,'' and 0579–0316, ''Importation of Fruits and Vegetables.'' After OMB approves and combines the burden for both collections under a single collection (0579–0316), the Department will retire number 0579–0293.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning this information collection activity. These comments will help us:

(1) Evaluate whether the information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 1.5103216 hours per response.

Respondents: Importers, exporters, and foreign national plant protection organizations.

Estimated annual number of respondents: 2,959.

Estimated annual number of responses per respondent: 27.748901.

Estimated annual number of responses: 82,109.

Estimated total annual burden on respondents: 124,011 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 5th day of August 2009.

William H. Clay,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–19210 Filed 8–10–09; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2009–0061]

Notice of Request for Extension of Approval of an Information Collection; Importation of Products of Poultry and Birds

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations restricting the importation of products of poultry and birds into the United States in order to prevent the introduction of poultry disease.

DATES: We will consider all comments that we receive on or before October 13, 2009.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0061* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2009–0061, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2009–0061.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information regarding regulations for the importation of products of poultry and birds, contact Dr. Lynette Williams, Senior Staff Veterinarian, Technical Trade Services Team—Products, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737; (301) 734–3277. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Products of Poultry and Birds.

OMB Number: 0579–0141.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. The regulations are contained in title 9, parts 92 through 98, of the Code of Federal Regulations.

Part 94, § 94.6, governs the importation of carcasses, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, and other birds to prevent the introduction of exotic Newcastle disease (END) and highly pathogenic avian influenza subtype H5N1 into the United States. Various conditions for importation apply.

These conditions include four information collection activities: (1) A certificate of origin that must be issued, (2) serial numbers that must be recorded, (3) records that must be maintained, and (4) cooperative service agreements that must be signed.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 1.14285 hours per response.

Respondents: Full-time salaried veterinarians employed by the national government of the exporting region.

Estimated annual number of respondents: 4.

Estimated annual number of responses per respondent: 1.75.

Estimated annual number of responses: 7.

Estimated total annual burden on respondents: 8 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

Done in Washington, DC, this 5th day of August 2009.

William H. Clay,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–19205 Filed 8–10–09; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2009–0025]

Codex Alimentarius Commission: Meeting of the Fifteenth Session of the Codex Committee on Fresh Fruits and Vegetables

AGENCY: Office of the Acting Under Secretary for Food Safety, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The Office of the Acting Under Secretary for Food Safety, U.S. Department of Agriculture (USDA), and the Agricultural Marketing Service (AMS), Fruit and Vegetable Programs, USDA, are sponsoring a public meeting on September 17, 2009. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States positions that will be discussed at the 15th Session of the Codex Committee on Fresh Fruits and Vegetables (CCFFV) of the Codex Alimentarius Commission (Codex). The Acting Under Secretary for Food Safety and AMS recognize the importance of providing interested parties the opportunity to obtain background information on the 15th Session of the CCFFV and to address items on the agenda.

DATES: The public meeting is scheduled for Thursday, September 17, 2009, at 10 a.m. to 12 p.m.

ADDRESSES: The public meeting will be held in Room 2068, USDA South Building at 1400 Independence Ave., SW., Washington, DC 20250. Documents related to the 15th CCFFV Session will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp*.

The U.S. Delegate to the 15th Session of the CCFFV invites interested U.S. parties to submit their comments electronically to the following e-mail address *dorian.lafond@usda.gov*.

For Further Information About the 15th CCFFV Session Contact: Dorian LaFond, International Standards Coordinator, AMS Fruit and Vegetable Programs, Stop 0235, 1400 Independence Ave., SW., Washington, DC 20250, Telephone: (202) 690–4944, E-mail: *dorian.lafond@usda.gov*.

For Further Information About the Public Meeting Contact: Doreen Chen-Moulec, Staff Officer, U.S. Codex Office, Food Safety and Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250, Telephone: (202) 205–7760, E-mail: *doreen.chen-moulec@fsis.usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius (Codex) was established in 1963 by two United Nations organizations, the Food and Agriculture Organization and the World Health Organization. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure that fair practices are used in trade. The CCFFV is hosted by Mexico.

Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 15th CCFFV Session will be discussed during the public meeting:

- Matters Arising from the Codex Alimentarius Commission and other Codex Committees;
- Matters Arising from other International Organizations on the Standardization of Fresh Fruits and Vegetables;
- United Nations Economic Commission for Europe (UNECE) Standards for Fresh Fruits and Vegetables: (i) UNECE Standard for Apples (FFV–50); (ii) UNECE Standard for Avocados (FFV–42);
- Draft Section 6 ''Marking or Labeling'' (Draft Standard for Bitter Cassava);
- Draft Standard for Apples;
- Proposed Draft Standard for Avocado (revision) (N19–2008);
- Proposed Draft Standard for Chili Peppers (N17–2008);
- Proposed Draft Standard for Tree Tomato (N18–2008);
- Layout for Codex Standards for Fresh Fruits and Vegetables;
- Proposed Layout for Codex Standards for Fresh Fruits and Vegetables—Comments in Response to CL 2008/13–FFV;
- Glossary of Terms used in the Proposed Layout for Codex Standards on Fresh Fruits and Vegetables;
- Proposals for Amendments to the Priority List for the Standardization of Fresh Fruits and Vegetables—CL 2008/13–FFV.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat prior to the meeting. Members of the public may access copies of these documents via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp*.

Public Meeting

At the September 17, 2009 public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate for the 15th CCFFV Session, Dorian LaFond (see **ADDRESSES**). Written comments should state that they relate to activities of the 15th CCFFV Session.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2009_Notices_Index/*. FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page.

Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/*. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on August 5, 2009.

Karen Stuck,

U.S. Manager for Codex Alimentarius.

[FR Doc. E9–19117 Filed 8–10–09; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Requirements for Patent Applications Containing Nucleotide Sequence and/or Amino Acid Sequence Disclosures

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the revision of a continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before October 13, 2009.

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

- *E-mail: Susan.Fawcett@uspto.gov*. Include A0651–0024 comment@ in the subject line of the message.
- *Fax:* 571–273–0112, marked to the attention of Susan K. Fawcett.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Administrative Management Group, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.
- *Federal Rulemaking Portal: http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Robert A. Clarke, Director, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7735; or by e-mail to *Robert.Clarke@uspto.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Patent applications that contain nucleotide and/or amino acid sequence disclosures must include a copy of the sequence listing in accordance with the requirements in 37 CFR 1.821–1.825. The rules of practice require applicants to submit these sequence listings in a standard international format that is consistent with World Intellectual Property Organization (WIPO) Standard ST.25 (1998). Applicants may submit sequence listings for both U.S. and international patent applications.

The USPTO uses the sequence listings during the examination process to determine the patentability of the associated patent application. Sequence listings are also disclosed as part of the published patent application or issued patent. Sequence listings that are extremely long (files larger than 600K or approximately 300 printed pages) are published only in electronic form and are available to the public on the USPTO sequence data Web page.

The sequence listing required by 37 CFR 1.821(c) for U.S. patent applications may be submitted on paper, compact disc (CD), or through EFS–Web, the USPTO's online filing system. Sequence listings for international applications may be submitted on paper or through EFS–Web only, though sequence listings that are too large to be filed electronically through EFS–Web may be submitted on a separate CD. Applicants may use EFS–Web to file a sequence listing online with a patent application or subsequent to a previously filed application.

Under 37 CFR 1.821(e)–(f), applicants must also submit a copy of the sequence listing in a computer-readable form@ (CRF) with a statement indicating that the CRF copy of the sequence listing is identical to the paper or CD copy required by 1.821(c). Applicants may submit the CRF copy of the sequence listing to the USPTO on CD or other acceptable media as provided in 37 CFR 1.824. Sequence listings that are submitted online through EFS–Web in the proper text format do not require a separate CRF copy or the associated statement.

If the CRF sequence listing in a new application is identical to the CRF sequence listing of another application that the applicant already has on file at the USPTO, 37 CFR 1.821(e) permits the applicant to refer to the CRF listing in the other application rather than having to submit a duplicate copy of the CRF listing for the new application. In such a case, the applicant may submit a letter identifying the application and CRF sequence listing that is already on file and stating that the sequence listing submitted in the new application is identical to the CRF copy already filed with the previous application. The USPTO is proposing to add a new form to this collection, Request for Transfer of a Computer Readable Form Under 37 CFR 1.821(e) (PTO/SB/93), in order to assist customers in submitting this statement.

This information collection contains the sequence listings that are submitted with biotechnology patent applications. Information pertaining to the filing of the initial patent application itself is collected under OMB Control Number 0651–0032, and international applications submitted under the Patent Cooperation Treaty (PCT) are covered under OMB Control Number 0651–0021.

II. Method of Collection

By mail, hand delivery, or electronically to the USPTO.

III. Data

OMB Number: 0651–0024.

Form Number(s): PTO/SB/93.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households; businesses or other for-profits; and not-for-profit institutions.

Estimated Number of Respondents: 19,750 responses per year.

Estimated Time Per Response: The USPTO estimates that it will take the public approximately six minutes (0.10 hours) to one hour and 20 minutes (1.33 hours) to gather the necessary information, prepare the form or sequence listing, and submit it to the USPTO.

Estimated Total Annual Respondent Burden Hours: 7,254 hours per year.

Estimated Total Annual Respondent Cost Burden: $725,400 per year. The USPTO expects that the information in this collection will be prepared by paraprofessionals at an estimated rate of $100 per hour. Therefore, the USPTO estimates that the respondent cost burden for this collection will be approximately $725,400 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Sequence Listing in Application (paper)	1 hour and 20 minutes	3,450	4,589
Sequence Listing in Application (CD)	15 minutes	865	216
Electronic Sequence Listing in Application (EFS–Web).	10 minutes	12,935	2,199
Request for Transfer of a Computer Readable Form under 37 CFR 1.821(e) (PTO/SB/93).	6 minutes	2,500	250
Totals		19,750	7,254

Estimated Total Annual Non-hour Respondent Cost Burden: $920,959 per year. There are no maintenance costs associated with this collection. The USPTO provides free software for creating and validating the format of sequence listings prior to submission. However, this collection does have annual (non-hour) costs in the form of fees, capital start-up costs, recordkeeping costs, and postage costs.

There is no separate filing fee for submitting a sequence listing as part of a U.S. patent application. While there is also no filing fee for a sequence listing filed in an international application, the basic international filing fee only covers the first 30 pages of the application. As a result, there is a $13 fee per page that is added to the international filing fee for each page over 30 pages. The average length of a paper sequence listing in an international application is 150 pages, which would carry an additional fee of $1,950 if the international application were already at least 30 pages long without the listing. The USPTO estimates that approximately 380 of the 3,450 paper sequence listings submitted per year will be for international applications, for a total of $741,000 per year in page fees. There are no page fees for sequence listings that are submitted via EFS–Web in the proper text format.

Under 37 CFR 1.16(s) and 1.492(j), both U.S. and international patent applications that include lengthy paper sequence listings may be subject to an application size fee. For applications with paper sequences listings that exceed 100 pages, the application size fee is $270 (or $135 for small entities) for each additional 50 pages or fraction thereof. The USPTO estimates that approximately 120 applications with long paper sequence listings from large entities will incur an average application size fee of $810, and approximately 95 applications with long paper sequence listings from small entities will incur an average application size fee of $405, for a total of $135,675 per year. Therefore, this collection has a total of $876,675 in fees per year.

There are capital start-up costs associated with submitting sequence listings and CRF copies to the USPTO on CD. Applicants who submit sequence listings on CD must submit two copies of the CD (or three copies for international applications) along with a transmittal letter stating that the copies are identical. This process requires additional supplies, including blank recordable CD media and padded envelopes for shipping. The USPTO estimates that the cost of these supplies will be approximately $3 per CD submission and that it will receive approximately 865 CD submissions per year, for a total of $2,595. In addition, customers who submit sequence listings on paper or CD must also submit a separate CRF copy of the listing, which may be submitted on CD. The USPTO estimates that it will receive approximately 4,315 CRF copies for paper and CD sequence listings at an estimated cost of $2 per copy, for a total of $8,630. Therefore, this collection has total capital start-up costs of $11,225 per year.

Applicants who submit sequence listings on CD may also incur recordkeeping costs. The USPTO advises applicants to retain a back-up copy of CD submissions and associated documentation for their records. The USPTO estimates that it will take applicants five minutes to produce a back-up CD copy and two minutes to print copies of documentation, for a total of seven minutes (0.12 hours) to make a back-up copy of the CD submission. The USPTO estimates that approximately 865 CD submissions will be received per year, for a total of 104 hours for making back-up CD copies. The USPTO expects that these back-up copies will be prepared by paraprofessionals at an estimated rate of $100 per hour, for a recordkeeping cost of $10,400 per year.

There are also recordkeeping costs associated with submitting sequence listings online using EFS-Web. The USPTO recommends that customers print and retain a copy of the acknowledgment receipt after a successful online submission. The USPTO estimates that it will take five seconds (0.001 hours) to print a copy of the acknowledgment receipt and that approximately 12,935 sequence listings per year will be submitted via EFS-Web, for a total of approximately 13 hours per year for printing this receipt. The USPTO expects that these receipts will be printed by paraprofessionals at an estimated rate of $100 per hour, for a recordkeeping cost of $1,300 per year. Therefore, this collection has total recordkeeping costs of $11,700 per year associated with retaining copies of CDs and acknowledgment receipts.

Customers may incur postage costs when submitting a sequence listing to the USPTO by mail. Mailed submissions may include the sequence listing on either paper or CD, the CRF copy of the listing on CD, and a transmittal letter containing the required identifying information. The USPTO estimates that the average postage cost for a paper or CD sequence listing submission will be $4.95 and that 4,315 sequence listings will be mailed to the USPTO per year, for a total postage cost of $21,359 per year.

The total non-hour respondent cost burden for this collection in the form of fees, capital start-up costs, recordkeeping costs, and postage costs is estimated to be $920,959 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.*, the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB

approval of this information collection; they also will become a matter of public record.

Dated: August 4, 2009.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer, Administrative Management Group.

[FR Doc. E9–19179 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: Customer Panel Quality Survey.

Form Number(s): None.

Agency Approval Number: 0651–0057.

Type of Request: Revision of a currently approved collection.

Burden: 406 hours.

Number of Respondents: 2,386 responses.

Avg. Hours per Response: The USPTO estimates that it takes the public approximately 10 minutes (0.17 hours) to complete either the paper or the online survey. This includes the time to gather the necessary information, respond to the survey, and submit it to the USPTO.

Needs and Uses: Individuals who work at firms that file more than six patent applications a year use the Customer Panel Quality Survey to provide the USPTO with their perceptions of examination quality. The USPTO uses the feedback gathered from the survey to assist them in targeting key areas for examination quality improvement and to identify important areas for examiner training.

Affected Public: Individuals or households; business or other for profit; and not-for-profit institutions.

Frequency: Semi-annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Nicholas A. Fraser, e-mail: *Nicholas_A._Fraser@omb.eop.gov.*

Once submitted, the request will be publically available in electronic format through the Information Collection Review page at *http://www.reginfo.gov.*

Paper copies can be obtained by:

* *E-mail: Susan.Fawcett@uspto.gov.* Include ''0651–0057 Customer Panel Quality Survey copy request'' in the subject line of the message.

* *Fax:* 571–273–0112, marked to the attention of Susan K. Fawcett.

* *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Administrative Management Group, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before September 10, 2009 to Nicholas A. Fraser, OMB Desk Officer, via e-mail at *Nicholas_A._Fraser@omb.eop.gov* or by fax to 202–395–5167, marked to the attention of Nicholas A. Fraser.

Dated: August 4, 2009.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer, Administrative Management Group.

[FR Doc. E9–19177 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–865]

Certain Hot–Rolled Carbon Steel Flat Products from the People's Republic of China: Final Rescission of Antidumping Duty Administrative Review

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

EFFECTIVE DATE: August 11, 2009.

FOR FURTHER INFORMATION CONTACT: Toni Dach or 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) 482–1655 and (202) 482–0413, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 3, 2008, the Department of Commerce (''Department'') published a notice of opportunity to request an administrative review of the antidumping duty order on certain hot–rolled carbon steel flat products from the People's Republic of China (''PRC'') for the period of review (''POR'') November 1, 2007, through October 31, 2008. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 65288 (November 3, 2008). On December 1, 2008, Nucor Corporation (''Nucor''), a domestic producer of certain hot–rolled carbon steel flat products, requested that the Department conduct an administrative review of Baosteel Group Corporation, Shanghai Baosteel International Economic & Trading Co., Ltd., and Baoshan Iron and Steel Co., Ltd. (collectively ''Baosteel'').[1] On December 1, 2008, ArcelorMittal USA, Inc. (''ArcelorMittal''), a domestic producer of certain hot–rolled steel flat products, requested that the Department conduct an administrative review of Angang Steel Company, Ltd., Angang Group International Trade Corporation, New Iron and Steel Co., Ltd., Angang Group Hong Kong Co., Ltd., Anshan Iron & Steel Group, and all affiliated entities (collectively ''Angang''); and Shanghai Baosteel Group Corporation, Baosteel Group International Trade Corp., and Baoshan Iron and Steel Co., Ltd. (also collectively ''Baosteel'').[2] On December 24, 2008, the Department published a notice of initiation of an antidumping duty administrative review on certain hot–rolled carbon steel flat products from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 79055 (December 24, 2008). On March 18, 2009, ArcelorMittal submitted a timely withdrawal of its request for review of Baosteel and Angang.

On June 26, 2009, we rescinded this review with respect to Angang based on ArcelorMittal's withdrawal of their request for review, and preliminarily rescinded this review with respect to Baosteel based on evidence on the record indicating that Baosteel made no entries of subject merchandise into the United States during the POR. *See Rescission and Preliminary Rescission of Antidumping Duty Administrative Review: Certain Hot Rolled Carbon Steel Flat Products from The People's Republic of China*, 74 FR 30525 (June 26, 2009) (''*Preliminary Rescission*''). We invited interested parties to submit comments on our *Preliminary Rescission*. We did not receive any comments on our Preliminary Rescission.

[1] Baosteel consists of the following five entities: Baosteel Group Corporation, Shanghai Baosteel International Economic & Trading Co., Ltd., Shanghai Baosteel Group Corporation, Baosteel Group International Trade Corp., and Baoshan Iron and Steel Co., Ltd.

[2] As noted above, Baosteel consists of the five entities listed in footnote 1.

Scope of the Order

For purposes of this review, the products covered are certain hot–rolled carbon steel flat 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 of 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 4.0 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 review.

Specifically included within the scope of this review 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 or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro–alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro–alloying levels of elements such as silicon and aluminum.

Steel products included in the scope of this review, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products in which: i) iron predominates, by weight, over each of the other contained elements; ii) the carbon content is 2 percent or less, by weight; and, iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 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
0.10 percent of molybdenum, or
0.10 percent of niobium, 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 review unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this review:

- Alloy hot–rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.*, American Society for Testing and Materials (''ASTM'') specifications A543, A387, A514, A517, A506).
- Society of Automotive Engineers (''SAE'')/American Iron & Steel Institute (''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 2.25 percent.
- ASTM specifications A710 and A736.
- USS abrasion–resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non–rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTSUS.

The merchandise subject to this review 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, 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, and 7211.19.75.90. Certain hot–rolled carbon steel flat products covered by this review, 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. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under review is dispositive.

Period of Review

The POR is November 1, 2007, through October 31, 2008.

Final Rescission of Review

Because there is no information on the record which indicates that Baosteel made sales to the United States of subject merchandise during the POR, and because we did not receive any comments on our Preliminary Rescission, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are rescinding this review of the antidumping duty order on certain hot–rolled carbon steel flat products from the PRC for the period of November 1, 2007, to October 31, 2008.[3] The cash deposit rate for Baosteel will continue to be the rate established in the most recently completed segment of this proceeding.

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. 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.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded, as of the publication date of this notice, 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 the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative

protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: August 4, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–19224 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–840]

Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review

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

SUMMARY: On April 6, 2009, the Department of Commerce published its preliminary results of the administrative review of the antidumping duty order on certain orange juice from Brazil. The period of review (POR) is March 1, 2007, through February 29, 2008.

Based on our analysis of the comments received, we have made certain changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted–average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: August 11, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Miriam Eqab, 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) 482–3693, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 6, 2009, the Department published in the **Federal Register** the preliminary results of administrative review of the antidumping duty order on certain orange juice from Brazil. *See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 15438 (Apr. 6, 2009) (*Preliminary Results*).

We invited parties to comment on our preliminary results of review. In May 2009, we received case briefs from the petitioners (*i.e.*, Florida Citrus Mutual, A. Duda & Sons, Citrus World Inc., and Southern Gardens Citrus Processing Corporation) and the respondents (*i.e.*, Fischer S.A. Comercio, Industria, and Agricultura (Fischer) and Sucocitrico Cutrale, S.A. (Cutrale)). Also in May 2009, we received rebuttal briefs from the petitioners and the respondents.

The Department has conducted 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 this order includes certain orange juice for transport and/or further manufacturing, produced in two different forms: (1) frozen orange juice in a highly concentrated form, sometimes referred to as frozen concentrated orange juice for manufacture (FCOJM); and (2) pasteurized single–strength orange juice which has not been concentrated, referred to as not–from-concentrate (NFC). At the time of the filing of the petition, there was an existing antidumping duty order on frozen concentrated orange juice (FCOJ) from Brazil. *See Antidumping Duty Order; Frozen Concentrated Orange Juice from Brazil*, 52 FR 16426 (May 5, 1987). Therefore, the scope of this order with regard to FCOJM covers only FCOJM produced and/or exported by those companies which were excluded or revoked from the pre–existing antidumping order on FCOJ from Brazil as of December 27, 2004. Those companies are Cargill Citrus Limitada, Coinbra–Frutesp (SA), Cutrale, Fischer, and Montecitrus Trading S.A.

Excluded from the scope of the order are reconstituted orange juice and frozen concentrated orange juice for retail (FCOJR). Reconstituted orange juice is produced through further manufacture of FCOJM, by adding water, oils and essences to the orange juice concentrate. FCOJR is concentrated orange juice, typically at 42 Brix, in a frozen state, packed in retail–sized containers ready for sale to consumers. FCOJR, a finished consumer product, is produced through further manufacture of FCOJM, a bulk manufacturer's product.

The subject merchandise is currently classifiable under subheadings 2009.11.00, 2009.12.25, 2009.12.45, and 2009.19.00 of the Harmonized Tariff Schedule of the United States (HTSUS). These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive. Rather, the written description of the scope of the order is dispositive.

Period of Review

The POR is March 1, 2007, through February 29, 2008.

Cost of Production

As discussed in the preliminary results, we conducted an investigation to determine whether Cutrale and Fischer made home market sales of the foreign like product during the POR at prices below their costs of production (COP) within the meaning of section 773(b) of the Act. *See Preliminary Results*, 74 FR at 15442. For these final results, we performed the cost test following the same methodology as in the *Preliminary Results*, except as discussed in the Issues and Decision Memorandum (the Decision Memo).

We found 20 percent or more of each respondent's sales of a given product during the reporting period were at prices less than the weighted–average COP for this period. Thus, we determined that these below–cost sales were made in ''substantial quantities'' within an extended period of time and at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade. *See* sections 773(b)(1) and (2) of the Act.

Therefore, for purposes of these final results, we found that Cutrale and Fischer made below–cost sales not in the ordinary course of trade. Consequently, we disregarded these sales for each respondent and used the remaining sales as the basis for determining normal value pursuant to section 773(b)(1) of the Act.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review, and to which we have responded, are listed in the Appendix to this notice and addressed in the Decision Memo, which is adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the

Central Records Unit, room 1117, of the main Department Building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at http://ia.ita.doc.gov/frn/. The paper copy and electronic version of the Decision Memo are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made certain changes to the margin calculations. These changes are discussed in the relevant sections of the Decision Memo.

Final Results of Review

We determine that the following weighted–average margin percentages exist for the period March 1, 2007, through February 29, 2008:

Manufacturer/Exporter	Percent Margin
Fischer S.A. Comercio, Industria, and Agricultura	0.00
Sucocitrico Cutrale, S.A.	2.17

Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries.

We have calculated 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. 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.*, less than 0.50 percent). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these 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). 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 their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate established in the less–than-fair–value (LTFV) investigation if there is no rate for the intermediate company(ies) involved in the transaction.

Cash Deposit Requirements

Further, the following deposit requirements will be effective for all shipments of certain orange juice from Brazil entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: 1) the cash deposit rates for the reviewed companies will be the rates shown above, except if the rate is less than 0.50 percent, *de minimis* within the meaning of 19 CFR 351.106(c)(1), the cash deposit will be zero; 2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company–specific rate published for the most recent period; 3) if the exporter is not a firm covered in this review, or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 4) the cash deposit rate for all other manufacturers or exporters will continue to be 16.51 percent, the all–others rate established in the LTFV investigation. *See Antidumping Duty Order: Certain Orange Juice from Brazil*, 72 FR 12183 (Mar. 9, 2006). These deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act and section 351.221(b)(5) of the Department's regulations.

Dated: August 4, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix - Issues in Decision Memorandum

1. Offsetting of Negative Margins
2. Constructed Export Price Offset for Cutrale
3. Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses
4. Calculation of the Indirect Selling Expense Ratios for Cutrale's U.S. Affilates, Citrus Products Inc. and Cutrale Citrus Juices
5. Ministerial Errors for Cutrale
6. Calculation of the Denominator used in the General and Administrative (G&A) and Financial Expense Ratios for Cutrale
7. Classification of Amortized Goodwill for Cutrale
8. Including *Adiantamentos Sobre Contraltos de Cambio* Financing Costs in Cutrale's Financial Expense Ratio
9. Conversion of U.S. Sales of NFC for Fischer from Gallons to Pounds Solids
10. Calculation of International Freight Expenses for Fischer
11. Window Period Sales for Fischer
12. Calculation of Fischer's U.S. Dollar Borrowing Rate
13. Raw Material Cost–Allocation Methodology for Fischer
14. Capitalized Costs Related to the Videira Plant for Fischer
15. Omission of Certain Costs in Calculating Fischer's Cost of Manufacture
16. Calculation of the G&A Expense Ratio for Fischer
17. Calculation of the Financial Expense Ratio for Fischer

[FR Doc. E9–19223 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XQ77

Caribbean Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Caribbean Fishery Management Council (Council) and its Administrative Committee will hold meetings.

DATES: The meetings will be held on September 1–2, 2009. The Council will convene on Tuesday, September 1, 2009, from 9 a.m. to 5 p.m., and the Administrative Committee will meet from 5:15 p.m. to 6 p.m. They will reconvene on Wednesday, September 2, 2009, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meetings will be held at the Courtyard by Marriott Aguadilla Hotel, located in West Parade/Belt Road, Ramey Base, Aguadilla, Puerto Rico.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–1920; telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION: The Council will hold its 132nd regular Council meeting to discuss the items contained in the following agenda:

September 1, 2009, 9 a.m. to 5 p.m.

•Call to Order
•Adoption of Agenda
•Consideration of the 131st Council Meeting Verbatim Transcription
•Executive Director's Report
•Presentation by Michael Kelly
•ACLs/AMs Scoping Meetings Report

September 1, 2009, 5:15 p.m. to 6 p.m.

•Administrative Committee Meeting
-AP/SSC/HAP Membership
-Budget
- FY 2009
- Budget Petition: 5-years (2010–14)
-SOPPs Amendment(s)
-Other Business

September 2, 2009, 8:30 a.m. to 5 p.m.

•Highly Migratory Species Presentation
•ACLs/AMs Scoping Meetings Report (Cont.)
•Bajo de Sico Regulations
•New Development of Acropora palmata Disease at a Marine Reserve in Puerto Rico
•Enforcement Reports
-Puerto Rico
-U.S. Virgin Islands - DPNR
-NOAA/NMFS
-U.S. Coast Guard
•Administrative Committee Recommendations
•Meetings Attended by Council Members and Staff
•PUBLIC COMMENT PERIOD (5-MINUTES PRESENTATIONS)
•Other Business
•Next Council Meeting

The established times for addressing items on the agenda may be adjusted as necessary to accommodate the timely completion of discussion relevant to the agenda items. To further accommodate discussion and completion of all items on the agenda, the meeting may be extended from, or completed prior to the date established in this notice.

The meetings are open to the public, and will be conducted in English. However, simultaneous translation (English/Spanish) will be provided. Fishers and other interested persons are invited to attend and participate with oral or written statements regarding agenda issues.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be subjects for formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice, and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and/other auxiliary aids, please contact Mr. Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico, 00918–1920, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: August 6, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–19151 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XQ87

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Caribbean Fishery Management Council's (CFMC) Scientific and Statistical Committee (SSC) will hold a meeting.

DATES: The SSC meeting will be held on August 31, 2009, from 9:30 a.m. until 5 p.m.

ADDRESSES: The meeting will be held at the Doubletree Hotel at Gallery Plaza (former Pierre Hotel), De Diego Avenue, Santurce, Puerto Rico.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–1920; telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION: The SSC will meet to discuss the items contained in the following agenda:

•Call to order
•Update since the last meeting/131st CFMC meeting
•SEFSC Update
•Discussion of the development of an objective procedure to provide advice to the CFMC on catch limits in the short term based on informed judgment
•Guidance to the CFMC regarding catch limits for species undergoing overfishing
•Other Business
•Next Meeting

The SSC will convene on August 31st, 2009, from 9:30 a.m. until 5 p.m. The meeting is open to the public, and will be conducted in English.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. For more information or request for sign language interpretation and/other auxiliary aids, please contact Mr. Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico, 00918–1920, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: August 6, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–19152 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XQ89

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Model Evaluation Workgroup (MEW) will hold a work session to review work products individual members have been developing prior to submission to the 2009 salmon methodology review process. The meeting is open to the public.

DATES: The work session will be held Thursday, August 27, 2009, from 9 a.m. to 12:30 p.m.

ADDRESSES: The work session will be held at the Northwest Indian Fisheries Commission Conference Room, 6730 Martin Way East, Olympia, WA 98516; telephone: (360) 438–1180.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the work session is to review work products, including possible bias in the Fishery Regulation Assessment Model (FRAM) associated with multiple encounters during mark selective fisheries, and new methodology for estimating Columbia River Chinook ocean abundance. The results of the analyses will be submitted for review during the Council's 2009 salmon methodology review process.

Although non-emergency issues not contained in the meeting agendas may come before the MEW for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: August 6, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–19153 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

The Manufacturing Council: Meeting of the Manufacturing Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of a meeting via teleconference.

SUMMARY: The Manufacturing Council will hold a meeting via teleconference to deliberate a draft letter of recommendation to the Secretary of Commerce.

DATES: August 25, 2009.

Time: 11 a.m. (EDT).

For the Conference Call-in Number and Further Information, Please Contact: The Manufacturing Council Executive Secretariat, Room 4043, Washington, DC 20230 (Phone: 202–482–4501), or e-mail the Executive Secretary at *Marc.Chittum@mail.doc.gov.*

Dated: August 5, 2009.

J. Marc Chittum,

Executive Secretary, the Manufacturing Council.

[FR Doc. E9–19212 Filed 8–10–09; 8:45 am]

BILLING CODE 3510–DR–P

CONSUMER PRODUCT SAFETY COMMISSION

Commission Agenda, Priorities and Strategic Plan; Notice of Hearing

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of public hearing.

SUMMARY: The Consumer Product Safety Commission (Commission) will conduct a public hearing to receive views from all interested parties about its agenda and priorities for Commission attention during fiscal year 2011, which begins October 1, 2010, and about its current strategic plan. Participation by members of the public is invited. Written comments and oral presentations concerning the Commission's agenda and priorities for fiscal year 2011 and the strategic plan will become part of the public record.

DATES: The hearing will begin at 10 a.m. on August 25, 2009. Requests to make oral presentations and the written text of any oral presentations must be received by the Office of the Secretary not later than 5 p.m. Eastern Standard Time (EST) on August 18, 2009.

ADDRESSES: The hearing will be in the Hearing Room, 4th Floor of the Bethesda Towers Building, 4330 East West Highway, Bethesda, Maryland 20814. Requests to make oral presentations and texts of oral presentations should be captioned ''Agenda, Priorities and Strategic Plan FY 2011'' and sent by electronic mail (''e-mail'') to *cpsc-os@cpsc.gov,* or mailed or delivered to the Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814, no later than 5 p.m. EST on August 18, 2009.

FOR FURTHER INFORMATION CONTACT: For information about the hearing or to request an opportunity to make an oral presentation, please send an e-mail, call, or write Todd A. Stevenson, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail *cpsc-os@cpsc.gov;* telephone (301) 504–7923; facsimile (301) 504–0127. An electronic copy of the CPSC budget request for fiscal year 2010 can be found at *http://www.cpsc.gov/cpscpub/pubs/reports/2010plan.pdf.* An electronic copy of the annotated 2003 Strategic Plan can be found at *http://www.cpsc.gov/cpscpub/ pubs/reports/2003strategicAnnotated.pdf.*

SUPPLEMENTARY INFORMATION: Section 4(j) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2053(j)) requires the Commission to establish an agenda for action under the laws it administers and, to the extent feasible, to select priorities for action at least 30 days before the beginning of each fiscal year. Section 4(j) of the CPSA provides further that before establishing its agenda and priorities, the Commission conduct a public hearing and provide an opportunity for the submission of comments. In addition, section 306(d) of the Government Performance and Results Act (GPRA) (5 U.S.C. 306(d)) requires the Commission to seek comments from interested parties as part of the process of revising the current CPSC strategic plan.

On June 9, 2009, the Commission issued a notice in the **Federal Register** (74 FR 27290) requesting comments on its agenda, priorities, and strategic plan, with written comments due on June 26, 2009. The Commission stated that, if the analysis of any issues raised in the comments would benefit from a public hearing, it would hold a hearing. The Commission received several written comments. In addition, some commenters requested an oral hearing. Accordingly, the Commission will conduct a public hearing on August 25, 2009, to hear oral comments from these requesters or other interested parties concerning its current strategic plan, and agenda and priorities for fiscal year 2011.

Persons who desire to make oral presentations at the hearing on August 25, 2009, should send an e-mail, call, or write Todd A. Stevenson, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814, e-mail *cpsc-os@cpsc.gov,* telephone (301) 504–7923, facsimile (301) 504–0127 not later than 5 p.m. EST on August 18, 2009. Presentations should be limited to approximately ten minutes.

Persons desiring to make presentations must submit the text of their presentations to the Office of the Secretary not later than 5 p.m. EST on August 18, 2009. The Commission reserves the right to impose further time limitations on all presentations and further restrictions to avoid duplication of presentations. The hearing will begin at 10 a.m. on August 25, 2009, and will conclude the same day.

Dated: August 4, 2009.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E9–19114 Filed 8–10–09; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Amended Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Regional Watershed Supply Project, Second Notice of Extension of Scoping Period

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice; extension of comment period.

SUMMARY: The public scoping comment period for the Intent to Prepare an Environmental Impact Statement for the Regional Watershed Supply Project by Million Conservation Resource Group, published in the **Federal Register** on Friday, March 20, 2009 (74 FR 11920), required comments be submitted May 19, 2009 following publication in the **Federal Register**. The comment period was later extended to July 27, 2009, to accommodate requests from entities that desired more time and from areas that desired additional public meetings. The comment period has now been extended to September 28, 2009. Due to number of cooperating agency requests received, the Corps is extending the comment period to allow for additional time to respond to these requests. During this time period, the Corps will communicate with certain entities regarding the possibility of consolidating participation through designation of a single point of contact to represent multiple entities.

FOR FURTHER INFORMATION CONTACT: Questions and comments regarding the proposed action and EIS should be addressed to Ms. Rena Brand, Project Manager, U.S. Army Corps of Engineers, Denver Regulatory Office, 9307 S. Wadsworth Blvd., Littleton, CO 80128–6901; (303) 979–4120; *mcrg.eis@usace.army.mil.*

SUPPLEMENTARY INFORMATION: None.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E9–19232 Filed 8–10–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Plaquemines Parish, LA, Federal Hurricane Protection Levee

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers, Vicksburg District, in cooperation with the New Orleans District and the Louisiana Coastal Protection and Restoration Authority (the non-Federal sponsor), are undertaking studies to develop and evaluate possible alternatives to improve the storm damage reduction capability of the Federal levee system, Plaquemines Parish, LA.

DATES: Initiate Supplemental Environmental Impact Statement (SEIS) August 17, 2009.

ADDRESSES: Correspondence may be sent to Mr. Larry Marcy at the U.S. Army Corps of Engineers, Vicksburg District, CEMVK–PP–PQ, 4155 Clay Street, Vicksburg, MS 39183–3435.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Marcy at the U.S. Army Corps of Engineers, Vicksburg District, telephone (601) 631–5965, fax number (601) 631–5115, or e-mail at *larry.e.marcy@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

Proposed Action. It is the intent of the Vicksburg District to prepare an SEIS for the New Orleans to Venice (NOV) Federal Hurricane Protection levee. The NOV Federal Hurricane Protection project straddles the Mississippi River in Plaquemines Parish, Louisiana, between approximate River Miles 59 and 10. On the west bank, it includes 37 miles of back levee divided into four reaches (Reaches A, B–1, B–2, and St. Jude to City Price) and 34 miles of enlarged west bank Mississippi River levees. On the east bank, the project includes 16 miles of enlarged back levees (Reach C). This project is a Federal system designed to provide protection from hurricane tidal overflow in the lower Mississippi River delta region.

The purpose of the SEIS is to identify and evaluate structural and nonstructural storm damage reduction alternatives to address hurricane-related flooding problems in Plaquemines Parish. Additional work is needed to restore the Federal levees and floodwalls to the authorized level of protection where the levee and floodwalls are below grade due to subsidence and/or post-Katrina design changes.

Alternatives. Alternatives to address flooding problems will be identified and evaluated in cooperation with state and Federal agencies, local government, and the public.

Scoping. Scoping is the process for determining the range of the alternatives and significant issues to be addressed in the SEIS. A part of this analysis will include a letter sent to all parties believed to have an interest in the analysis, requesting their input on alternatives and issues to be evaluated. The letter will also notify interested parties of public scoping meetings that are being held in the local area. A meeting notice will be sent to the local news media. All interested parties are invited to comment at this time, and anyone interested in the study should request to be included on the mailing list.

Two public scoping meetings will be held on Saturday, September 12, 2009: one meeting will be held at the Woodland Plantation, 21997 Highway 23, West Point a La Hache, Louisiana,

from 9 to 11:30 a.m. (open house from 9 until 9:30 a.m., scoping meeting to begin promptly at 9:30 a.m.); the second meeting will be held at Boothville Elementary School, #1 Oiler Drive, Boothville, Louisiana, from 3 to 5:30 p.m. (open house from 3 until 3:30 p.m., scoping meeting to begin promptly at 3:30).

Significant Issues. The tentative list of resources and issues to be evaluated in the SEIS includes aquatic resources, essential fish habitat, fisheries and wildlife resources, wetlands, water quality, air quality, threatened or endangered species, recreation resources, and cultural resources. Socioeconomic items to be evaluated in the SEIS include residential housing and business activity, tax revenues, population, community and regional growth, transportation, and community cohesion.

Environmental Consultation and Review. The U.S. Fish and Wildlife Service (FWS) will be asked to assist in the documentation of existing conditions, impact analysis of alternatives, and overall study review through the Fish and Wildlife Coordination Act (FWCA) consultation procedures. The FWS would provide an FWCA report to be incorporated into the SEIS. The FWS and National Marine Fisheries Service will be asked to be cooperating agencies. The draft SEIS or a Notice of Availability will be distributed to all interested agencies, organizations, individuals, congressionals, and Indian tribes.

Estimated Date of Availability. The draft SEIS is expected to be available in November 2010.

Daniel A. Johnson,

Acting Chief, Planning, Programs, and Project Management Division.

[FR Doc. E9–19230 Filed 8–10–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration panel decision under the Randolph-Sheppard Act.

SUMMARY: The Department of Education (Department) gives notice that on March 1, 2009, an arbitration panel rendered a decision in the matter of *Bernard R. Werwie, Sr.* v. *Pennsylvania Office of Vocational Rehabilitation, Case No. R–S/07–9.* This panel was convened by the Department under 20 U.S.C. 107d–1(a), after the Department received a complaint filed by the petitioner, Bernard R. Werwie, Sr.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the arbitration panel decision from Suzette E. Haynes, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5022, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–7374. If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

Individuals with disabilities may obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: Under section 6(c) of the Randolph-Sheppard Act (the Act), 20 U.S.C. 107d–2(c), the Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

Background

Mr. Bernard R. Werwie, Sr., (Complainant) alleged violations by the Pennsylvania Office of Vocational Rehabilitation, the State licensing agency (SLA) of the Randolph-Sheppard Act (Act) and the implementing regulations in 34 CFR part 395. Specifically, Complainant alleged that the SLA improperly administered the Randolph-Sheppard Vending Facility Program in violation of the Act, implementing regulations under the Act, and State rules and regulations, when the SLA denied Complainant's bid to manage Facility #804 at the U.S. Post Office in Pittsburgh, Pennsylvania.

On or about June 2006, Facility #804 became available due to the death of the previous vending facility manager. At that time, the SLA placed the facility out for bid on a regional satellite basis rather than on a Statewide or permanent basis. According to section 2430.91 of the SLA's rules and regulations governing the Randolph-Sheppard vending program, a satellite facility is one operated by a vendor at the same time the vendor is operating another assigned facility. The SLA is authorized to establish a satellite facility only on a temporary basis when the SLA can demonstrate that it does not have a qualified blind vendor to place on a permanent basis.

The SLA alleged that, because there was a crisis situation at Facility #804, its decision to place the facility out for bid on a regional satellite basis rather than on a Statewide or permanent basis was within its discretion under its State rules and regulations. Further, the SLA contended that its decision was sanctioned by the Elected Committee of Blind Vendors (ECBV), which pursuant to the Act and 34 CFR part 395, is an elected body fully representative of all blind vendors in a State.

A State fair hearing on this matter was held on March 19, 2007. On April 18, 2007, the hearing officer issued a decision denying Complainant's grievance. It was this decision that Complainant sought review of by a Federal arbitration panel.

According to the arbitration panel, the issues to be resolved were: (i) Whether the Pennsylvania Office of Vocational Rehabilitation's decision to bid Facility #804 on a regional basis violated the Randolph-Sheppard Act, the implementing regulations, and State program rules and regulations; and (ii) if there was a violation, what is the remedy.

Arbitration Panel Decision

After hearing testimony and reviewing all of the evidence, the panel majority ruled that the Pennsylvania Office of Vocational Rehabilitation's decision was a reasonable, good faith attempt to remedy a bad situation, and was done in the best interest of all licensed blind vendors in the State of Pennsylvania. The panel denied Complainant's request to be placed without delay to Facility #804. Additionally, the panel denied his request for monetary relief.

One panel member dissented. Specifically, this panel member believed that the SLA unlawfully designated Facility #804 as a satellite facility and that the Complainant should have been compensated for loss of revenue had he been the successful bidder as well as for attorney's fees incurred in his seeking Federal arbitration.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the Department.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about

using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Delegation of Authority: The Secretary of Education has delegated authority to Andrew J. Pepin, Executive Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: August 6, 2009.

Andrew J. Pepin,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E9–19235 Filed 8–10–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Ultra-Deepwater Advisory Committee; Open Meeting

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Ultra-Deepwater Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, September 16, 2009, 1:30 p.m.–5 p.m. (CDT), and Thursday, September 17, 2009, 8 a.m.–12 p.m. (CDT).

ADDRESSES: Crowne Plaza Riverwalk, 111 E. Pecan Street, San Antonio, TX 78205.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, Washington, DC 20585. Phone: 202–586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Ultra-Deepwater Advisory Committee is to provide advice on development and implementation of programs related to ultra-deepwater architecture and technology to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999D.

Tentative Agenda

September 16

1 p.m.–1:30 p.m.—Registration

1:30 p.m.—Call to Order and Welcome, Introductions, Opening Remarks, Standing Subcommittee Reports, Status Updates as of Last Meeting, Topical Presentations such as: Legislative Update; Ocean Task Force Update; DOE Response to Comments from Ocean Conservation Research; Benefits Assessment Program; the Technology Transfer Program and Knowledge Management Database demo; and Overview of the *2010 Annual Plan.*

5 p.m.—Suspend meeting until September 17

September 17

7:30 a.m.–8 a.m.—Registration

8 a.m.—Continue Overview of the *2010 Annual Plan* and Deadlines, and Ad Hoc Review Committees

11:45 a.m.—Public Comments

12 p.m.—Adjourn

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the address or telephone number listed above. You must make your request for an oral statement at least five business days prior to the meeting, and reasonable provisions will be made to include the presentation on the agenda. Public comment will follow the 5 minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, Room 1G–033, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on August 5, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–19226 Filed 8–10–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Unconventional Resources Technology Advisory Committee

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Unconventional Resources Technology Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Tuesday, September 15, 2009, 1:30 p.m.–5 p.m. (CDT) and Wednesday, September 16, 2009, 8 a.m.–12 p.m. (CDT).

ADDRESSES: Crowne Plaza Riverwalk, 111 E. Pecan Street, San Antonio, TX 78205.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, Washington, DC 20585. Phone: 202–586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Unconventional Resources Technology Advisory Committee is to provide advice on development and implementation of programs related to onshore unconventional natural gas and other petroleum resources to the Secretary of Energy; and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999D.

Tentative Agenda

September 15

1 p.m.–1:30 p.m.—Registration

1:30 p.m.—Call to Order and Welcome, Introductions, Opening Remarks, Standing Subcommittee Reports, Status Updates as of Last Meeting, Topical Presentations such as: Legislative Update; Benefits Assessment Program; the Technology Transfer Program and Knowledge Management Database demo; and Overview of the *2010 Annual Plan.*

5 p.m.—Suspend meeting until September 16

September 16

7:30 a.m.–8 a.m.—Registration

8 a.m.—Continue Overview of the *2010 Annual Plan* and Deadlines and Ad Hoc Review Committees

11:45 a.m.—Public Comments

12 p.m.—Adjourn

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the address or telephone number listed above. You must make your request for an oral statement at least five business days prior to the meeting, and reasonable provisions will be made to include the presentation on the agenda. Public comment will follow the 5 minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, Room 1G–033, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on August 5, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–19227 Filed 8–10–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science; Notice of Renewal of the Fusion Energy Sciences Advisory Committee

Pursuant to Section 14(a)(2)(A) of the Federal Advisory Committee Act, 5 U.S.C. App., and in accordance with Title 41 of the Code of Federal Regulations, Section 102–3.65, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Fusion Energy Sciences Advisory Committee has been renewed for a two-year period.

The Committee will provide advice to the Office of Science (DOE), on long-range plans, priorities, and strategies for advancing plasma science, fusion science and fusion technology—the knowledge base needed for an economically and environmentally attractive fusion energy source. The Secretary of Energy has determined that the renewal of the Fusion Energy Sciences Advisory Committee is essential to the conduct of the Department's business and in the public interest in connection with the performance of duties imposed upon the Department of Energy by law. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, the Department of Energy Organization Act (Pub. L. 95–91), the General Services Administration Final Rule on Federal Advisory Committee Management, and other directives and instruction issued in the implementation of those Acts.

FOR FURTHER INFORMATION CONTACT: Ms. Rachel Samuel at (202) 586–3279.

Issued in Washington, DC on August 6, 2009.

Eric Nicoll,

Committee Management Officer.

[FR Doc. E9–19220 Filed 8–10–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12783–003]

Inglis Hydropower, LLC; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

August 4, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* P–12783–003.

c. *Date filed:* July 22, 2009.

d. *Applicant:* Inglis Hydropower, LLC.

e. *Name of Project:* Inglis Hydropower Project.

f. *Location:* The proposed project would be located at the existing Inglis Bypass Channel and Spillway on the Withlacoochee River, west of Lake Rousseau and the Inglis Dam, within the town of Inglis, Levy County, Florida. No federal lands would be occupied by the proposed project.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contacts:* Mr. Dean Edwards, P.O. Box 1565, Dover, FL 33527, (813) 659–3014, (813) 966–4300, *inglishydro@hotmail.com;* Mr. Kevin Edwards, P.O. Box 143, Mayodan, NC 27027, (336) 589–6138, *ph@piedmonthydropower.com.*

i. *FERC Contact:* Jennifer Adams at (202) 502–8087, or via e-mail at *jennifer.adams@ferc.gov.*

j. *Cooperating agencies:* Federal, State, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See, 94 FERC ¶ 61,076 (2001).

k. Pursuant to § 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* September 20, 2009.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Additional study requests and requests for cooperating agency status may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *(http://www.ferc.gov/docs-filing/ferconline.asp)* under the ''e-filing'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.''

m. The application is not ready for environmental analysis at this time.

n. The proposed 2.0-megawatt (MW) Inglis Project would operate in a run-of-river mode by using flows released to maintain the surface elevation of Lake Rousseau at 27.5 feet mean sea level (msl). Flow releases are determined by the Southwest Florida Water Management District (WMD). The proposed powerhouse would be 60-foot-long by 80-foot-wide by 30-foot-high, and contain three vertical shaft turbines. The penstock would be 130 feet in length. The project would generate about 12.3 gigawatt hours (GWH) annually, which would be fed into the interconnected transmission system via an existing 3.4-mile-long, 12,470-kV transmission line.

o. A copy of the application is available for review at the Commission in the Public Reference Room, or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the

document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the Florida State Historic Preservation Officer (SHPO), as required by § 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR, at § 800.4.

q. *Procedural schedule:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter: September 2009.
Issue Acceptance Notice and Letter: December 2009.
Issue Scoping Document 1 for comments: January 2010.
Request Additional Information: March 2010.
Issue Scoping Document 2: March 2010.
Notice of application is ready for environmental analysis: March 2010.
Notice of the availability of the EA: July 2010.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19137 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12555–004]

Mahoning Creek Hydroelectric Company, LLC; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

August 4, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* 12555–004.

c. *Date Filed:* July 27, 2009.

d. *Applicant:* Mahoning Creek Hydroelectric Company, LLC.

e. *Name of Project:* Mahoning Creek Hydroelectric Project.

f. *Location:* On Mahoning Creek in Armstrong County, Pennsylvania. The proposed project would occupy Federal land managed by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* M. Clifford Phillips, Vice President, Mahoning Creek Hydroelectric Company, LLC, 150 North Miller Road, Suite 450 C, Fairlawn, OH 44333, (330) 869–8451.

i. *FERC Contact:* Thomas Dean, (202) 502–6041.

j. This application is not ready for environmental analysis at this time.

k. The proposed Mahoning Creek Project would use the U.S. Army Corps of Engineers' (Corps) Mahoning Creek dam and would consist of: (1) A new 50-foot-high intake structure attached to the upstream face of the dam, equipped with removable trashracks, dewatering bulkhead panels, and a vertical slide gate; (2) a new lining on the existing (currently plugged), 108-inch-diameter conduit through dam monolith 15; (3) a new 1,090-foot-long, 120-inch-diameter penstock on the left (south) bank, bifurcating into two new 110-foot-long, 96-inch-diameter penstocks; (4) a new powerhouse located approximately 100 feet downstream of an existing stilling basin weir containing two new Kaplan turbine/generator units with a total installed capacity of 6.0 MW; (5) a new 40-foot-wide, 150-foot-long, 10-foot-deep tailrace; (6) a new 2.2-mile-long, 25-kilovolt transmission line; (7) a new 100-foot-long bridge to span a small stream to the entrance of a refurbished 0.5-mile-long access road; and (8) appurtenant facilities. The project would have an estimated annual generation of 20,000 megawatt-hours.

The project would operate using flows released by the Corps in accordance with the current dam operation as set by the Corps.

l. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

m. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural Schedule:* The application will be processed according to the following Hydro Licensing Schedule. The Commission staff proposes to issue a single Environmental Assessment (EA) rather than issuing a draft and final EA. The schedule allows 30 days for entities to comment on the EA, and 60 days for agencies to file modified mandatory terms and conditions. Staff will take into consideration all comments and terms and conditions received on the EA before final action is taken on the license application. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Notice of Acceptance and Ready for Environmental Analysis.	September 25, 2009.
Filing interventions, comments, recommendations, preliminary terms and conditions, and fishway prescriptions.	November 24, 2009.
Notice of availability of the EA	March 24, 2010.
Filing comments on EA	April 23, 2010.
Filing modified terms and conditions.	June 22, 2010.

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19136 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

August 4, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–511–013; ER97–4345–025.

Applicants: Oklahoma Gas and Electric Company, OGE Energy Resources, Inc.

Description: Oklahoma Gas and Electric company *et al* submit an updated market power analysis.

Filed Date: 07/31/2009.

Accession Number: 20090803–0063.

Comment Date: 5 p.m. Eastern Time on Tuesday, September 29, 2009.

Docket Numbers: ER99–1757–016.
Applicants: Empire District Electric Company.
Description: The Empire District Electric Company submits updated market power analysis and Order No 697 compliance filing.
Filed Date: 07/30/2009.
Accession Number: 20090803–0066.
Comment Date: 5 p.m. Eastern Time on Monday, September 28, 2009.

Docket Numbers: ER09–1505–000.
Applicants: Stony Creek Wind Farm, LLC.
Description: Application of Stony Creek Wind Farm, LLC for order accepting initial market-based rate tariffs (FERC Electric Tariff, Original Volume 1) and granting certain waivers and blanket approvals.
Filed Date: 07/31/2009.
Accession Number: 20090803–0050.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1534–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits revision to its Transmission Owner Tariff FERC Electric Tariff, Second Revised Volume No 6.
Filed Date: 07/31/2009.
Accession Number: 20090803–0072.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1535–000.
Applicants: Berkshire Power Company, LLC.
Description: Berkshire Power Company, LLC submits Reliability Must-Run Agreement with ISO New England, Inc.
Filed Date: 07/31/2009.
Accession Number: 20090803–0084.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1536–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest ISO submits Notice of Cancellation of the 2008 Adjacent Balancing Authority Coordination Agreement.
Filed Date: 07/31/2009.
Accession Number: 20090803–0083.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1537–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest ISO submits Notice of Cancellation of the 2008 Adjacent Balancing Authority Coordination Agreement.
Filed Date: 07/31/2009.
Accession Number: 20090803–0082.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1540–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submit agreements for load interconnection facilities etc.
Filed Date: 07/31/2009.
Accession Number: 20090803–0085.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08–35–005.
Applicants: Xcel Energy Services, Inc.
Description: Compliance Filing of Xcel Energy Services, Inc.
Filed Date: 07/29/2009.
Accession Number: 20090729–5115.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[FR Doc. E9–19126 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

August 3, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–100–000.
Applicants: PPL Maine, LLC, Black Bear Hydro Partners, LLC.
Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of Black Bear Hydro Partners, LLC, *et al.*
Filed Date: 07/31/2009.
Accession Number: 20090731–5119.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG09–80–000.
Applicants: Fowler Ridge II Wind Farm LLC.
Description: Notice of Self-Certification of Fowler Ridge II Wind Farm LLC as an Exempt Wholesale Generator.
Filed Date: 08/3/2009.
Accession Number: 20090803–5050.
Comment Date: 5 p.m. Eastern Time on Monday, August 24, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–3502–009.
Applicants: Berkshire Power Company, LLC.
Description: EIF MBR Affiliates including Berkshire File Order No. 697–C Notification re Kleen Energy.
Filed Date: 07/31/2009.
Accession Number: 20090731–5118.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER02–1052–011; ER07–1000–003; ER96–1947–025.
Applicants: Las Vegas Power Company, LLC, LS Power Marketing, LLC, West Georgia Generating Company, L.L.C.
Description: Notification of Change in Status pursuant to section 35.42(d).
Filed Date: 07/30/2009.
Accession Number: 20090730–5119.
Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Docket Numbers: ER06–1271–015; ER06–456–020; ER06–880–015; ER06–954–016; ER07–424–011; EL07–54–001.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, LLC submits proposed revisions to its Open Access Transmission Tariff.
Filed Date: 07/29/2009.
Accession Number: 20090730–0193.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 19, 2009.

Docket Numbers: ER06–1313–005; ER03–9–017; ER98–2157–018.
Applicants: Westar Energy, Inc., Kansas Gas and Electric Company.
Description: Westar Energy, Inc. & Kansas Gas and Electric Company submits Triennial Market Power Report *et al.*
Filed Date: 07/31/2009.
Accession Number: 20090803–0069.
Comment Date: 5 p.m. Eastern Time on Tuesday, September 29, 2009.

Docket Numbers: ER08–552–003.
Applicants: Niagara Mohawk Power Corporation.
Description: Refund Report of Niagara Mohawk Power Corporation d/b/a National Grid.
Filed Date: 07/31/2009.
Accession Number: 20090731–5108.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER08–394–023.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits annual recalculation of the Cost of New Entry Value for the Transmission Provider Region.
Filed Date: 07/31/2009.
Accession Number: 20090803–0079.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER08–830–002.
Applicants: ISO New England Inc., New England Power Pool.
Description: Report of ISO New England Inc. and New England Power Pool Regarding Treatment of Price-Responsive Demand in the New England Electricity Markets.
Filed Date: 07/31/2009.
Accession Number: 20090731–5128.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER08–1055–004.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest ISO submits revised tariff sheets on further compliance revising certain provisions of the Amended and Restated Midwest Contingency Reserve Sharing Group Agreement.
Filed Date: 07/30/2009.
Accession Number: 20090731–0107.
Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Docket Numbers: ER08–1169–004.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest ISO submits First Revised Sheet 3072 *et al.* to FERC Electric Tariff, Fourth Revised Volume 1.
Filed Date: 07/24/2009.
Accession Number: 20090727–0026.
Comment Date: 5 p.m. Eastern Time on Friday, August 14, 2009.

Docket Numbers: ER09–807–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits an amendment to its 3/6/09 proposed revisions to Schedule 16 and Schedule 17 of their Open Access Transmission Tariff, FERC Electric Tariff, Fourth Revised Vol 1.
Filed Date: 07/31/2009.
Accession Number: 20090803–0075.
Comment Date: 5 p.m. Eastern Time on Friday, August 7, 2009.

Docket Numbers: ER09–1349–001.
Applicants: WestConnect.
Description: WestConnect *et al.* submits supplement to 6/24/09 section 205 filing to Amend Original Filing to correct certain tariff regulation.
Filed Date: 07/30/2009.
Accession Number: 20090730–0246.
Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Docket Numbers: ER09–1364–001.
Applicants: Michigan Power Limited Partnership.
Description: Michigan Power Limited Partnership submits supplement in response to a request from Commission Staff to remove the citation to Green Power Partners I in section 5 of the Tariff & clean version of the Sub. Original Tariff Sheet 2 etc.
Filed Date: 07/30/2009.
Accession Number: 20090730–0248.
Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009

Docket Numbers: ER09–1522–000.
Applicants: Torofino Trading LLC.
Description: Torofino Trading, LLC submits petition for acceptance of initial tariff, waivers and blanket authority of FERC Electric Tariff, Original Volume 1.
Filed Date: 07/30/2009.
Accession Number: 20090730–0144.
Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Docket Numbers: ER09–1528–000.
Applicants: New England Power Pool.
Description: New England Power Pool submits Attachment 1 *et al.* with regards to the NEPOOL member application and termination membership.
Filed Date: 07/31/2009.
Accession Number: 20090731–0150.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1529–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corp submits am amendment to its FERC Electric Tariff.
Filed Date: 07/31/2009.
Accession Number: 20090731–0149.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1530–000.
Applicants: International Transmission Company.
Description: International Transmission Company submits materials in support of its request for authorization to use updated depreciation rates in the calculation of charges for transmission services.
Filed Date: 07/31/2009.
Accession Number: 20090731–0148.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1531–000.
Applicants: Entergy Services, Inc.
Description: Entergy Arkansas, Inc submits Network Integration Transmission Service Agreement *et al* to be effective 10/0/09.
Filed Date: 07/31/2009.
Accession Number: 20090803–0076.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1533–000.
Applicants: Florida Power & Light Company.
Description: Florida Power & Light Company submits Revised Service Agreement for Network Integration Transmission Service with Seminole Electric Coop, Inc.
Filed Date: 07/31/2009.
Accession Number: 20090803–0078.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1538–000.
Applicants: Carolina Power & Light Company.
Description: Carolina Power & Light Company submits Rate Schedule FERC 183 to be effective 9/29/09.

Filed Date: 07/31/2009.
Accession Number: 20090803–0080.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Docket Numbers: ER09–1539–000.
Applicants: Northern Indiana Public Service Company.
Description: Northern Indiana Public Service Company submits a Transmission Upgrade Agreement.
Filed Date: 07/31/2009.
Accession Number: 20090803–0081.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES09–45–000.
Applicants: Entergy Mississippi, Inc., Entergy Services, Inc., Entergy Arkansas, Inc., Entergy Louisiana, LLC, Entergy New Orleans, Inc., Entergy Gulf States Louisiana, L.L.C., System Energy Resources, Inc., Entergy Texas, Inc.
Description: Joint Application for Authorizations Under Federal Power Act 204 of Entergy Services, Inc., *et al.*
Filed Date: 07/31/2009.
Accession Number: 20090731–5121.
Comment Date: 5 p.m. Eastern Time on Friday, August 21, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E9–19127 Filed 8–10–09; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR09–21–000]

BP West Coast Products LLC, Complainant v. SFPP, L.P., Respondent; Notice of Complaint

August 4, 2009.

Take notice that on July 31, 2009, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, section 343.2 of the Procedural Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.2, sections 1(5), 8, 9, 13, 15, and 16 of the Interstate Commerce Act, 49 U.S.C. App. 1(5), 8, 9, 13, 15, and 16 (1988) and section 1803 of the Energy Policy Act of 1992, BP West Coast Products LLC (Complainant) filed a formal complaint against SFPP, L.P. (Respondent) challenging the justness and reasonableness of the rate increases placed into effect by Respondent's 2009 index rate filing in Docket No. IS09–375–000, tendering FERC Tariff Nos. 175, 176, 177, 178, 179, 180, and 181.

The Complainant states that a copy of the complaint has been served on both the counsel for the Respondent and the contacts for Respondent listed on Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 20, 2009.

Nathaniel J. Davis, Sr.,
Deputy Secretary.
[FR Doc. E9–19132 Filed 8–10–09; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR09–20–000]

BP West Coast Products LLC, Complainant v. Calnev Pipe Line, L.L.C., Respondent; Notice of Complaint

August 4, 2009.

Take notice that on July 31, 2009, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, section 343.2 of the Procedural Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.2, sections 1(5), 8, 9, 13, 15, and 16 of the Interstate Commerce Act, 49 U.S.C. App. 1(5), 8, 9, 13, 15, and 16 (1988) and section 1803 of the Energy Policy Act of 1992, BP West Coast

Products LLC (Complainant) filed a formal complaint against Calnev Pipe Line, L.L.C (Respondent) challenging the justness and reasonableness of all of the Respondent's rates in effect on July 31, 2009, as reflected in its FERC Tariff Nos. 26 and 27.

The Complainant certifies that copies of the complaint were served on both counsel for the Respondent and contacts listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests, must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 20, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19134 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR09–22–000]

BP West Coast Products LLC, Complainant, v. SFPP, L.P., Respondent; Notice of Complaint

August 4, 2009.

Take notice that on July 31, 2009, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, section 343.2 of the Procedural Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.2, sections 1(5), 8, 9, 13, 15, and 16 of the Interstate Commerce Act, 49 U.S.C. App. 1(5), 8, 9, 13, 15, and 16 (1988) and section 1803 of the Energy Policy Act of 1992, BP West Coast Products LLC (Complainant) filed a formal complaint against SFPP, L.P. (Respondent) challenging the justness and reasonableness of all of the Respondent's rates in effect on July 31, 2009, as reflected in its FERC Tariff Nos. 175, 176, 177, 178, 179, 180, and 181.

The Complainant certifies that copies of the complaint were served on both counsel for the Respondent and contacts listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 20, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19133 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR09–23–000]

BP West Coast Products LLC, Complainant, v. Calnev Pipe Line, L.L.C., Respondent; Notice of Complaint

August 4, 2009.

Take notice that on July 31, 2009, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, section 343.2 of the Procedural Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.2, sections 1(5), 8, 9, 13, 15, and 16 of the Interstate Commerce Act, 49 U.S.C. App. 1(5), 8, 9, 13, 15, and 16 (1988) and section 1803 of the Energy Policy Act of 1992, BP West Coast Products LLC (Complainant) filed a formal complaint against Calnev Pipe Line, L.L.C. (Respondent) challenging the justness and reasonableness of the index rate increases placed into effect by the Respondent's 2009 index rate filing in Docket No. IS09–377–000, tendering FERC Tariff Nos. 26 and 27 (superseding FERC Tariff Nos. 24 and 25, respectively).

The Complainant certifies that copies of the complaint were served on both counsel for the Respondent and contacts listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer

and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 20, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19131 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2403–056; 2312–019; 2721–020]

Penobscot River Restoration Trust; Notice of Availability of Draft Environmental Assessment

August 4, 2009.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47879) the Office of Energy Projects has reviewed an application filed on November 7, 2008, to surrender the project licenses for the Veazie, Great Works, and Howland Hydroelectric Projects, located on the Penobscot and Piscataquis Rivers in Penobscot County, Maine. A draft environmental assessment (DEA) has been prepared as part of staff's review. The DEA finds that approval of the application would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the DEA is on file with the Commission and is available for public inspection. The DEA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number (P–2403, P–2312, or P–2721) excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3372, or for TTY, (202) 502–8659.

Any comments should be filed by September 3, 2009, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please reference the project name and project number (P–2232) on all comments. Comments may be filed electronically via Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. For further information, contact Christopher Yeakel at (202) 502–8132.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19135 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–47–004]

PJM Interconnection, L.L.C.; Notice of Filing

August 4, 2009.

Take notice that on July 31, 2009, PJM Interconnection, L.L.C. filed revised sheets to Schedule 1 of its Amended and Restated Operating Agreement, the parallel provisions of Attachment K—Appendix of the PJM Open Access Transmission Tariff, and Schedule 2 of the Operating Agreement in compliance with the Commission's February 19, 2009 Initial Order on Market Power Mitigation Provisions and Establishing Procedures, *PJM Interconnection, L.L.C.*, 126 FERC 61,145 (2009).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov/.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov/*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 21, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19129 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–49–003]

BJ Energy LLC, Franklin Power LLC, GLE Trading LLC, Ocean Power LLC, Pillar Fund LLC, Complainants, v. PJM Interconnection, L.L.C., Respondent; Notice of Filing

August 4, 2009.

Take notice that on July 31, 2009, PJM Interconnection, L.L.C. filed a refund report in compliance with the Commission's April 2, 2009 Order, *BJ Energy LLC* v. *PJM Interconnection, L.L.C.,* 127 FERC 61,006 (2009).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will

not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 21, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19128 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ES09–31–001]

Entergy Texas, Inc.; Notice of Filing

August 4, 2009.

Take notice that on July 28, 2009, Entergy Texas, Inc. filed a supplement providing additional explanation to its April 30, 2009 application.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov/.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 7, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19130 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–2001–013, Docket No. ER08–19–000, Docket No. ER04–197–000, Docket No. ER06–792–000, Docket No. ER04–848–000, Docket No. ER00–167–000, Docket No. ER06–298–000]

Electric Quarterly Reports, Energy Algorithms, LLC, Forest Energy Partners, LLC, Norge Power Marketing Corporation, Ohms Energy Company, LLC, Strategic Energy Management Corp., The Energy Group of America Inc.; Order on Intent To Revoke Market-Based Rate Authority

Issued August 5, 2009.

Before Commissioners: Jon Wellinghoff, Chairman; Suedeen G. Kelly, Marc Spitzer, and Philip D. Moeller.

1. Section 205 of the Federal Power Act (FPA), 16 U.S.C. 824d (2006), and 18 CFR Part 35 (2009), require, among other things, that all rates, terms, and conditions of jurisdictional services be filed with the Commission. In Order No. 2001, the Commission revised its public utility filing requirements and established a requirement for public utilities, including power marketers, to file Electric Quarterly Reports summarizing the contractual terms and conditions in their agreements for all jurisdictional services (including market-based power sales, cost-based power sales, and transmission service) and providing transaction information (including rates) for short-term and long-term power sales during the most recent calendar quarter.[1]

2. Commission staff's review of the Electric Quarterly Report submittals indicates that six utilities with authority to sell electric power at market-based rates have failed to file their Electric Quarterly Reports. This order notifies these public utilities that their market-based rate authorizations will be revoked unless they comply with the Commission's requirements within 15 days of the date of issuance of this order.

3. In Order No. 2001, the Commission stated that,

> [i]f a public utility fails to file a[n] Electric Quarterly Report (without an appropriate request for extension), or fails to report an agreement in a report, that public utility may forfeit its market-based rate authority and may be required to file a new application for market-based rate authority if it wishes to resume making sales at market-based rates.[2]

4. The Commission further stated that,

> [o]nce this rule becomes effective, the requirement to comply with this rule will supersede the conditions in public utilities' market-based rate authorizations, and failure to comply with the requirements of this rule will subject public utilities to the same consequences they would face for not satisfying the conditions in their rate authorizations, including possible revocation of their authority to make wholesale power sales at market-based rates.[3]

5. Pursuant to these requirements, the Commission has revoked the market-based rate tariffs of several market-based rate sellers that failed to submit their Electric Quarterly Reports.[4]

6. As noted above, Commission staff's review of the Electric Quarterly Report submittals identified six public utilities with authority to sell power at market-based rates that failed to file Electric

[1] *Revised Public Utility Filing Requirements,* Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reconsideration and clarification denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filings,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002) *order directing filings,* Order No. 2001–D, 102 FERC ¶ 61,334 (2003).

[2] Order No. 2001 at P 222.

[3] Id. P 223.

[4] *See,* e.g., *Electric Quarterly Reports,* 73 FR 31,460 (June 2, 2008), *Notice of Revocation of Market-Based Rate Tariff; Electric Quarterly Reports,* 115 FERC ¶ 61,073 (2006), *Electric Quarterly Reports,* 114 FERC ¶ 61,171 (2006).

Quarterly Reports for the first quarter of 2009. Commission staff contacted these entities to remind them of their regulatory obligations.[5] None of the public utilities listed in the caption of this order has met those obligations.[6] Accordingly, this order notifies these public utilities that their market-based rate authorizations will be revoked unless they comply with the Commission's requirements within 15 days of the issuance of this order.

7. In the event that any of the above-captioned market-based rate sellers has already filed its Electric Quarterly Report in compliance with the Commission's requirements, its inclusion herein is inadvertent. Such market-based rate seller is directed, within 15 days of the date of issuance of this order, to make a filing with the Commission identifying itself and providing details about its prior filings that establish that it complied with the Commission's Electric Quarterly Report filing requirements.

8. If any of the above-captioned market-based rate sellers do not wish to continue having market-based rate authority, they may file a notice of cancellation with the Commission pursuant to section 205 of the FPA to cancel their market-based rate tariff.

The Commission orders:

(A) Within 15 days of the date of issuance of this order, each public utility listed in the caption of this order shall file with the Commission all delinquent Electric Quarterly Reports. If a public utility fails to make this filing, the Commission will revoke that public utility's authority to sell power at market-based rates and will terminate its electric market-based rate tariff. The Secretary is hereby directed, upon expiration of the filing deadline in this order, to promptly issue a notice, effective on the date of issuance, listing the public utilities whose tariffs have been revoked for failure to comply with the requirements of this order and the Commission's Electric Quarterly Report filing requirements.

(B) The Secretary is hereby directed to publish this order in the **Federal Register.**

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19139 Filed 8–10–09; 8:45 am]

BILLING CODE P

[5] *See Energy Algorithms, LLC,* Docket No. ER08–19–000 (June 17, 2009) (unpublished letter order); *Forest Energy Partners, LLC,* Docket No. ER04–197–000 (June 17, 2009) (unpublished letter order); *Norge Power Marketing Corporation,* Docket No. ER06–792–000 (June 17, 2009) (unpublished letter order); *Ohms Energy Company, LLC,* Docket No. ER04–848–000 (June 17, 2009) (unpublished letter order); *Strategic Energy Management Corp.,* Docket No. ER00–167–000 (June 17, 2009) (unpublished letter order); *The Energy Group of America Inc.,* Docket No. ER06–298–000 (June 17, 2009) (unpublished letter order).

[6] According to the Commission's records, the companies subject to this order last filed their Electric Quarterly Reports for the 4th quarter of 2008.

DEPARTMENT OF ENERGY

Western Area Power Administration

Request for Interest for Purchase of Long-Term Firm Electrical Energy With Capacity or Non-Firm Electrical Energy

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Availability of Request for Interest for Purchase of Long-Term Firm Electrical Energy with Capacity or Non-Firm Electrical Energy.

SUMMARY: The Western Area Power Administration (Western), a Federal power marketing agency of the Department of Energy, announces the availability of a Request for Interest (RFI) for the Purchase of Long-Term Firm Electrical Energy with Capacity or Non-Firm Electrical Energy. Western seeks to determine whether suppliers are interested in providing Western with long-term firm energy with capacity, non-firm energy, or a combination of the two for a contract term to exceed five years but terminating no later than September 2024. The energy would be delivered to Western's Rocky Mountain Region's (RMR) Loveland Area Projects (LAP) at one or more of four points of delivery located within the Western Area Colorado Missouri (WACM) balancing authority.

DATES: Responses to the RFI must be received by Western on or before 4 p.m. MDT September 10, 2009.

ADDRESSES: Send written responses to: Regional Manager, Rocky Mountain Customer Service Region, Western Area Power Administration, 5555 East Crossroads Boulevard, Loveland, CO 80538–8986. Comments may be delivered by certified mail, commercial mail, e-mail *LAPlongtermRFI@wapa.gov,* or fax 970–461–7204.

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of the RFI, please contact Mr. John Gierard, Western Area Power Administration, Rocky Mountain Customer Service Region, Federal Power Programs, P.O. Box 3700, Loveland, CO 80539–3003, (970) 461–7445, fax (970) 461–7204, or e-mail *LAPlongtermRFI@wapa.gov.* The RFI is also available on Western's Web site at *http://www.wapa.gov/fedreg/FRNpdfs/RMR2009 Long-Term Resource RFI.pdf.*

SUPPLEMENTARY INFORMATION: Responses to the RFI will allow Western to determine how it chooses to supplement LAP Federal hydroelectric generation. Delivery points and maximum amounts of monthly on-peak and off-peak firm electrical energy with capacity or non-firm electrical energy are listed in the RFI. The RFI does not specify a maximum price for firm electrical energy with capacity or non-firm electrical energy.

Dated: July 31, 2009.

Timothy J. Meeks,

Administrator.

[FR Doc. E9–19225 Filed 8–10–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD09–8–000]

Transmission Planning Processes Under Order No. 890; Supplemental Notice of Technical Conferences

August 3, 2009.

On June 30, 2009, the Commission issued a notice scheduling staff technical conferences to examine the transmission planning processes that are being conducted pursuant to Order No. 890.[1] As stated in the June 30 notice, these technical conferences are intended to meet the Commission's commitment that its staff would conduct an assessment of the Order No. 890 transmission planning processes. The focus of the 2009 regional technical conferences will be: (1) To determine the progress and benefits realized by each transmission provider's transmission planning process, obtain customer and other stakeholder input, and discuss any areas that may need improvement; (2) to examine whether existing transmission planning processes adequately consider needs and solutions on a regional or interconnection-wide basis to ensure adequate and reliable supplies at just and reasonable rates; and (3) to explore whether existing processes are sufficient to meet emerging challenges to the

[1] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g,* Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 126 FERC ¶ 61,228 (2009).

transmission system, such as the development of inter-regional transmission facilities, the integration of large amounts of location-constrained generation, and the interconnection of distributed energy resources.

The attached agenda provides details on the topics that will be discussed on the panels at each of the three conferences as well as the topics panelists should be prepared to address.

As provided for in the June 30 notice, those wishing to participate as panelists should submit a request form, as indicated below, describing the topic(s) they wish to address. Those wishing to attend each conference are also asked to complete the registration form, as indicated below.

A final notice with a list of the panelists for each conference will be issued in advance of the conferences.

Date	*Location*	*Further information*
September 3, 2009	Phoenix Airport Marriott, 1101 North 44th Street, Phoenix, AZ 85008.	Entities located within the ColumbiaGrid, Northern Tier Transmission Group, WestConnect, and CAISO footprints, and other entities in the WECC region that are not a part of any of these subregional groups. Staff also requests a representative of WECC's Transmission Expansion Planning Policy Committee attend this technical conference. For further information, see calendar listing, located at: *http://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=4744&CalType=%20&CalendarID=116&Date=09/03/2009&View=Listview.* Those wishing to participate as a panelist on one of the panels in the attached agenda should submit a request form by close of business on August 13, 2009, located at: *https://www.ferc.gov/whats-new/registration/trans-09–03-speaker-form.asp.* Those that plan to attend the Phoenix conference should submit the registration form, located at: *https://www.ferc.gov/whats-new/registration/trans-09-03-form.asp*
September 10, 2009	Sheraton Gateway Hotel, Atlanta Airport, 1900 Sullivan Road, Atlanta, GA 30337.	Entities located in the states represented in the Southeastern Association of Regulatory Utility Commissioners (SEARUC) and entities located in the Southwest Power Pool footprint. For further information, see calendar listing, located at: *http://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=4745&CalType=%20&CalendarID=116&Date=09/10/2009&View=Listview.* Those wishing to participate as a panelist on one of the panels in the attached agenda should submit a request form by close of business on August 20, 2009, located at: *https://www.ferc.gov/whats-new/registration/trans-09-10-speaker-form.asp* Those that plan to attend the Atlanta conference should submit the registration form, located at: *https://www.ferc.gov/whats-new/registration/trans-09-10-form.asp.*
September 21, 2009	Marriott Philadelphia Airport, One Arrivals Road, Philadelphia, PA 19153.	Entities located within the Midwest ISO, PJM, New York ISO, and ISO New England footprints, MAPP/MAPP Participants, and adjacent areas. For further information, see calendar listing, located at: *http://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=4746&CalType=%20&CalendarID=116&Date=09/21/2009&View=Listview.* Those wishing to participate as a panelist on one of the panels in the attached agenda should submit a request form by close of business on August 31, 2009, located at: *https://www.ferc.gov/whats-new/registration/trans-09-21-speaker-form.asp.* Those that plan to attend the Philadelphia conference should submit the registration form, located at: *https://www.ferc.gov/whats-new/registration/trans-09-21-form.asp.*

In the event a transmission provider is uncertain as to which technical conference is the appropriate forum for discussion of its planning process, such transmission providers should contact Commission staff in advance to discuss the matter. Lastly, a comment date will be set at a later date allowing for the filing of post-conference comments.

For further information about these conferences, please contact:

Zeny Magos (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8244, *zeny.magos@ferc.gov.*

John Cohen (Legal Information), Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8705, *john.cohen@ferc.gov.*

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–19138 Filed 8–10–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0407; FRL–8943–4]

Agency Information Collection Activities; Proposed Collection; Comment Request; Information Collection Activities Associated With EPA's ENERGY STAR Program in the Commercial and Industrial Sectors; EPA ICR No. 1772, OMB Control No. 2060–0347

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44

U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on February 28, 2010. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 13, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2006–0407, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-Docket@epa.gov*.
- Fax: 202–566–9744.
- Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2006–0407. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

FOR FURTHER INFORMATION CONTACT: Mary Susan Bailey, Climate Protection Partnerships Division, Mailcode: 6202J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–343–9014; fax number: 202–343–2204; e-mail address: *bailey.marysusan@epa.gov*.

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2006–0407, which is available for online viewing at *www.regulations.gov*, or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and Federal Register citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities affected by this action are participants in EPA's ENERGY STAR Program in the Commercial and Industrial Sectors.

Title: Information Collection Activities Associated with EPA's ENERGY STAR Program in the Commercial and Industrial Sectors.

ICR numbers: EPA ICR No. 1772, OMB Control No. 2060–0347.

ICR status: This ICR is currently scheduled to expire on February 28, 2010. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed

either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: ENERGY STAR is a voluntary program helping businesses and organizations as well as individuals protect the environment through superior energy efficiency. The program focuses on reducing utility-generated emissions by reducing the demand for energy. In 1991, EPA launched the Green Lights program to encourage corporations, State and local governments, colleges and universities, and other organizations to adopt energy-efficient lighting as a profitable means of preventing pollution and improving lighting quality. Since then, EPA has rolled Green Lights into ENERGY STAR and expanded ENERGY STAR to encompass organization-wide energy performance improvement, such as building technology upgrades, product purchasing initiatives, and employee training. At the same time, EPA has streamlined the reporting procedures of ENERGY STAR and focused on providing incentives for improvements (*e.g.*, ENERGY STAR Awards Program). EPA provides tools and other resources over the web to help the public overcome the barriers to evaluating their energy performance and investing in profitable improvements. EPA regularly evaluates its reporting procedures and tools to identify ways to minimize the public's burden. For example, EPA has increasingly automated ENERGY STAR's information collections so that organizations can submit information online instead of by mail.

For several reasons, EPA has seen a dramatic increase in the public's participation in ENERGY STAR over the past several years and expects their participation to rise even more in the coming years. President Obama has made energy efficiency an important component of the Federal government's approach to energy management. Under the American Recovery and Reinvestment Act of 2009, Congress and the president allocated approximately $20 billion to encourage Federal agencies, States, local governments and industry to design, improve and use energy efficient buildings and products. President Obama is currently urging Congress to pass the American Clean Energy and Security Act, which would encourage greater energy efficiency in the nation's buildings and homes.

In addition, a growing number of State and local governments are promoting ENERGY STAR as a way for the public to respond to rising energy costs and global warming. Participation in ENERGY STAR has also risen dramatically because of the efforts of trade associations, utilities, and third-party providers in promoting the program to the public. These organizations voluntarily transmit ENERGY STAR messages and promote the use of ENERGY STAR tools and strategies in an effort to help companies reduce their energy consumption and find more environmentally friendly ways to conduct business.

To join ENERGY STAR, organizations are asked to complete a Partnership Letter or Agreement that establishes their commitment to protect the environment. Partners agree to undertake efforts such as measuring and tracking the energy performance of their facilities where possible by using tools such as those offered by ENERGY STAR, spreading the word about the importance of energy efficiency to staff and the community, supporting the ENERGY STAR Challenge, and highlighting achievements with recognition offered through ENERGY STAR.

Partners also may be asked to periodically submit information to EPA as needed to assist in program implementation. For example, EPA maintains the Most Active Service and Product Providers Directory to provide the public with easy access to energy efficiency services that can help companies lower operating costs and increase their bottom line. Businesses wishing to appear in this directory are asked to submit a completed application that demonstrates that they have met specified requirements.

Partnership in ENERGY STAR is voluntary and can be terminated by Partners or EPA at any time. EPA does not expect organizations to join the program unless their participation is cost-effective and otherwise beneficial for them.

In addition, Partners and any other interested party can help EPA promote energy-efficient technologies by evaluating the efficiency of their buildings using EPA's on-line tools (*e.g.*, Portfolio Manager) and applying for recognition.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information will vary depending on the type of participant, the specific collection activity, and other factors. The annual burden for joining ENERGY STAR and conducting related activities is estimated to range from about 2 to 7 hours per respondent. This includes time for preparing and submitting the Partnership Letter or Agreement and other information as requested. The burden for applying for an ENERGY STAR is estimated to range from about 5.5 to 10.5 hours per respondent. This includes time for reading the instructions of the benchmarking tool if needed, gathering and entering information on building characteristics and energy use into the tool, and preparing/submitting the ENERGY STAR application materials to EPA. The burden for applying for an ENERGY STAR Award is estimated to range from 2 to 26.5 hours per respondent. This includes time for preparing and submitting the awards application materials to EPA.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated annual number of potential respondents: 6,000.

Frequency of response: One-time, annually, and/or periodically, depending on the type of respondent and collection.

Estimated total annual respondent burden hours: 54,500.

Estimated total annual respondent costs: $5,436,710, including $3,574,491 in labor costs and $1,862,219 in O&M costs. There are no capital/start-up costs to respondents.

Are There Changes in the Estimates From the Last Approval?

The burden estimates presented in this document are from the last approval. EPA is currently evaluating and updating these estimates as part of the ICR renewal process. EPA will discuss its updated estimates, as well as changes from the last approval, in the next **Federal Register** notice to be issued for this renewal.

What is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: August 5, 2009.

Kathleen Hogan,

Director, Climate Protection Partnerships Division.

[FR Doc. E9–19188 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8943–5]

Clean Air Act Advisory Committee (CAAAC); Request for Nominations for 2009 Clean Air Excellence Awards Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for nominations for Clean Air Excellence Awards.

SUMMARY: EPA established the Clean Air Excellence Awards Program in February, 2000. This is an annual awards program to recognize outstanding and innovative efforts that support progress in achieving clean air. This notice announces the competition for the Year 2009 program.

DATES: All submissions of entries for the Clean Air Excellence Awards Program must be postmarked by September 25, 2009.

FOR FURTHER INFORMATION CONTACT: Concerning the Clean Air Excellence Awards Program please use the CAAAC Web site and click on awards program or contact Mr. Pat Childers, U.S. EPA at 202–564–1082 or 202–564–1352 (Fax), mailing address: Office of Air and Radiation (6102A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

SUPPLEMENTARY INFORMATION:

Awards Program Notice: Pursuant to 42 U.S.C. 7403(a)(1) and (2) and sections 103(a)(1) and (2) of the Clean Air Act (CAA), notice is hereby given that the EPA's Office of Air and Radiation (OAR) announces the opening of competition for the Year 2009 ''Clean Air Excellence Awards Program'' (CAEAP). The intent of the program is to recognize and honor outstanding, innovative efforts that help to make progress in achieving cleaner air. The CAEAP is open to both public and private entities. Entries are limited to the United States. There are five general award categories: (1) Clean Air Technology; (2) Community Action; (3) Education/Outreach; (4) Regulatory/Policy Innovations; (5) Transportation Efficiency Innovations; and two special awards categories: (1) Thomas W. Zosel Outstanding Individual Achievement Award; and (2) Gregg Cooke Visionary Program Award. Awards are given on an annual basis and are for recognition only.

Entry Requirements: All applicants are asked to submit their entry on a CAEAP entry form, contained in the CAEAP Entry Package, which may be obtained from the Clean Air Act Advisory Committee (CAAAC) Web site at *http://www.epa.gov/oar/caaac* by clicking on Awards Program or by contacting Mr. Pat Childers, U.S. EPA at 202–564–1082 or 202–564–1352 Fax, mailing address: Office of Air and Radiation (6102A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004. The entry form is a simple, three-part form asking for general information on the applicant and the proposed entry; asking for a description of why the entry is deserving of an award; and requiring information from three (3) independent references for the proposed entry. Applicants should also submit the entry form electronically (cd preferred) and additional supporting documentation as necessary. Specific directions and information on filing an entry form are included in the Entry Package.

Judging and Award Criteria: Judging will be accomplished through a screening process conducted by EPA staff, with input from outside subject experts, as needed. Members of the CAAAC will provide advice to EPA on the entries. The final award decisions will be made by the EPA Assistant Administrator for Air and Radiation. Entries will be judged using both general criteria and criteria specific to each individual category. There are four (4) general criteria: (1) The entry directly or indirectly (*i.e.,* by encouraging actions) reduces emissions of criteria pollutants or hazardous/toxic air pollutants; (2) The entry demonstrates innovation and uniqueness; (3) The entry provides a model for others to follow (*i.e.,* it is replicable); and (4) The positive outcomes from the entry are continuing/sustainable. Although not required to win an award, the following general criteria will also be considered in the judging process: (1) The entry has positive effects on other environmental media in addition to air; (2) The entry Demonstrates effective collaboration and partnerships; and (3) The individual or organization submitting the entry has effectively measured/evaluated the outcomes of the project, program, technology, *etc.* As previously mentioned, additional criteria will be used for each individual award category. These criteria are listed in the 2009 Entry Package.

Dated: August 5, 2009.

Patrick Childers,

Designated Federal Official for Clean Air Act Advisory Committee.

[FR Doc. E9–19192 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8942–9]

Notice of a Regional Project Waiver of Section 1605 (Buy American requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Hooksett, New Hampshire Sewer Commission

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a waiver of the Buy America requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the Hooksett, New Hampshire Sewer Commission (''HSC'') for the purchase of a foreign manufactured polyethylene Biofilm chip media. HSC's proposed upgrade of its wastewater treatment facility upgrade will utilize an Integrated Fixed Film Activated Sludge (IFAS) process, in which the AnoxKaldnes™ Biochip-M IFAS media manufactured in Germany by Kruger, Inc. will meet the HSC's design specifications. This is a project specific waiver and only applies to the use of the identified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on project specific circumstance. The Acting Regional Administrator is making this determination based on the review and recommendations of the Municipal Assistance Unit. The HSC through its design engineer has provided sufficient

documentation to support their request. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of the AnoxKaldnes™ Biochip-M IFAS media manufactured by Kruger, Inc. by the HSC, as specified in its May 19, 2009 waiver request, to upgrade its wastewater treatment facility in Hooksett, New Hampshire.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Katie Connors, Environmental Engineer, (617) 918–1658, or David Chin, Environmental Engineer, (617) 918–1764, Municipal Assistance Unit (CMU), Office of Ecosystem Protection (OEP), U.S. EPA, One Congress Street, CMU, Boston, MA 02114.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a project waiver of the requirements of Sections 1605(b)(2) of Public Law 111–5, Buy American requirements, to the Hooksett, New Hampshire Sewer Commission HSC) for the purchase of the AnoxKaldnes™ Biochip-M IFAS media manufactured by Kruger, Inc. in Germany, to meet the HSC's technical design specifications for its wastewater treatment plant upgrade project. The process equipment (including installation) is estimated to be $1.67M, with a total estimated project cost of $6.2M.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project is produced in the United States or unless a waiver is provided to the recipient by the head of the appropriate agency, here the EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The Hooksett, New Hampshire Sewer Commission (''HSC''), has requested through its design engineer a waiver from the Buy American Provision for the purchase of a foreign manufactured polyethylene Biofilm chip carrier element (media), as part of HSC's proposed wastewater treatment facility upgrade utilizing an Integrated Fixed Film Activated Sludge (IFAS) process.

According to HSC's design engineer, the rationale behind HSC's design and performance specifications utilizing the IFAS process is to increase its existing plant flow from 1.1 MGD to 2.2 MGD without requiring the construction of additional in-ground reinforced concrete aeration tanks. This process will also allow HSC to meet the current NPDES discharge permit loading requirements of 30 mg/L for both Biological Oxygen Demand (BOD) and Total Suspended Solids (TSS), as well as newly established ammonia limits.

The specified media greatly increases the fixed film surface area for biomass growth over conventional activated sludge processes resulting in additional organic loading capability. According to its manufacturer, Kruger, Inc., the AnoxKaldnes™ Biochip-M IFAS media has a very high specific surface area, which makes it possible for the HSC to meet new ammonia limits at the Hooksett Wastewater Treatment Plant without having to construct two additional aeration tanks.

The HSC has requested a waiver of the ARRA Buy American provisions on the basis of unavailability of a domestic manufactured product that will meet the design specifications for this project, based on the following circumstances:

1. Each AnoxKaldnes™ Biofilm chip has an effective surface area of 366 ft^2/ft^3. To achieve a plant flow of 2.2 MGD and to meet the current permit limits without constructing new aeration tanks, 6,316,263 ft^2 of fixed film surface area is required for attachment of the biomass. The manufacturer of the AnoxKaldnes™ Biofilm chip, Kruger, Inc., actually has another type of media that is manufactured domestically. The U.S. made K3 media has an effective surface area of 152 ft^2/ft^3 which would result in slightly less fixed film surface area, 5,597,233 ft^2, but would require double the aeration tank volume: 64,443 cubic feet as opposed to 32,180 cubic feet. Therefore, the use of the domestic K3 media would result in the construction of two additional aeration tanks, which is contrary to the original project premise and would not meet project design specifications.

2. Constructing the additional aeration tanks to accommodate the U.S. made K3 media would not only be more costly, but would be physically and environmentally challenging due to space limitations, topography, the presence of a nearby perennial stream, and the need to find a location for a chemical building to be constructed adjacent to the existing aeration tanks. Constructing two additional aeration tanks would likely require the relocation of the perennial stream, involve creating additional compensatory flood plain storage, wetland restoration, extensive earthwork on a steep slope, and construction of stepped or cascading retaining walls. It would also require additional blower capacity, new process piping, slide gates, rapid mixers for dispersing chemicals, railings, additional dissolved oxygen analyzers, and the modification of a recently constructed influent flow splitter box.

3. Results from an on-site pilot study utilizing the AnoxKaldnes™ Biofilm chip were provided by the HSC design engineer. The Biofilm Chip–M media, with an effective surface area of 366 ft^2/ft^3, was pilot tested and demonstrated that this total surface area was required to meet the treatment objectives. According to the HSC design engineer, the plant will operate near the maximum solids loading on the final clarifiers and, therefore, the effective surface area cannot be significantly reduced. Furthermore, the IFAS tank cannot be filled past the point where the media movement of the carrier elements no longer effectively moves within the bulk liquid. The fill fraction ranges between 33% to 55%, depending upon the media with each manufacturer specifying the maximum fill fraction for their media. For the BIOFILM Chip–M, the fill fraction is 52% for the first IFAS reactor and 55% for the second IFAS reactor.

The information provided to EPA by the HSC through its design engineer was confirmed through a technical review by EPA's national contractor of the submitted documentation. To the best of our knowledge at this time, there does not appear to be other IFAS process media manufactured in the United States available to meet the HSC's project design specifications and performance requirements for its proposed wastewater treatment plant upgrade. The applicant has provided a list of manufacturers of various polyethylene biofilm media, along with effective bulk specific surface area characteristics. The applicant has also provided additional information from the pilot testing to justify the 55% fill fraction and information on the surface area required to increase flow capacity from 1.1 MGD to 2.2 MGD.

The April 28, 2009 EPA HQ Memorandum, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' '' (''Memorandum''), defines *reasonably*

available quantity as ''the quantity of iron, steel, or relevant manufactured good that is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.'' The same Memorandum defines ''satisfactory quality'' as ''the quality of steel, iron or manufactured good specified in the project plans and designs.''

Furthermore, the purpose of the ARRA is to stimulate economic recovery by funding current infrastructure construction, not to delay projects that are already ''shovel ready'' by requiring potential SRF eligible recipients such as the HSC to revise their design standards and specifications. The imposition of ARRA Buy American requirements in this case would result in unreasonable delay for this project. To delay this construction would directly conflict with a fundamental economic purpose of ARRA, which is to create or retain jobs.

The Municipal Assistance Unit (CMU) has reviewed this waiver request and has determined that the supporting documentation provided by the HSC established both a proper basis to specify the particular good required and that this manufactured good was not available from a producer in the United States able to meet the design specifications for the proposed project. The information provided is sufficient to meet the following criteria listed under Section 1605(b) of the ARRA and in the April 28, 2009 Memorandum: Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients.

Having established both a proper basis to specify the particular good required for this project and that this manufactured good was not available from a producer in the United States, the HSC is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5 for the purchase and use of the specified polyethylene Biofilm chip carrier element (media) documented in HSC's waiver request submittal dated May 19, 2009, for its proposed wastewater treatment plant upgrade using ARRA funds. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

Authority: Public Law 111–5, section 1605.

Dated: July 29, 2009.

Ira W. Leighton,

Acting Regional Administrator, Region I, New England.

[FR Doc. E9–19194 Filed 8–10–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

August 5, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 10, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.''

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0010.

Title: Ownership Report for Commercial Broadcast Stations.

Form Number: FCC Form 323.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities; not-for-profit institutions; State, Local or Tribal Governments.

Number of Respondents/Responses: 9,250 respondents, 9,250 responses.

Estimated Time per Response: 1.5 to 2.5 hours.

Frequency of Response: Recordkeeping requirement; on occasion reporting requirement; Biennially reporting requirement.

Total Annual Burden: 21,375 hours.

Total Annual Costs: $14,670,000.

Nature of Response: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in Sections 154(i), 303, and 310 of the Communications Act of 1934, as amended.

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

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On December 18, 2007, the Commission adopted a Report and Order and Third Further Notice of Proposed Rulemaking (the ''Diversity Order'') in MB Docket Nos. 07–294; 06–121; 02–277; 04–228, MM Docket Nos. 01–235; 01–317; 00–244; *FCC 07–217.* Consistent with actions taken by the Commission in the Diversity Order, the

following changes are made to Form 323: The instructions have been revised to incorporate a definition of ''eligible entity,'' which will apply to the Commission's existing Equity Debt Plus (''EDP'') standard, one of the standards used to determine whether interests are attributable. The instructions have also been revised to update citations to the Commission's media ownership rules.

In addition, on April 8, 2009, the Commission adopted a Report and Order and Fourth Further Notice of Proposed Rulemaking (the ''323 Order'') in MB Docket Nos. 07–294, 06–121, 02–277, 01–235, 01–317, 00–244, 04–228; *FCC 09–33*. Consistent with actions taken by the Commission in the 323 Order, the following changes are made to Form 323: The instructions have been revised to state the Commission's revised Biennial filing requirements adopted in the 323 Order. The instructions and questions in all sections of the form have been significantly revised. Many questions on the form have been reworked or reordered in order to (1) Clarify the information sought in the form; (2) simplify completion of the form by giving respondents menu-style or checkbox-style options to select rather than submit a separate narrative exhibit; and (3) make the data collected on the form more adaptable for use in database programs used to prepare economic and policy studies relating to media ownership.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–19222 Filed 8–10–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 26, 2009.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Don Arthur Barnette, Jonesboro, Georiga; to acquire additional voting shares of CCB Financial Corporation, and thereby indirectly acquire additional voting shares of Community Capital Bank, both of Jonesboro, Georgia.

2. Odric Gregory, individually, and as Chief Manager of Gregory Investments LLC, both of Gallatin, Tennessee; to acquire additional voting shares of Macon Banctrust, Inc., and thereby indirectly acquire additional voting shares of Macon Bank and Trust Company, both of Lafayette, Tennessee.

B. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Harold Ira Kane, Corpus Christi, Texas; to retain voting shares of Charter Bancshares, Inc., and thereby indirectly retain voting shares of Charter Alliance Bank (*de novo*), both of Corpus Christi, Texas, Charter IBHC, Inc., Wilmington, Delaware, and Charter Bank, Corpus Christi, Texas.

Board of Governors of the Federal Reserve System, August 6, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–19172 Filed 8–10–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed; Correction

AGENCY: Federal Maritime Commission.

Citation of Previous Notice of Agreements Filed: 74 FR 37709, July 29, 2009.

Previous Notice of Agreements Filed Dated: July 24, 2009.

Correction to the Notice of Agreements Filed: All of the Filing Parties and the complete Synopsis of Agreement No. 201204 were not printed in the original Notice. The complete Notice should read as follows:

Agreement No.: 201204.

Title: Port of Houston Authority and Houston Marine Terminal Operators/Freight Handlers Agreement.

Parties: Port of Houston Authority; Ceres Gulf, Inc.; Chaparral Stevedoring Company of Texas, Inc.; CT Stevedoring, Inc. dba Cooper/T. Smith Stevedoring Co.; Ports America Texas, Inc.; GP Terminals LLC; Shippers Stevedoring Company; and SSA Gulf, Inc.

Filing Party: Erik A. Eriksson, Esq.; Port of Houston Authority; Executive Office; 111 East Loop; Houston, TX 77029–4327.

Synopsis: The agreement authorizes the Port of Houston Authority and seven affiliated freight handlers to discuss and voluntarily agree on matters of common interest at the Port of Houston.

Contact Person for More Information: Karen V. Gregory, Secretary, (202) 523–5725.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–19208 Filed 8–10–09; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

The National Biodefense Science Board (NBSB), a Federal Advisory Committee to the Secretary; Request for Public Comment

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Request for public comment.

SUMMARY: The U.S. Department of Health and Human Services is hereby giving notice that the National Biodefense Science Board (NBSB) Medical Countermeasure Markets and Sustainability Working Group is requesting public comment to their working document, ''Inventory of Issues Constraining or Enabling Industry Involvement in Medical Countermeasure Efforts''. The inventory (or grid) includes factors that may discourage industry involvement or partnering with the U.S. Government in medical countermeasure development efforts, reported constraints to industry involvement, and potential solutions for relief from a particular constraint. The inventory has been catalogued by financial, legislative, scientific, human capital, regulatory, and societal elements. The Working Group wishes to solicit comment, feedback, and guidance from members of industry, other government agencies, and the public at large for consideration by the Working Group to strengthen and refine the document prior to its public presentation to the NBSB at the scheduled Fall 2009 public meeting of the Board.

DATES: The public is asked to submit comments by October 30, 2009, to the NBSB e-mail box (*NBSB@hhs.gov*) in order to be considered by the Working Group in preparing the final document.

ADDRESSES:

Availability of Materials: Requests for a copy of the Inventory and accompanying ''Comment Revision Form'' should be made to the NBSB's e-mail box at *NBSB@hhs.gov* with ''M&S–WG Inventory Request'' in the subject line. All comments and/or recommendations for improvement to the Inventory should be made on the ''Comment Revision Form'' enclosed with the inventory document.

Procedures for Providing Public Input: Interested members of the public may submit written comments and/or suggestions, using the ''Comment Revision Form,'' to the NBSB's e-mail box at *NBSB@hhs.gov,* with ''M&S–WG Inventory Comments'' in the subject line and should be received no later than October 30, 2009. Individuals providing comment or suggestions will be asked to provide their name, title, and organization. All comments received will be posted without change to *http://www.hhs.gov/aspr/omsph/nbsb/,* including any personal or commercial information provided.

FOR FURTHER INFORMATION, CONTACT: Donald Malinowski, M.Sc., HHS/ASPR/NBSB, 330 C St., SW., #5118, Washington, DC 20201, 202–205–4761, *donald.malinowski@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 319M of the Public Health Service Act (42 U.S.C. 247d–7f) and section 222 of the Public Health Service Act (42 U.S.C. 217a), the Department of Health and Human Services established the National Biodefense Science Board. The Board shall provide expert advice and guidance to the Secretary on scientific, technical, and other matters of special interest to the Department of Health and Human Services regarding current and future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate. The Board may also provide advice and guidance to the Secretary on other matters related to public health emergency preparedness and response.

Dated: July 29, 2009.

Nicole Lurie,

Assistant Secretary for Preparedness and Response, Rear Admiral, U.S. Public Health Service.

National Biodefense Science Board

Markets & Sustainability Working Group Working Document

''Inventory of Issues Constraining or Enabling Industrial Involvement With Medical Countermeasure Development''

Request for Public Comment Published in **Federal Register** June 1, 2009.

Inventory of Issues Constraining or Enabling Industrial Involvement with Medical Countermeasure Development

Introduction: The National Biodefense Science Board (NBSB) Medical Countermeasure Markets and Sustainability Working Group (M&S–WG) has posted a request for public comment in the **Federal Register** to solicit comment, feedback, and guidance from members of industry, other government agencies, and the public at large on their working document, *''Inventory of Issues Constraining or Enabling Industry Involvement in Medical Countermeasure Efforts.''* Posting of the working document in the **Federal Register** will serve to solicit and obtain public comment for consideration by the Working Group to strengthen and refine the document. The Working Group plans to present the document to the NBSB at the scheduled Fall 2009 public meeting of the Board.

Background: There exists a variety of limitations and barriers to biotechnology and pharmaceutical companies'' involvement in the biosecurity and biodefense efforts of the U.S. Government (USG), most notably medical countermeasure advanced research and development programs coordinated by the Department of Defense (DoD) and the Department of Health and Human Services (DHHS). Make-up of the medical countermeasure development efforts has been called fragmented, with confusing approaches used. To delineate and simplify the complexities of USG endeavors in medical countermeasure development, and the interactions between government agencies and private industry, the NBSB Markets & Sustainability Working Group (M&S–WG) assembled the enclosed inventory (or grid) of issues. This inventory includes factors that may discourage industry involvement or partnering with the USG in medical countermeasure development efforts, reported constraints to industry involvement, and potential solutions for relief from a particular constraint. The inventory has been catalogued by financial, legislative, scientific, human capital, regulatory, and societal elements.

The public is encouraged to consider submitting comments and/or recommendations on the content of this inventory. Requests for a copy of the inventory and accompanying Comment Revision Form should be sent to the NBSB's e-mail box at *NBSB@hhs.gov* with ''M&S–WG Inventory Request'' in the subject line. All comments and/or recommendations for improvement to the inventory grid should be made on the Comment Revision Form enclosed with the inventory document. Comments and/or recommendations are to be submitted to the NBSB's e-mail box at *NBSB@hhs.gov* with ''M&S–WG Inventory Comments'' in the subject line and should be received no later than October 30, 2009.

NBSB Markets & Sustainability Work Group 18 May 09

Observations, Adapted From June 08 NBSB Meeting

Business Planning:

■ Contracting with some portions of the USG can be slow, unwieldy, expensive, and opaque.

■ Lack of clarity increases industry risk.

■ Procurement size, warm-base requirements, length of review, etc.

■ Lack of transparency increases industry risk.

■ Contract review process, rate of issuance of new proposals, requirement generation.

■ With a contract in place, situation improves.

■ HHS viewed as cooperative, helpful, responsible and responsive.

■ Perceived lack of coordination between development activities and regulatory responsibilities remains a concern to industry.

Regulatory:

■ Lack of clarity regarding usable product definitions, seeming differences in FDA approaches to providing guidance to industry.

■ Industry reliance upon USG for key components of licensure submissions can lead to lack of accountability.

■ Disease studies, toxicology reports, etc.

Funding, Stability, Reliability, Predictability:

■ Advanced Development needs more dedicated funding, separate from BioShield funding.

■ BioShield remains a funded procurement device, not an advanced-development mechanism.

■ Advanced development efforts would benefit from contracting flexibility.

■ Cost-plus-fee contracting flexibility is appropriate for advanced development and would reduce risk.

■ Multiyear funding.

■ Drug development and corporate investment/planning is long-term process, multiyear funding with carry-over authority, with multi-year contracting authority would signal USG commitment and increase industry sense of long-term stability.

■ Project BioShield expires in 2013 and will need to be reauthorized and funded.

■ Five years not a long time in drug-development process.

■ BioShield funds should not be diverted to fund other initiatives.

■ Inadequate funding delays the journey to MCM licensure.

■ Initiate additional program against emerging diseases, modeled after pandemic program.

Next Steps for WG :

■ Continue to identify obstacles to greater industry participation in MCM development.

■ Make recommendations where appropriate.

■ Identify incentives to encourage greater industry participation in MCM development.

■ Make recommendations where appropriate.

■ Consider alternative models for MCM development.

■ Do other models ensure national and public-health security while more efficiently using limited resources?

Barriers Hindering Partnership: Opportunity cost (distractions from commercial business), economics (e.g. margins, volumes), product liability, uncertainty over sustained funding, ambiguous governance, competing public-health alternatives (e.g., needs of developing world), finite human capital, complexity of working with USG, obligations during crisis.

Incentives Encouraging Partnership: Reliable access to excess capacity (e.g., for redundant capacity or developing-world projects), tax credits, patent-term extensions, grants, priority-review vouchers, preferred customer/vendor status with USG, product licensing rights, larger pool of scientists and engineers, public good, long-term contracts, intellectual-property development.

INVENTORY OF ISSUES CONSTRAINING OR ENABLING INDUSTRIAL INVOLVEMENT WITH MEDICAL COUNTERMEASURE DEVELOPMENT 18 MAY 09

Row #	Problem/category Column #1	Potential solution Column #2	Approach/ advantages/ action Column #3	Problem/limitation Column #4
		Financial Elements		
1	Row 1; Column 1 ..... Capital requirements to establish safety, efficacy, validated manufacture.	Row 1; Column 2 ..... Increase financial return after risking capital to industry-standard rates. Reduce requirement for private capital for advanced development.	Row 1; Column 3 ..... Increased federal funding for advanced development, in the form of cost-reimbursement contracts and rewarding private-capital investments with milestone payments and at procurement.	Row 1; Column 4. Risk of distraction of large industry partners from commercial mission or dilution of effort [potential conflict with fiduciary responsibility to shareholders of publicly traded companies].
2	Row 2; Column 1 ..... Risk of technical failure of vaccine development effort.	Row 2; Column 2a ..... Decentralized discovery/centralized development and manufacture. Row 2; Column 2b ..... Evaluation of whether indirect-cost reimbursement greater than 100% may be appropriate. Assistance with calculating indirect cost rates (for companies that have never done so before)..	Row 2; Column 3a ..... Reimbursement of development costs at cost +15%, with return-on-working-capital at 22%, and cost-of-money-for-capital at 15%. Row 2; Column 3b. Provides support early in process.	Row 2; Column 4. Lack of interest, given opportunity costs Congressional tolerance for anticipatable frustrations is unknown.
3	Row 3; Column 1 ..... Tax incentives	Row 3; Column 2a ..... Enhance current incremental R&D tax credit (increase, make refundable). Row 3; Column 2b ..... New investment tax credit (20%) for construction of new R&D and manufacturing facilities for biosecurity and emerging-infectious disease purposes (with refundable and/or transferable provisions).	Row 3; Column 3a. Currently, 20% for qualified R&D expenses and 50% for clinical-trial expenses. Row 3; Column 3b ..... Enhance net revenue	Row 3; Column 4. Not yet authorized.
4	Row 4; Column 1	Row 4; Column 2	Row 4; Column 3	Row 4; Column 4.

INVENTORY OF ISSUES CONSTRAINING OR ENABLING INDUSTRIAL INVOLVEMENT WITH MEDICAL COUNTERMEASURE DEVELOPMENT 18 MAY 09—Continued

Row #	Problem/category Column #1	Potential solution Column #2	Approach/ advantages/ action Column #3	Problem/limitation Column #4
	Revenue enhancements based on Intellectual Property.	Enhance current product or use patent-term restoration and/ or extension (revise formula). Allow full patent-term extension for licensed products that gain CBRN or emerging disease application (akin to adding pediatric indication). Allow transfer of patent-term extension to another product or company (''wildcard''). Market exclusivity: Increase term of market exclusivity to ~ 12–15 years and extend it to biologicals (as does Orphan Drug Act).	Current statutory formula: Patent extension supplemented by [½ time from IND to filing BLA + full time from BLA filing to FDA approval/licensure]. Currently, 5 years of market exclusivity is provided to New Chemical Entities (NCEs) but not biologicals via Hatch-Waxman Act and 7 years of market exclusivity is provided via Orphan Drug Act.	Note: Orphan drug tax credit applies to vaccines only if less than 200,000 vaccinated recipients anticipated.
5	Row 5; Column 1 ..... Priority-Review Vouchers (PRV).	Row 5; Column 2 ..... Make applicable to biosecurity products.	Row 5; Column 3 ..... A PRV is a tradable certificate awarded to a developer of a treatment for a neglected tropical disease that gains licensure from FDA. It entitles holder to a priority review (a speedier review time) for a future product of their choosing, potentially shortening the review process by 6 to 12 months. First PRV awarded to Novartis for Coartem malaria treatment (artemether and lumefantrine) in Apr 09.	Row 5; Column 4. Predictability: Would a priority-review voucher simply accelerate a ''no'' or ''not yet'' response? 2007 law: Text at: *http://www.bvgh.org/documents/HR3580-CompromiseFDA-PDUFABill.pdf* Draft FDA guidance: *http://www.fda.gov/cber/gdlns/tropicaldisease.htm*.
6	Row 6; Column 1 ..... Limited market size (development costs >> market potential).	Row 6; Column 2a ..... Acquisition RFPs should state minimum quantities (total and to each successful awardee) to increase market certainty to potential bidders and their investors. Row 6; Column 2b ..... Contract terms allowing manufacturers access to allied foreign governments and other authorized customers outside the US, as well as civilian first responders, hospitals, and travel-vaccine providers within the US. Row 6; Column 2c ..... Add biodefense and other adult vaccines to Standardized Equipment List (SEL) and Authorized Equipment List (AEL), so state and local first-responders can use federal (DHS) grant funds to pay for vaccinations.	Row 6; Column 3a ..... Publication of requirements along with advanced-development RFPs. It may be possible to more widely describe procurement requirements, in contrast to the more sensitive value of treatment requirements. Row 6; Column 3b ..... Treaty allies represent additional markets.	Row 6; Column 4a. Requirements are not static and can be expected to change based on threat assessments and discoveries during product development. Requirements may signal USG threat recognition, so may not be appropriate for public release. Row 6; Column 4b. Allies have not made substantial independent purchases to date. Some may hope/expect USG to share stockpile when attack occurs. Row 6; Column 4c. Currently only drugs, antidotes, and various treatments are covered, but not vaccines for prophylaxis in the first place.
7	Row 7; Column 1	Row 7; Column 2	Row 7; Column 3	Row 7; Column 4.

INVENTORY OF ISSUES CONSTRAINING OR ENABLING INDUSTRIAL INVOLVEMENT WITH MEDICAL COUNTERMEASURE DEVELOPMENT 18 MAY 09—Continued

Row #	Problem/category Column #1	Potential solution Column #2	Approach/ advantages/ action Column #3	Problem/limitation Column #4
	Surge issues	Compensation if commercial product(s) displaced during emergencies (*e.g.*, lost sales, market share, delayed licensing).	Define ''compensation'' in initial contract or agree to a dispute-resolution mechanism.	Potential compensation may need to include delay of a new product or loss of market share to a competitor. Level difficult to determine a priori.
		Legislative Elements		
8	Row 8; Column 1 Predictability, consistency adequacy of Congressional appropriations.	Row 8; Column 2a Increase annual NIAID appropriation increases for early-stage MCM development to offset flat funding since 2001 anthrax attacks. Insufficient funds now allocated for advanced development for CBRN. Increase BARDA appropriations for advanced development of CBRN MCMs and continued long-term funding for both CBRN and pandemic countermeasures, to offset recent funding shortfalls. Row 8; Column 2b Need significantly expanded federal funding under BioShield for advanced development and procurement activities (BioShield reauthorization and funding). Stop and reverse Congressional diversion of BioShield Reserve Fund for other initiatives ($412M in FY09 = $137M for pandemic + $275M for PAHPA implementation), Need long-term funding for acquisition of FDA-approved/licensed MCMs for Strategic National Stockpile.	Row 8; Column 3a Multi-year contracting authority (for large molecules, due to complex manufacturing and limited use) and multi-year funding with carry-over authority for R&D and procurement initiatives. Manage funding as a ''national portfolio'' that mitigates risk by a broad set of target products, with multiple MCMs per disease. Base metrics on portfolio performance, rather than individual candidate countermeasures. Long-term funding and ongoing government procurement (10 years or longer) is essential to maintain warm-base MCM manufacturing and surge capacity. Row 8; Column 3b. Solution: a blend of indefinite mandatory funding authority with caveats to assure good-faith performance and sufficient ongoing discretionary appropriations.	Row 8; Column 4a. Limited track record. Partial analogies: Aerospace industry in early 1940s. Consistent procurement of aircraft carriers since 1940s. Congressional long-term recognition of threat (natural and malicious) and tolerance for MCM technical failure unknown.
9	Row 9; Column 1 Funding stream	Row 9; Column 3 Provide for greater flexibility in milestone-driven payment schedules under PAHPA and BioShield, to account for the unpredictability of vaccine R&D technical difficulties and progress.	Row 9; Column 3 PAHPA (2006) authorized $1B to BARDA for advanced development of MCMs, in addition to BioShield Reserve Fund. Avoids rPA102 scenario (risk of repayment upon cancellation).	Row 9; Column 4. Would likely require BARDA to use Other Transaction Authority (OTA) (not used to date).
10	Row 10; Column 1	Row 10; Column 2	Row 10; Column 3..	

INVENTORY OF ISSUES CONSTRAINING OR ENABLING INDUSTRIAL INVOLVEMENT WITH MEDICAL COUNTERMEASURE DEVELOPMENT 18 MAY 09—Continued

Row #	Problem/category Column #1	Potential solution Column #2	Approach/ advantages/ action Column #3	Problem/limitation Column #4
	Untrodden development pathways.	Cooperative R&D Agreements (CRADAs) allow collaboration with respect for intellectual property. US Gov't and sponsor agree on defined development pathway at early stages to achieve a target product profile.	Enhanced recognition that changes in product requirements can be expected to increase the cost and time required to achieve a useable product. Requires enhanced integration of efforts by each USG entity (notably BARDA, NIAID, CDC, FDA, DoD, Inter-Agency Board).	
11	Row 11; Column 1 ..... Facilitating technology transfer from basic to advanced development.	Row 11; Column 2 ..... Streamline process to support integration of disciplines needed for successful scale-up of manufacturing processes. Increase U.S. Gov't funding for applied bioscience, material sciences and biopharmaceutical processes.	Row 11; Column 3 ..... Offer innovator an option of (a) a milestone payment ("prize") as a single fee to license the intellectual property for further development or (b) continue involvement in development in exchange for the possibility of royalties after FDA licensure achieved.	Row 11; Column 4. Milestone payments could be used on a multiple of private paid-in capital (variable) or a fixed amount per drug.
		Human Capital Elements		
12	Row 12; Column 1 ..... Human capital within industry ..	Row 12; Column 2 ..... Grow the pool of science and engineering talent pool within industry needed to develop and manufacture MCMs within the US.	Row 12; Column 3 ..... Increased range of scientific programs offers additional career-development for industrial scientists and engineers. DARPA model assumes industry-standard compensation rates. Congress authorized large increases for NIH grants for researcher awards, but a long-term approach is needed to sustain the industrial base..	Row 12; Column 4 Additional flexibility needed in USG agency authority to provide competitive compensation to critical employees.
13	Row 13; Column 1 ..... Complex, evolving regulatory requirements.	Row 13; Column 2a ..... Clarify expectations early in product development and minimize changes in expectations in application review (e.g., requirements under "animal rule"). Row 13; Column 2b ..... Implement best practices for quality/regulatory systems for biosecurity products. Row 13; Column 2c ..... Collaboration with FDA to meet evolving (more stringent) standards for development, manufacture, clinical trials, and "animal-rule" pathways. Row 13; Column 2d. Accelerated FDA review.	Row 13; Column 3a. Spill-over benefits to commercial sphere via enhanced dialog with FDA. Row 13; Column 3b ..... Partner with experienced biopharma organization to gain access to either staff or quality systems. Row 13; Column 3c. Centralized advanced development and manufacturing to facilitate cross-product learning and system development.	Row 13; Column 4b. Companies with extensive FDA experience not currently engaged with MCM development or manufacture.
14	Row 14; Column 1 ..... Administrative requirements to comply with USG contracts.	Row 14; Column 2 ..... Contracting reform to relieve the regulatory and reporting burden.	Row 14; Column 3 ..... Waive nonessential accounting requirements and other components of the Federal Acquisition Regulation (FAR).	Row 14; Column 4 Familiarity with Federal Acquisition Regulations (FAR) (or relief from them).

INVENTORY OF ISSUES CONSTRAINING OR ENABLING INDUSTRIAL INVOLVEMENT WITH MEDICAL COUNTERMEASURE DEVELOPMENT 18 MAY 09—Continued

Row #	Problem/category Column #1	Potential solution Column #2	Approach/ advantages/ action Column #3	Problem/limitation Column #4
			BARDA should identify opportunities to use Other Transaction Authority (OTA) to enhance R&D contracts (akin to DARPA).. Explore Cooperative R&D Agreement (CRADA) approaches.	
15	Row 15; Column 1 ..... Adequacy of review and consultation resources at FDA.	Row 15; Column 2 ..... Increase appropriations to enhance FDA review and consultation.	Row 15; Column 3. More medical reviewers needed, plus research and assay development within FDA. Increase percentage of personnel eligible for enhanced bonus payments or supergrades.	
Societal Elements				
16	Row 16; Column 1 ..... Contribution to national security..	Row 16; Column 2 ..... Exploration of biosecurity MCMs is likely to have spillover benefits to ''natural'' infectious diseases as well.	Row 16; Column 3 ..... Enhanced corporate reputation.	Row 16; Column 4 Increased public attention during crisis.
Legal Elements				
17	Row 17; Column 1 ..... Product liability	Row 17; Column 2 ..... Expand coverage of PREP Act to additional MCMs for which Material Threat Assessments (MTAs) exist.	Row 17; Column 3 ..... Indemnification via Public Readiness & Emergency Preparedness (PREP) Act of 2005 (PL 109–148, Dec 30, 2005).	Row 17; Column 4. Not tested in practice or litigated. *http://www.pandemicflu.gov/plan/federal/prep_act.html* Public Law 109–148. PHS Act Section 319(f)(3). 42 U.S.C. 247d–6d. [See also Support Antiterrorism by Fostering Effective Technologies (SAFE-T) Act of 2002 [within Homeland Security Act, Pub. L. 107–296].]
18	Row 18; Column 1 ..... Antitrust Provisions	Row 18; Column 2 ..... Assess need for, plan, and implement antitrust waiver authority under PAHPA 2006 for R&D and preparedness activities to allow nominally competing parties to collaborate during a public health emergency or to conduct contingency exercises before a public-health emergency. Involve DoJ and Attorney General in supervisory/compliance role.	Row 18; Column 3. Need ability to develop contingency plans and preliminary communication and technical consultation. Continue and expand efforts such as those underway with pandemic influenza vaccine and adjuvant ''mix-and-match'' studies to assess safety and efficacy.	
Corollary Elements				
19	Row 19; Column 1	Row 19; Column 2	Row 19; Column 3.	

INVENTORY OF ISSUES CONSTRAINING OR ENABLING INDUSTRIAL INVOLVEMENT WITH MEDICAL COUNTERMEASURE DEVELOPMENT 18 MAY 09—Continued

Row #	Problem/category Column #1	Potential solution Column #2	Approach/ advantages/ action Column #3	Problem/limitation Column #4
	Attractiveness of commercial vaccine market for support of future R&D and manufacturing.	Implement national policies to provide adequate reimbursement for vaccines and their administration in both the public and private sectors, to help underwrite and sustain the industrial base needed for biosecurity and global-health products.	Consolidate Medicare coverage of all vaccines within Part B (not Part D). Increase administration reimbursement rates under Medicaid and Vaccines for Children (VFC) beneficiaries with federal subsidies to offset increased State costs. Third-party payers to provide first-dollar coverage for FDA-licensed vaccines and their administration under healthcare reform.	
20	Row 20; Column 1 ..... Approaches suitable for developing-world situations (perhaps useful by analogy).	Row 20; Column 2 ..... Advanced Market Commitments (AMC) separately for existing vaccines and global health vaccines at R&D stage.	Row 20; Column 3.. Examples: Guarantee a market in developing countries for pneumococcal vaccines to prevent deadly respiratory infections in children and as an incentive for development of vaccines that currently do not exist against infectious disease threats in those countries, but which may be imported into the U.S. or threaten global security.	
Other Benefits to Involvement With Biosecurity Initiative				
21	Row 21; Column 1 ..... Competitive situation	Row 21; Column 2 ..... Don't put all eggs in one basket, allow multiple technologies and product candidates to progress simultaneously through development pathways.	Row 21; Column 3. Participation by manufacturer with U.S. Gov't withholds scientific, financial, and human-capital benefit to competitors.	
22	Row 22; Column 1 ..... New intellectual property		Row 22; Column 3 ..... IP developed in course of government contract remains with discoverer.	Row 22; Column 4. U.S. Gov't has step-in rights if patent arising from federal government-funded research not exploited [Bayh-Dole Act of 1980 (or University & Small Business Patent Procedures Act), codified in 35 U.S.C. 200–212[1], implemented by 37 CFR 401[2]].
23	Row 23; Column 1 ..... Staying abreast of advancing sciences.		Row 23; Column 3 ..... Access to state-of-art process analytics for wide variety of biological products.	Row 23; Column 4. Need to understand exclusivity of access.

Citations:

Project BioShield Act of 2004: Public Law 108–276, *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ276.108.pdf.*

BioShield II (2005):

PAHPA, PL 109–417, Dec 19, 2006.

Bibliography:

Matheny J, Mair M, Mulcahy A, Smith BT. Incentives for biodefense countermeasure

development. *Biosecur Bioterror* 2007 Sep;5(3):228–38.

Animal Rule = U.S. Food and Drug Administration. New drug and biological drug products; evidence needed to demonstrate effectiveness of new drugs when human efficacy studies are not ethical or feasible. Final rule. *FR* 2002 May 31;67(105):37988–98. *http://frwebgate5.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=483712496781+5+2+0&WAISaction=retrieve.*

BILLING CODE 4150–37–C

Markets & Sustainability-WG "Inventory of Issues Constraining or Enabling Industry Involvement in Medical Countermeasure Efforts" Revision Form

Revisions due by 10:00 a.m. October 30, 2009

Name:	
Organization:	
Email:	

Please identify revised sections of the inventory grid by their corresponding Row and Column Numbers. Provide specific, concrete language for revision utilizing this revision form.

Row #	Column #	Comment	Recommended Revision

[FR Doc. E9–19199 Filed 8–10–09; 8:45 am]
BILLING CODE 4150–37–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission of OMB Review; Comment Request; Investigator Registration and Financial Disclosure for Investigational Trials in Cancer Treatment (NCI)

SUMMARY: In compliance with the requirement of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute, (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collected below. This proposed information collection was previously published in the **Federal Register** on June 10, 2009 (74 FR 27552), and allowed 60 days for public comment. One public comment was received regarding pharmaceutical testing. The submitter responded to the e-mail. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a valid OMB control number.

Proposed Collection: *Title:* Investigator Registration and Financial Disclosure for Investigational Trials in Cancer Treatment (NCI). *Type of Information Collection Request:* Existing Collection in Use without an OMB Number. *Need and Use of Information Collection:* Food and Drug Administration (FDA) regulations require sponsors to obtain information from the investigator before permitting the investigator to begin participation in investigational studies. The National Cancer Institute, (NCI) as a sponsor of investigational drug trials, has the responsibility to assure the FDA that investigators in its clinical trials program are qualified by training and experience as appropriate experts to investigate the drug. In order to fulfill these requirements, a standard Statement of Investigator (FDA Form 1572 modified), Supplemental Investigator Data Form, Financial Disclosure Form and Curriculum vitae (CV) are required. The NCI will accept the investigator's CV in any format. All investigators maintain a CV as part of their academic and professional practice. The data obtained from these forms allows the NCI to evaluate the qualifications of the investigator, identify appropriate personnel to receive shipment of investigational agent, ensure supplies are not diverted for inappropriate protocol or patient use and identify financial conflicts of interest. Comparisons are done with the intention of ensuring protocol, patient safety and drug compliance for patient and drug compliance for patient safety and protections. *Frequency of Response:* Annually.

Affected Public: Public sector, businesses or other for-profit that will include Federal agencies or employees, non-profit institutions and a very small number of private practice physicians. *Type of Respondents:* Investigators. The annual reporting burden is limited to those physicians who choose to participate in NCI sponsored investigational trials to identify new medicinal agents to treat and relieve those patients suffering from cancer.

The annualized respondents' burden for record keeping is estimated to require 8,564 hours (see table below).

TABLE—ESTIMATES OF ANNUAL BURDEN

Type of respondents	Form	Number of respondents	Frequency of response	Average time per response	Total hour burden
Investigators and Designee	Statement of Investigator	17,128	1	0.25 (15 minutes)	4,282
	Supplemental Investigator	17,128	1	0.167 (10 minutes)	2,855
	Financial Disclosure	17,128	1	0.083 (5 minutes)	1,427
Totals		17,128			8,564

There are no capital costs, operating costs, and maintenance cost.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) 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) 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) 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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Attention: NIH Desk Officer, Office of Management and Budget, at *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Charles L. Hall, Jr., Chief, Pharmaceutical Management Branch, Cancer Therapy Evaluation Program, Division of the Cancer Treatment and Diagnosis, and Centers, National Cancer Institute, Executive Plaza North, Room 7148, 9000 Rockville Pike, Bethesda, MD 20892 or call non-toll-free number 301–496–5725 or E-mail your request, including your address, to: *Hallch@mail.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days following the date of this publication.

Dated: August 5, 2009.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. E9–19207 Filed 8–10–09; 8:45 am]
BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: National Evaluation of the Comprehensive Community Mental Health Services for Children and Their Families Program: Phase VI—NEW

The Substance Abuse and Mental Health Services Administration (SAMHSA), Center of Mental Health Services is responsible for the national evaluation of the Comprehensive Community Mental Health Services for Children and Their Families Program (Children's Mental Health Initiative—CMHI) that will collect data on child mental health outcomes, family life, and service system development and performance. Data will be collected on 26 service systems, and approximately 5,541 children and families.

Data collection for this evaluation will be conducted over a five-year period. Child and family outcomes of interest will be collected at intake and during subsequent follow-up sessions at six-month intervals. The length of time that individual families will participate in the study ranges from 12 to 24 months depending upon when they enter the evaluation. The outcome measures include the following: Child symptomatology and functioning, family functioning, satisfaction, and caregiver strain. The core of service system data will be collected every 18–24 months throughout the 5-year evaluation period, with a sustainability survey conducted in years 3 and 5. Service utilization and cost data will be tracked and submitted to the national evaluation every six months using two tools: The Flex Fund Tool and the Services and Costs Data Tool to estimate average cost of treatment per child, distribution of costs, and allocation of costs across service categories. Service delivery and system variables of interest include the following: Maturity of system of care development in funded system of care communities, adherence to the system of care program model, and client service experience. We will also conduct a comprehensive evaluation of the CMHI's data driven technical assistance; this component of the evaluation will employ a mixed-methods approach, combining qualitative and quantitative data to provide a comprehensive assessment of the continuous quality improvement (CQI) process in funded system of care communities. Specifically, data will be gathered through three complementary activities: A baseline survey of key constituents in all funded communities; a subsequent monitoring survey administered every two years to the same constituents; and biennial case studies of four selected communities.

In addition, the evaluation will include three special studies: (1) The sector specific assessment and quasi-experimental comparison study will examine in more detail the outcomes and service experience of children from multiple child-serving sectors and, through child-level matching, compare these outcomes with those not receiving system of care services; (2) The Alumni Network Study will examine the effectiveness of the system of care Alumni Network web site by evaluating end-user satisfaction and usability of the web site and will also assess the collaboration between communities via a Web-based Networking and Collaboration Survey that will measure the nature and extent of the interaction between communities; (3) The Study of State Strategies for Sustainability will examine the state's role in sustaining communities after federal funding ceases and describe effective strategies for sustaining funded systems of care. A short version of the sustainability survey developed for this evaluation will be used to gather this information.

Internet-based technology such as Web-based surveys and data entry and management tools will be used in this evaluation. The measures of the national evaluation address the national outcome measures for mental health programs as currently established by SAMHSA.

The average annual respondent burden is estimated below. The estimate reflects the average number of respondents in each respondent category, the average number of responses per respondent per year, the average length of time it will take to complete each response, and the total average annual burden for each category of respondent, and for all categories of respondents combined.

PHASE VI ESTIMATE OF RESPONDENT BURDEN

[Note: Total burden is annualized over a 5-year period]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
System of Care Assessment						
Interview Guide A. Core Agency Representative.	Key site informants	[1] 828	3	1.00	2,484	497
Interview Guide B. Project Director.						
Interview Guide C. Family Representative/Representative of Family/Advocacy Organizations.						
Interview Guide D. Program Evaluator.						
Interview Guide E. Intake Worker.						
Interview Guide F. Care Coordinator.						

PHASE VI ESTIMATE OF RESPONDENT BURDEN—Continued

[Note: Total burden is annualized over a 5-year period]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
Interview Guide G. Direct Service Delivery Staff.						
Interview Guide H. Care Review Participant.						
Interview Guide I. Caregiver of Child or Youth Served by the Program.						
Interview Guide L. Direct Service Staff from Other Public Child-Serving Agencies.						
Interview Guide M. Care Record/Chart Review.						
Interview Guide N. Other Staff.						
Interview Guide O. Debriefing Document.						
Interview Guide P. Youth Respondent.						
Interview Guide Q. Youth Coordinator.						
Interview Guide R. Cultural and Linguistic Competence Coordinator.						
Interview Guide S. Social Marketing Communications Manager.						
Child and Family Outcome Study						
Caregiver Information Questionnaire, Revised: Caregiver—Intake (CIQ–RC–I).	Caregiver	[2] 7,550	1	0.37	2,768	554
Caregiver Information Questionnaire, Revised: Staff as Caregiver—Intake (CIQ–RS–I).	Staff as Caregiver.					
Caregiver Information Questionnaire, Revised: Caregiver—Follow-Up (CIQ–RC–F).	Caregiver	7,550	[3] 4	0.28	8,557	1,711
Caregiver Information Questionnaire, Revised: Staff as Caregiver—Follow-Up (CIQ–RS–F).	Staff as Caregiver.					
Caregiver Strain Questionnaire (CGSQ).	Caregiver	7,550	5	0.17	6,304	1,261
Child Behavior Checklist 1½–5 (CBCL 1½–5).	Caregiver	7,550	5	0.33	12,571	2,514
Child Behavior Checklist 6–18 (CBCL 6–18).						
Education Questionnaire, Revision 2 (EQ–R2).	Caregiver	7,550	5	0.33	12,571	2,514
Living Situations Questionnaire (LSQ).	Caregiver	7,550	5	0.08	3,133	627
Behavioral and Emotional Rating Scale—Second Edition, Parent Rating Scale (BERS–2C).	Caregiver	[4] 6,675	5	0.17	5,574	1,115
Columbia Impairment Scale (CIS).	Caregiver	[5] 7,282	5	0.08	3,022	604
Parenting Stress Index (PSI).	Caregiver	[6] 2,862	5	0.08	1,193	239
Devereux Early Childhood Assessment for Infants (DECA 1–18M).	Caregiver	[7] 2,176	5	0.08	907	181

PHASE VI ESTIMATE OF RESPONDENT BURDEN—Continued

[Note: Total burden is annualized over a 5-year period]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
Devereux Early Childhood Assessment for Toddlers (DECA 18–36M).						
Devereux Early Childhood Assessment (DECA 2–5Y).						
Preschool Behavioral and Emotional Rating (PreBERS).	Caregiver	2,176	5	0.10	1,088	218
Delinquency Survey, Revised (DS–R).	Youth	[8] 4,896	5	0.13	3,264	653
Behavioral and Emotional Rating Scale—Second Edition, Youth Rating Scale (BERS–2Y).	Youth	4,896	5	0.17	4,088	818
Gain Quick—R: Substance Problem Scale (GAIN).	Youth	4,896	5	0.08	2,032	406
Substance Use Survey, Revised (SUS–R).	Youth	4,896	5	0.10	2,448	490
Revised Children's Manifest Anxiety Scales (RCMAS).	Youth	4,896	5	0.05	1,224	245
Reynolds Adolescent Depression Scale—Second Edition (RADS–2).	Youth	4,896	5	0.05	1,224	245
Youth Information Questionnaire, Revised—Intake (YIQ–R–I).	Youth	4,896	1	0.25	1,224	245
Youth Information Questionnaire, Revised—Follow-Up (YIQ–R–F).	Youth	4,896	4	0.25	4,896	979
Service Experience Study						
Multi-Sector Service Contacts, Revised: Caregiver—Intake (MSSC–RC–I).	Caregiver	7,550	1	0.25	1,888	378
Multi-Sector Service Contacts, Revised: Staff as Caregiver—Intake (MSSC–RS–I).	Staff as Caregiver.					
Multi-Sector Service Contacts, Revised: Caregiver—Follow-Up (MSSC–RC–F).	Caregiver	7,550	4	0.25	7,550	1,510
Multi-Sector Service Contacts, Revised: Staff as Caregiver—Follow-Up (MSSC–RS–F).	Staff as Caregiver.					
Cultural Competence and Service Provision Questionnaire, Revised (CCSP–R).	Caregiver	7,550	[9] 4	0.13	4,027	805
Youth Services Survey for Families (YSS–F).	Caregiver	7,550	4	0.12	3,533	707
Youth Services Survey (YSS).	Youth	4,896	4	0.08	1,625	325
Comparison and Sector Study: Juvenile Justice						
Court Representative Questionnaire (CRQ).	Court representatives	[10] 212	5	0.50	530	106
Electronic Data Transfer of Juvenile Justice Records.	Key site personnel	212	5	0.03	35	7
Comparison and Sector Study: Education						
Teacher Questionnaire (TQ)	Teacher	212	5	0.50	530	106

PHASE VI ESTIMATE OF RESPONDENT BURDEN—Continued

[Note: Total burden is annualized over a 5-year period]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
School Administrator Questionnaire (SAQ).	School administrators	212	5	0.50	530	106
Electronic Data Transfer of Education Records.	Key site personnel	212	5	0.03	35	7
Comparison and Sector Study: Child Welfare						
Child Welfare Sector Study Questionnaire—Intake (CWSQ–I).	Care coordinators	212	1	0.50	106	21
Child Welfare Sector Study Questionnaire—Follow-Up (CWSQ–F).	Care coordinators	212	4	0.50	424	85
Electronic Data Transfer of Child Welfare Records.	Key site personnel	212	5	0.03	35	7
Sustainability Study						
Sustainability Survey: Brief Form.	Project Director	79	2	0.17	26	5
Sustainability Survey	Providers[11]	156	2	0.75	234	47
	Caregiver[11]	52	2	0.75	78	16
CQI Initiative Evaluation						
CQI Baseline Survey, Web-Based.	Key site personnel	288	1	0.50	144	29
CQI Monitoring Survey, Web-Based.	Key site personnel	288	2	0.50	288	58
CQI Local Focus Group Guide.	Key site personnel	30	2	1.00	60	12
CQI National Focus Group Guide.	National TA providers	20	2	1.00	40	8
Alumni Networking Study						
Networking and Collaboration Survey.	Key site personnel	302	2	0.50	302	60
Alumni Network Web Site Satisfaction Survey.	Key site personnel, National TA providers, Branch staff.	512	2	0.25	256	51
Services and Costs Study						
Flex Funds Data Dictionary/Tool.	Local programming staff compiling/entering administrative data on children/youth.	[12] 1,808	[13] 3	0.03	179	36
Services and Costs Data Dictionary/Data Entry Application.	Local evaluator, staff at partner agencies, and programming staff compiling/entering service and cost records on children/youth.	7,550	[14] 100	0.05	37,750	7,550

Summary of Annualized Burden Estimates for 5 Years

	Number of distinct respondents	Average annual number of responses per respondent	Total annual number of responses	Average 5-year burden per response (hours)	Total annual burden (hours)[15]	
Caregivers	550	0.9	78,572	2.2	14,953	
Youth	4,896	0.9	38,189	1.0	4,405	
Providers/Administrators	828	11.4	154,678	1.0	8,798	

PHASE VI ESTIMATE OF RESPONDENT BURDEN—Continued

[Note: Total burden is annualized over a 5-year period]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
Total Summary	13,274		271,439		28,156	

[1] An average of 23 stakeholders in up to 26 grant communities will complete the System of Care Assessment interview. These stakeholders will include site administrative staff, providers, agency representatives, family representatives, and youth.

[2] Number of respondents across 26 grantees (5223), in addition to 318 children/families from the comparison sample. Average based on a 5 percent attrition rate at each data collection point.

[3] Number of responses per respondent is five over the course of the study (once every 6 months for 24 months, with one baseline/intake response, and 4 follow-up responses).

[4] Approximate number of caregivers with children over age 5, based on Phase IV data submitted as of 12/08. Also includes 318 children/families from the comparison sample.

[5] Approximate number of caregivers with children 3 and older, based on Phase IV data submitted as of 12/08. Also includes 318 children/families from the comparison sample.

[6] Approximate number of caregivers with either: (1) Children served at the roughly 7 early childhood-focused communities, for whom the instrument is required; or (2) children aged 0 to 12 at other communities, where the instrument is optional (we estimate that ⅓ of caregivers will be administered the instrument when it is optional). Estimates are based on Phase IV data submitted as of 12/08.

[7] Approximate number of caregivers with either: (1) Children served at the roughly 7 early childhood-focused communities, for whom the instrument is required; or (2) children aged 0 to 5 at other communities, where the instrument is optional (we estimate that ⅓ of caregivers will be administered the instrument when it is optional). Estimates are based on Phase IV data submitted as of 12/08.

[8] Based on Phase IV finding that approximately 63 percent of the children in the evaluation were 11 years old or older. Also includes 318 children/families from the comparison sample.

[9] With the exception of the MSSC–R, respondents only complete Service Experience Study measures at follow-up points. See Footnote #3 for the explanation about the average number of responses per respondent.

[10] Approximate number of children/families in each sector, for the Sector and Comparison Study. This includes cases within the communities, as well as within the comparison sample.

[11] For each community, 1 respondent will be a caregiver and 3 respondents will be administrators/providers.

[12] Assumes that each community will use flexible funds expenditures on average for approximately one quarter of the children/youth enrolled.

[13] Assumes that three expenditures, on average, will be spent on each child/youth receiving flexible fund benefits.

[14] Assumes that each child/youth in system of care communities and in the comparison sample will have 100 service episodes, on average.

[15] Total Annual Burden (hours) is the product of Number of Distinct Respondents × Average Annual Number of Responses per Respondent × Average 5-Year Burden per Response (hours).

Written comments and recommendations concerning the proposed information collection should be sent by September 10, 2009 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–5806.

Dated: August 5, 2009.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. E9–19228 Filed 8–10–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: ACF Uniform Project Description.

OMB No.: 0970–0139.

Description: The Administration for Children and Families (ACF) has more than 50 discretionary grant programs. The proposed information collection form would be a uniform discretionary application form eligible for use by grant applicants to submit project information in response to ACF program announcements. ACF would use this information, along with other OMB-approved information collections, to evaluate and rank applicants and protect the integrity of the grantee selection process. All ACF discretionary grant programs would be eligible but not required to use this application form. The application consists of general information and instructions; the Standard Form 424 series that requests basic information, budget information and assurances; the Project Description requesting the applicant to describe how these objectives will be achieved; along with assurances and certifications. Guidance for the content of information requested in the Project Description is found in OMB Circular A–102 and 45 CFR Part 74.

Respondents: Applicants for ACF Discretionary Grant Programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
UPD	6,752	1	40	270,080

Estimated Total Annual Burden Hours: 270,080

Additional Information: Copies of the proposed collection may be obtained 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. All requests should be identified by the title of the

information collection. *E-mail address: infocollection@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–7245, *Attn:* Desk Officer for the Administration for Children and Families.

Dated: August 6, 2009.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E9–19170 Filed 8–10–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–E–0053]

Determination of Regulatory Review Period for Purposes of Patent Extension; NPLATE

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for NPLATE 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 biological product.

ADDRESSES: Submit written or electronic 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 biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological 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 biological product and continues until FDA grants permission to market the biological 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 biological 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 biologic product NPLATE (romiplostim). NPLATE is indicated for the treatment of thrombocytopenia in patients with chronic immune (idiopathic) thrombocytopenic purpura (ITP) who have had an insufficient response to corticosteroids, immunoglobulins, or splenectomy. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for NPLATE (U.S. Patent No. 6,835,809) from Amgen Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated February 26, 2009, FDA advised the Patent and Trademark Office that this human biological product had undergone a regulatory review period and that the approval of NPLATE 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 NPLATE is 2,319 days. Of this time, 2,014 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 (21 U.S.C. 355(i)) became effective*: April 19, 2002. The applicant claims April 23, 2002, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was April 19, 2002, the date of the FDA correspondence removing the clinical hold on the application.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262)*: October 23, 2007. FDA has verified the applicant's claim that the biologics license application (BLA) for NPLATE (BLA 125268/0) was initially submitted on October 23, 2007.

3. *The date the application was approved*: August 22, 2008. FDA has verified the applicant's claim that BLA 125268/0 was approved on August 22, 2008.

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 818 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 October 13, 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 February 8, 2010. 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: June 8, 2009.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. E9–19233 Filed 8–10–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Research Resources Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Research Resources Council.

Date: September 15, 2009.

Open: 8 a.m. to 12 p.m.

Agenda: Report from the NCRR Director and other Council business.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Closed: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Louise E. Ramm, PhD, Deputy Director, National Center for Research Resources, National Institutes of Health, Building 31, Room 3B11, Bethesda, MD 20892. 301–496–6023. *louiser@ncrr.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

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.

Information is also available on the Institute's/Center's home page: *http://www.ncrr.nih.gov/newspub/minutes.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards, National Institutes of Health, HHS).

Dated: July 31, 2009.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–19215 Filed 8–10–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; P01 and P01 Supplement Reviews.

Date: August 24–25, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Eduardo A. Montalvo, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5212, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Radiation Therapeutics and Biology Study Section.

Date: September 21–22, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Chicago, 151 East Wacker Drive, Chicago, IL 60601.

Contact Person: Bo Hong, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–435–5879, *hongb@csr.nih.gov.*

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Developmental Therapeutics Study Section.

Date: September 24–25, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Sharon K. Gubanich, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 435–1767, *gubanics@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; LCMI Member Conflicts.

Date: September 24–25, 2009.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Everett E. Sinnett, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, 301–435–1016, *sinnett@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 5, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–19216 Filed 8–10–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of General Medical Sciences Special Emphasis Panel, August 17, 2009, 8 a.m. to August 17, 2009, 5 p.m., National Institutes of Health, Natcher Building, Room 3AN12, 45 Center Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on July 24, 2009, 74 FR 36728.

The meeting has been changed from August 17, 2009 to August 20, 2009. The meeting is closed to the public.

Dated: August 4, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–19091 Filed 8–10–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Joint Meeting of the Anesthetic and Life Support Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committees: Anesthetic and Life Support Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee.

General Function of the Committees: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 23, 2009, from 8 a.m. to 4:30 p.m.

Location: Holiday Inn, The Ballrooms, Two Montgomery Village Ave., Gaithersburg, MD. The hotel phone number is 301–948–8900.

Contact Person: Kalyani Bhatt, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, (for express delivery, 5630 Fishers Lane, rm. 1093, Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *Kalyani.Bhatt@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572) in Washington, DC area), codes 3014512529 or 3014512535. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory hotline/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committees will discuss new drug application (NDA) 21–217, EXALGO (hydromorphone HCl), a modified-release hydromorphone drug product indicated for the treatment of moderate-to-severe pain in opioid-tolerant patients.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before September 9, 2009. Oral presentations from the public will be scheduled between approximately 1 p.m. to 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before September 1, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by September 2, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kalyani Bhatt at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 3, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–19105 Filed 8–10–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Commission on Childhood Vaccines; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Commission on Childhood Vaccines (ACCV).

Date and Time: September 17, 2009, 1 p.m. to 5:30 p.m. EDT; September 18, 9 a.m. to 12 p.m. EDT.

Place: Parklawn Building (and via audio conference call), Conference Rooms G & H, 5600 Fishers Lane, Rockville, MD 20857.

The ACCV will meet on Thursday, September 17 from 1 p.m. to 5:30 p.m. (EDT) and Friday, September 18 from 9 a.m. to 12 p.m. (EDT). The public can join the meeting via audio conference call by dialing 1–800–369–1791 on September 17 & 18 and providing the following information:

Leader's Name: Dr. Geoffrey Evans.

Password: ACCV.

Agenda: The agenda items for the June meeting will include, but are not limited to: Updates from the Division of Vaccine Injury Compensation (DVIC), Department of Justice, National Vaccine Program Office, Immunization Safety Office (Centers for Disease Control and Prevention), National Institute of Allergy and Infectious Diseases

(National Institutes of Health), Center for Biologics, Evaluation and Research (Food and Drug Administration), a discussion on causation, and an update from the IOM on the project to review adverse effects of vaccines. Agenda items are subject to change as priorities dictate.

Public Comments: Persons interested in providing an oral presentation should submit a written request, along with a copy of their presentation to: Kay Cook, DVIC, Healthcare Systems Bureau (HSB), Health Resources and Services Administration (HRSA), Room 11C–26, 5600 Fishers Lane, Rockville, Maryland 20857 or e-mail: *kcook@hrsa.gov*. Requests should contain the name, address, telephone number, and any business or professional affiliation of the person desiring to make an oral presentation. Groups having similar interests are requested to combine their comments and present them through a single representative. The allocation of time may be adjusted to accommodate the level of expressed interest. DVIC will notify each presenter by mail or telephone of their assigned presentation time. Persons who do not file an advance request for a presentation, but desire to make an oral statement, may announce it at the time of the comment period. These persons will be allocated time as it permits.

FOR FURTHER INFORMATION CONTACT: Anyone requiring information regarding the ACCV should contact Kay Cook, DVIC, HSB, HRSA, Room 11C–26, 5600 Fishers Lane, Rockville, MD 20857; telephone (301) 443–6593 or e-mail: *kcook@hrsa.gov*.

Dated: August 4, 2009.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E9–19109 Filed 8–10–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Meeting; National Commission on Children and Disasters

AGENCY: Administration for Children and Families, Department of Health and Human Services.

ACTION: Notice of meeting.

DATES: The meeting will be held on Tuesday, September 15, 2009, from 9:30 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held at the Administration for Children and Families, 901 D Street, SW., Washington, DC 20024. To attend either in person or via teleconference, please register by 5 p.m., Eastern Time, September 11, 2009. To register, please e-mail *capelt@acf.hhs.gov* with ''Meeting Registration'' in the subject line, or call (202) 205–9560. Registration must include your name, affiliation, and phone number. If you require a sign-language interpreter or other special assistance, please call Carol Apelt at (202) 205–4618 as soon as possible and no later than 5 p.m., Eastern Time, September 1, 2009.

Agenda: The Commission will hear reports from four subcommittees: (1) Pediatric Medical Care Subcommittee; (2) Education, Child Welfare, and Juvenile Justice Subcommittee; (3) Evacuation, Transportation and Housing Subcommittee; and (4) Human Services Recovery Subcommittee. The Commission will also deliberate and vote on its Interim Report to the President and Congress.

Written comments may be submitted electronically to *roberta.lavin@acf.hhs.gov* with ''Public Comment'' in the subject line. The Commission recommends that you include your name, mailing address and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment, and it allows the Commission to contact you if further information on the substance of your comment is needed or if your comment cannot be read due to technical difficulties. The Commission's policy is that the Commission will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment placed in the official record.

The Commission will provide an opportunity for public comments during the public meeting on September 15, 2009. Those wishing to speak will be limited to three minutes each; speakers are encouraged to submit their remarks in writing in advance to ensure their comment is received in case there is inadequate time for all comments to be heard on September 15, 2009.

Additional Information: Contact Roberta Lavin, Office of Human Services Emergency Preparedness and Response, e-mail *roberta.lavin@acf.hhs.gov* or phone (202) 401–9306.

SUPPLEMENTARY INFORMATION: The National Commission on Children and Disasters is an independent Commission that shall conduct a comprehensive study to examine and assess the needs of children as they relate to preparation for, response to, and recovery from all hazards, building upon the evaluations of other entities and avoiding unnecessary duplication by reviewing the findings, conclusions, and recommendations of these entities. The Commission shall then submit a report to the President and Congress on the Commission's independent and specific findings, conclusions, and recommendations to address the needs of children as they relate to preparation for, response to, and recovery from all hazards, including major disasters and emergencies.

Dated: August 3, 2009.

David A. Hansell,

Acting Assistant Secretary for Children and Families.

[FR Doc. E9–19157 Filed 8–10–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council on Blood Stem Cell Transplantation; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Council on Blood Stem Cell Transplantation.

Date and Times: September 21, 2009, 8:30 a.m. to 4:30 p.m.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, Maryland 20814.

Status: The meeting will be open to the public.

Purpose: Pursuant to Public Law 109–129, 42 U.S.C. 274k (section 379 of the Public Health Service Act, as amended) the Advisory Council on Blood Stem Cell Transplantation (ACBSCT) advises the Secretary of HHS and the Administrator, HRSA, on matters related to the activities of the C.W. Bill Young Cell Transplantation Program (Program) and the National Cord Blood Inventory (NCBI) Program.

Agenda:

The Council will hear reports from three ACBSCT Work Groups: Informed Consent, Access to Transplantation, and Cord Blood Collections. The Council also will hear presentations and discussions on the following topics: Induced pluripotent stem cells and adult stem cells, National Marrow Donor Program Infrastructure Summit, Radiation Injury Treatment Network, and trends in post-transplant survival. Agenda items are subject to change as priorities indicate.

After the presentations and Council discussions, members of the public will have an opportunity to provide comments. Because of the Council's full agenda and the timeframe in which to cover the agenda topics, public comment will be limited. All public comments will be included in the record of the ACBSCT meeting. Meeting summary notes will be made available on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html*.

The draft meeting agenda and a registration form will be available on or about August 21, 2009, on the HRSA's Program Web site at *http://bloodcell.transplant.hrsa.gov/ABOUT/Advisory_Council/index.html*.

The completed registration form should be submitted by facsimile to Professional and Scientific Associates (PSA), the logistical support contractor for the meeting, at fax number (703) 234–1701 ATTN: Rebecca Pascoe. Registration can also be completed electronically at *https://www.team-psa.com/dot/fall2009/acbsct*. Individuals without access to the Internet who wish to register may call Rebecca Pascoe with PSA at (703) 234–1747.

FOR FURTHER INFORMATION CONTACT: Remy Aronoff, Executive Secretary, Healthcare Systems Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Room 12–105, Rockville, Maryland 20857; telephone (301) 443–3264.

Dated: August 4, 2009.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E9–19110 Filed 8–10–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Oncologic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Oncologic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 1, 2009, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC/Silver Spring, The Ballrooms, 8727 Colesville Rd., Silver Spring, MD. The hotel phone number is 301–589–5200.

Contact Person: Nicole Vesely, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–6793, FAX: 301–827–6776, e-mail: *nicole.vesely@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512542. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss the following topics: (1) Supplemental new drug application (sNDA) 021–673/S–009, CLOLAR (clofarabine) Injection for intravenous use, Genzyme Corp., proposed indication for the treatment of previously untreated adults aged 60 years or older with acute myeloid leukemia with at least one unfavorable baseline prognostic factor and (2) new drug application (NDA) 022–489, proposed trade name ONRIGIN (laromustine) Injection, Vion Pharmaceuticals, Inc., proposed indication for remission induction therapy for patients 60 years or older with de novo poor-risk acute myeloid leukemia (AML).

CLOLAR (clofarabine) Injection for intravenous use has a new proposed indication for treatment of AML in previously untreated adults aged 60 years or older with at least one medical or health factor that increases the risk of an unfavorable outcome. Laromustine Injection, with the proposed trade name ONRIGIN, has a proposed use for ''remission induction therapy'' for AML. This is an initial approach to AML treatment designed to induce, or bring about, remission (reduction or disappearance) of leukemia in patients 60 years or older with de novo, or first occurrence, AML designated as ''poor-risk,'' or more likely to have a poor outcome.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 25, 2009. Oral presentations from the public will be scheduled between approximately 10:45 a.m. and 11:15 a.m. and between approximately 3:30 p.m. and 4 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 25, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 26, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Nicole Vesely at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 3, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–19108 Filed 8–10–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Oncologic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Oncologic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 2, 2009, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC/ Silver Spring, The Ballrooms, 8727 Colesville Rd., Silver Spring, MD. The hotel phone number is 301–589–5200.

Contact Person: Nicole Vesely, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane, (for express delivery, 5630 Fishers Lane, rm. 1093) Rockville, MD 20857, 301–827–6793, fax: 301–827–6776, e-mail: *nicole.vesely@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512542. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss: (1) new drug application (NDA) 022–393, with the proposed trade name ISTODAX (romidepsin) Injection, manufactured by Gloucester Pharmaceuticals, Inc. The proposed indication (use) for this product is for the treatment of cutaneous T-cell lymphoma (CTCL), a form of cancer that arises in cells located in the skin, including relief of pruritus (itching), in patients who have received at least one prior systemic therapy; and (2) NDA 022–468, with the proposed trade name FOLOTYN (pralatrexate) Injection, manufactured by Allos Therapeutics, Inc., with a proposed indication for the treatment of patients with relapsed or refractory (recurring and/or not responsive to other treatments) peripheral T-cell lymphoma (PTCL), a form of cancer that develops from cells in the body known as T-cells.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 25, 2009. Oral presentations from the public will be scheduled between approximately 10:30 a.m. and 11 a.m., and 3:30 p.m. and 4 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 25, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 26, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Nicole Vesely at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 3, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–19106 Filed 8–10–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available, Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: September 11, 2009.

Closed: 8:30 a.m. to 10:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892.

Open: 10:30 a.m. to 3 p.m.

Agenda: Staff reports on divisional, programmatic, and special activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Director, Division of Extramural Activities,

NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8693, *jordanc@nidcd.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

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.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/groups/ndcdac/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: August 4, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–19092 Filed 8–10–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; ARRA Funds—ZGM1–GDB–0–FR.

Date: August 18, 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: Margaret J. Weidman, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18B, Bethesda, MD 20892, 301–594–3663.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: August 4, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–19089 Filed 8–10–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

Date: September 16, 2009.

Open: 8:30 a.m. to 12 p.m.

Agenda: To discuss administrative details relating to the Council's business and special Reports.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Closed: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Susana Serrate-Sztein, MD, Director, Division of Skin and Rheumatic Diseases, NIAMS/NIH, 6701 Democracy Blvd., Suite 800, Bethesda, MD 20892–4872, (301) 594–5032. *szteins@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

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.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: August 4, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–19219 Filed 8–10–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0335]

Review of Post-Inspection Responses

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a program to support public health protection by facilitating the timely issuance of warning letters. The program establishes a timeframe for the submission and agency review of post-inspection responses to inspectional

observations that are communicated to a firm through issuance of a form FDA 483, list of inspectional observations.

DATES: The program will begin on September 15, 2009.

FOR FURTHER INFORMATION CONTACT: Karen Stutsman, Division of Compliance Policy (HFC–230), Office of Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 240–632–6860.

SUPPLEMENTARY INFORMATION:

I. Background

FDA issues a form FDA 483, Inspectional Observations, upon completion of an inspection, to notify an inspected establishment's top management of objectionable conditions relating to products and/or processes, or other violations of the Federal Food, Drug, and Cosmetic Act and related acts, that were observed during the inspection.

The FDA 483 form includes this preprinted instruction: ''This document lists observations made by the FDA representative(s) during the inspection of your facility. They are inspectional observations; and do not represent a final agency determination regarding your compliance. If you have an objection regarding an observation, or have implemented, or plan to implement corrective action in response to an observation, you may discuss the objection or action with the FDA representative(s) during the inspection or submit this information to FDA at the address [on the form].''

When FDA determines, based on the inspection, that the establishment is in violation of the Federal Food, Drug, and Cosmetic Act or another statute that we enforce, we may issue a warning letter. Warning letters are issued only for significant violations that may lead to enforcement action if they are not promptly and adequately corrected. The decision to issue a warning letter is made by senior officials within FDA, often including the product center, after a thorough review of all of the relevant facts.

It is not uncommon for an inspected establishment to respond in writing to observations made on an FDA 483 to describe completed or ongoing corrective actions or to promise future corrections. In fact, some inspected establishments submit multiple responses to FDA, sometimes over many months. Delayed and multiple responses to an FDA 483 have resulted in delays in the issuance of warning letters while these responses are reviewed and addressed. FDA's timely issuance of a warning letter should help to achieve prompt voluntary compliance and is therefore in the public interest.

While FDA considers corrective actions, and other factors, in determining whether to issue a warning letter, ongoing or promised corrective actions generally do not preclude the issuance of a warning letter. A warning letter is an important means of notifying regulated industry of violations and achieving prompt voluntary correction. Warning letters serve to ensure that the seriousness and scope of the violations are understood by top management of the inspected establishment, and that the appropriate resources are allocated to fully correct the violations and to prevent their recurrence. FDA is initiating a program to establish a timeframe for the submission of such post-inspection responses to FDA 483 inspectional observations for FDA's consideration in deciding whether to issue a warning letter. Under the program (described in more detail later in this document), the agency will not ordinarily delay the issuance of a warning letter in order to review a response to an FDA 483 that is received more than 15 business days after the FDA 483 was issued.

The purpose of this program is to optimize resource utilization, facilitate the timely issuance of warning letters, and promote prompt correction of violations. FDA will use the information from the program to determine whether to make the program permanent. FDA will conduct an assessment of the program after approximately 18 months.

II. Program Description

Under the program, before issuing a warning letter, FDA will generally allow firms 15 business days to provide a response to FDA 483 observations. If we receive a response to FDA 483 observations within 15 business days after the FDA 483 was issued, we plan to conduct a detailed review of the response before determining whether to issue a warning letter. If we issue a warning letter after reviewing a firm's timely response, the warning letter will recognize receipt of the response and reply as to the apparent adequacy of the firm's corrective actions set forth in the response. Additional correspondence from FDA may be issued with regard to the response, if needed.

If we receive a response to FDA 483 observations more than 15 business days after the FDA 483 was issued, we do not plan to routinely include a response on the apparent adequacy of the firm's corrective actions in the warning letter. Rather, we plan to evaluate the response along with any other written material provided as the direct response to the warning letter (a firm's response to a warning letter may reference any of the firm's earlier responses).

Note that FDA, at its discretion, may issue Warning Letters at any time, independent of receiving a response; and that firms are expected to implement needed corrections to conform to the requirements of the Federal Food, Drug, and Cosmetic Act and associated regulations regardless of whether they respond in writing to FDA or whether such a response is reviewed by FDA.

After the 18-month time period, FDA will evaluate this program and decide whether to continue it with or without adjustments.

Dated: August 4, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–19107 Filed 8–10–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2009–0001]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0099; FEMA Form 646–0, Citizen Corps Individual Registration.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the online registration process for Citizen Corps Individual Registration.

DATES: Comments must be submitted on or before October 13, 2009.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at www.regulations.gov under docket ID FEMA–2009–0001. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Wash, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to FEMA–POLICY@dhs.gov. Include docket ID FEMA–2009–0001 in the subject line.

All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Kerry Hoerth, Community Preparedness Division Program Specialist, FEMA, 202–786–9775 for additional information. You may contact the Records Management Branch for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA–Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION: Citizen Corps was launched as a Presidential Initiative, Executive Order 13254, in 2002 with a mission to harness the power of every individual through education, training, and volunteer service to make communities safer, stronger, and better prepared for the threats of terrorism, crime, public health issues, and disasters of all kinds. In order to fulfill its mission, the Federal Emergency Management Agency (FEMA) Community Preparedness Division (CPD) requires individuals to submit profiles electronically through its information collection online process and forms.

Collection of Information

Title: Citizen Corps Individual Registration.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: OMB No. 1660–0099.

Form Titles and Numbers: FEMA Form 646–0, Citizen Corps Individual Registration.

Abstract: FEMA's Community Preparedness Division (CPD) would like to revise a currently approved collection for its individual registration to allow members of the public to provide contact information to receive national programmatic updates and announcements such as upcoming preparedness demonstrations and training opportunities and the opportunity to get involved in local organizations and events.

Affected Public: Individuals or households.

Estimated Total Annual Burden Hours: 1,600 burden hours.

ANNUAL HOUR BURDEN

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/ form No.	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate*	Total annual respondent cost
Individuals or households	FEMA Form	20,000	1	5 minutes (.08 hours)	1,600	27.38	43,808.00
Total		20,000			1,600		43,808.00

* Note: The "Avg. Hourly Wage Rate" for each respondent includes a 1.4 multiplier to reflect a fully-loaded wage rate.

Estimated Cost: None.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Larry Gray,

Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E9–19154 Filed 8–10–09; 8:45 am]

BILLING CODE 9111–05–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0098; FEMA Form 646, Citizen Corps Council Registration.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the online database of Citizen Corps Councils and Community Emergency Response Team (CERT) so that they can submit profiles via the national Web site. Approved registration of a Council or CERT program allows them to be recognized as official entities

listed in the participation directory and become eligible for various Citizen Corps Program benefits.

DATES: Comments must be submitted on or before October 13, 2009.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under docket ID FEMA–2009–0001. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, WASH, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA–POLICY@dhs.gov*. Include docket ID FEMA–2009–0001 in the subject line.

All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Contact Kerry Hoerth, Community Preparedness Division Program Specialist, FEMA, 202–786–9775 for additional information. You may contact the Records Management Branch for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA–Information-Collections@dhs.gov*.

SUPPLEMENTARY INFORMATION: Citizen Corps was launched as a Presidential Initiative, Executive Order 13254, in 2002 with a mission to harness the power of every individual through education, training, and volunteer service to make communities safer, stronger, and better prepared for the threats of terrorism, crime, public health issues, and disasters of all kinds. In order to fulfill its mission, the Federal Emergency Management Agency (FEMA) Community Preparedness Division (CPD) seeks to establish a network of State, local, and Tribal Citizen Corps Councils that will coordinate activities, including Community Emergency Response Teams, at these levels. The Citizen Corps Council Registration Form will allow FEMA and State personnel to ensure that prospective Councils/CERTs have the support of the appropriate government officials in their area, ensure a dedicated coordinator is assigned to the Council, and will provide an efficient way to track the effectiveness of the nationwide network of Councils and CERTs. This revised registration process will allow the Community Preparedness Division to collect information that is more usable and provide a more efficient way to track the effectiveness of the nationwide network of Councils and CERTs and make it easier for Councils to register or update information.

Collection of Information

Title: Citizen Corps Council Registration.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: OMB No. 1660–0098.

Form Titles and Numbers: FEMA Form 646, Citizen Corps Council Registration.

Abstract: FEMA's Community Preparedness Division would like to revise a currently approved collection for its registration of State, local, Tribal and territorial Councils and Community Emergency Response Teams. The registration process allows for new Councils to submit information on the Council or CERT to the State Citizen Corps Program Manager for approval. The revised registration process will allow for the collection of more valuable information and the tool is more user-friendly for Citizen Corps Councils and CERTs.

Affected Public: State, local or Tribal Government.

Estimated Total Annual Burden Hours: 11,518 burden hours.

Annual Hour Burden

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/ form no.	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate *	Total Annual respondent cost
State, local or Tribal Government	FEMA-Form	5759	2	1	11,518	22.40	$258,003.20
Total		5759			11,518		258,003.20

Estimated Cost: None.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Larry Gray,

Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E9–19155 Filed 8–10–09; 8:45 am]

BILLING CODE 9111–05–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1852–DR]
[Docket ID FEMA–2008–0018]

Maine; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Maine (FEMA–1852–DR), dated July 30, 2009, and related determinations.

DATES: *Effective Date:* July 30, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 30, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Maine resulting from severe storms, flooding, and landslides during the period of June 18 to July 8, 2009, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Maine.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James N. Russo, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Maine have been designated as adversely affected by this major disaster:

Franklin, Hancock, Knox, Lincoln, Oxford, Somerset, Waldo, and Washington Counties for Public Assistance.

All counties within the State of Maine are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9–19158 Filed 8–10–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1853–DR; Docket ID FEMA–2008–0018]

Nebraska; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Nebraska (FEMA–1853–DR), dated July 31, 2009, and related determinations.

DATES: Effective Date: July 31, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 31, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Nebraska resulting from severe storms, flooding, and tornadoes during the period of June 5–26, 2009, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Nebraska.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael L. Karl of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Nebraska have been designated as adversely affected by this major disaster:

Arthur, Box Butte, Cherry, Custer, Dixon, Garden, Hamilton, Keya Paha, Morrill, Pawnee, Richardson, Rock, and Scotts Bluff Counties for Public Assistance.

All counties within the State of Nebraska are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036,

Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9–19159 Filed 8–10–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–64]

Accountability in the Provision of HUD Assistance—''Applicant/Recipient Disclosure/Update''

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Section 102 of the Department of Housing and Urban Development Reform Act of 1989 requires applicants for HUD assistance for certain projects to disclose information, which will include other government assistance being requested, names, and financial interests of all interested parties, and a report of expected sources and uses of funds. A $200,000 threshold applies to this disclosure requirement.

DATES: *Comments Due Date:* September 10, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2510–0011) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Accountability in the Provision of HUD Assistance—''Applicant/Recipient Disclosure/Update''.

OMB Approval Number: 2510–0011.

Form Numbers: HUD–2880.

Description of the Need for the Information and its Proposed Use:

Section 102 of the Department of Housing and Urban Development Reform Act of 1989 requires applicants for HUD assistance for certain projects to disclose information, which will include other government assistance being requested, names, and financial interests of all interested parties, and a report of expected sources and uses of funds. A $200,000 threshold applies to this disclosure requirement.

Frequency of Submission: Other submitted with application for funding.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	13,520	1.25		2.4		40,560

Total Estimated Burden Hours: 40,560.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: August 4, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–19238 Filed 8–10–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–63]

Home Mortgage Disclosure Act (HMDA) Loan/Application Register

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The HMDA Loan/Application Register collects information from mortgage lenders on application for, and originations and purchases of, mortgage and home improvement loans.

Non-depository mortgage lending institutions are required to use the information generated as a running log throughout the calendar year, and send the information to HUD by March 1 of the following calendar year.

DATES: *Comments Due Date:* September 10, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0539) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh

Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Home Mortgage Disclosure Act (HMDA) Loan/Application Register.

OMB Approval Number: 2502–0539.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: The HMDA Loan/Application Register collects information from mortgage lenders on application for, and originations and purchases of, mortgage and home improvement loans.

Non-depository mortgage lending institutions are required to use the information generated as a running log throughout the calendar year, and send the information to HUD by March 1 of the following calendar year.

Frequency of Submission: On occasion, annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden Hours
Reporting Burden	1,100	1		120		132,000

Total Estimated Burden Hours: 132,000.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: August 4, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–19239 Filed 8–10–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5285–N–25]

Notice of Proposed Information Collection: Comment Request; Direct Endorsement Underwriter/HUD Reviewer—Analysis of Appraisal Report

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: October 13, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8003, Washington, DC 20410, or *Lillian_L_ Deitzer@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Margaret Burns, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Direct Endorsement Underwriter/HUD Reviewer—Analysis of Appraisal Report.

OMB Control Number, if applicable: 2502–0477.

Description of the need for the information and proposed use: The Department may review the information on the Direct Endorsement Underwriter/HUD Reviewer Analysis of Appraisal Report. This information is provided by the lenders and reviewed for any and all comments that are provided by the lender on deficient information contained in the appraisal report. The information collected is used by FHA to monitor the quality of the lender's analysis of the appraisal report, identify areas of weakness for future training, and removing lenders that consistently exhibit careless underwriting and subsequently affect the risk to the Department.

Agency form numbers, if applicable: HUD–54114.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of burden hours needed to prepare the information collection is 27,916; the number of respondents is 558,319 generating approximately 558,319 annual responses; the frequency

of response is on occasion; and the estimated time needed to prepare the response is .05 hour per response.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: August 4, 2009.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E9–19240 Filed 8–10–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–62]

Application for HUD/FHA Insured Mortgage ''Hope for Homeowners''

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information is collected on new mortgages offered by FHA approved mortgagees to mortgagors who are at risk of losing their homes to foreclosure. The new FHA insured mortgages refinance the borrowers' existing mortgage at a significant write-down. Under the program the mortgagors share the new equity and future appreciation with FHA.

DATES: *Comments Due Date:* September 10, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0579) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Insured Mortgage ''Hope for Homeowners''.

OMB Approval Number: 2502–0579.

Form Numbers: HUD–92900–H4H, HUD–92915–H4H, HUD–92916–H4H, and HUD–92917–H4H.

Description of the Need for the Information and its Proposed Use: This information is collected on new mortgages offered by FHA approved mortgagees to mortgagors who are at risk of losing their homes to foreclosure. The new FHA insured mortgages refinance the borrowers' existing mortgage at a significant write-down. Under the program the mortgagors share the new equity and future appreciation with FHA.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	8,000	158		0.723		915,040

Total Estimated Burden Hours: 915,040.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: August 4, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–19243 Filed 8–10–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the current list of 564 tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. The list is updated from the notice published on April 4, 2008 (73 FR 18553).

FOR FURTHER INFORMATION CONTACT: Daisy West, Bureau of Indian Affairs, Division of Tribal Government Services, Mail Stop 4513–MIB, 1849 C Street, NW., Washington, DC 20240. Telephone number: (202) 513–7641.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to section 104 of the Act of November 2, 1994 (Pub. L. 103–454; 108 Stat. 4791, 4792), and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

Published below is a list of federally acknowledged tribes in the contiguous 48 states and in Alaska.

Two tribes have been added to the list since the last publication. Federal relations have been reestablished with Wilton Rancheria pursuant to a court-ordered settlement stipulation. The court order was dated June 8, 2009. Direct government-to-government relations were reestablished with the Delaware Tribe of Indians through its

reorganization under federal statute, the Oklahoma Indian Welfare Act. This reorganization of its tribal government, separate from that of the Cherokee Nation, Oklahoma, is pursuant to a Memorandum of Agreement between the two tribes. The reorganization was effective May 27, 2009.

Other amendments to the list include name changes and name corrections. To aid in identifying tribal name changes, the tribe's former name is included with the new tribal name. To aid in identifying corrections, the tribe's previously listed name is included with the tribal name. We will continue to list the tribe's former or previously listed name for several years before dropping the former or previously listed name from the list.

The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. We have continued the practice of listing the Alaska Native entities separately solely for the purpose of facilitating identification of them and reference to them, given the large number of complex Native names.

Dated: July 29, 2009.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

Absentee-Shawnee Tribe of Indians of Oklahoma
Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California
Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona
Alabama-Coushatta Tribes of Texas
Alabama-Quassarte Tribal Town, Oklahoma
Alturas Indian Rancheria, California
Apache Tribe of Oklahoma
Arapahoe Tribe of the Wind River Reservation, Wyoming
Aroostook Band of Micmac Indians of Maine
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana
Augustine Band of Cahuilla Indians, California (formerly the Augustine Band of Cahuilla Mission Indians of the Augustine Reservation)
Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
Bay Mills Indian Community, Michigan
Bear River Band of the Rohnerville Rancheria, California
Berry Creek Rancheria of Maidu Indians of California
Big Lagoon Rancheria, California
Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California
Big Sandy Rancheria of Mono Indians of California
Big Valley Band of Pomo Indians of the Big Valley Rancheria, California
Blackfeet Tribe of the Blackfeet Indian Reservation of Montana
Blue Lake Rancheria, California
Bridgeport Paiute Indian Colony of California
Buena Vista Rancheria of Me-Wuk Indians of California
Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon
Cabazon Band of Mission Indians, California
Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California
Caddo Nation of Oklahoma
Cahuilla Band of Mission Indians of the Cahuilla Reservation, California
Cahto Indian Tribe of the Laytonville Rancheria, California
California Valley Miwok Tribe, California
Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California
Capitan Grande Band of Diegueno Mission Indians of California: Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California
Catawba Indian Nation (aka Catawba Tribe of South Carolina)
Cayuga Nation of New York
Cedarville Rancheria, California
Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
Cher-Ae Heights Indian Community of the Trinidad Rancheria, California
Cherokee Nation, Oklahoma
Cheyenne and Arapaho Tribes, Oklahoma (formerly the Cheyenne-Arapaho Tribes of Oklahoma)
Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota
Chickasaw Nation, Oklahoma
Chicken Ranch Rancheria of Me-Wuk Indians of California
Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana
Chitimacha Tribe of Louisiana
Choctaw Nation of Oklahoma
Citizen Potawatomi Nation, Oklahoma
Cloverdale Rancheria of Pomo Indians of California
Cocopah Tribe of Arizona
Coeur D'Alene Tribe of the Coeur D'Alene Reservation, Idaho
Cold Springs Rancheria of Mono Indians of California
Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
Comanche Nation, Oklahoma
Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana
Confederated Tribes of the Chehalis Reservation, Washington
Confederated Tribes of the Colville Reservation, Washington
Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon
Confederated Tribes of the Goshute Reservation, Nevada and Utah
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians of Oregon (previously listed as the Confederated Tribes of the Siletz Reservation)
Confederated Tribes of the Umatilla Reservation, Oregon
Confederated Tribes of the Warm Springs Reservation of Oregon
Confederated Tribes and Bands of the Yakama Nation, Washington
Coquille Tribe of Oregon
Cortina Indian Rancheria of Wintun Indians of California
Coushatta Tribe of Louisiana
Cow Creek Band of Umpqua Indians of Oregon
Cowlitz Indian Tribe, Washington
Coyote Valley Band of Pomo Indians of California
Crow Tribe of Montana
Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota
Death Valley Timbi-Sha Shoshone Band of California
Delaware Nation, Oklahoma
Delaware Tribe of Indians, Oklahoma
Dry Creek Rancheria of Pomo Indians of California
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada
Eastern Band of Cherokee Indians of North Carolina
Eastern Shawnee Tribe of Oklahoma
Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California
Elk Valley Rancheria, California
Ely Shoshone Tribe of Nevada
Enterprise Rancheria of Maidu Indians of California
Ewiiaapaayp Band of Kumeyaay Indians, California
Federated Indians of Graton Rancheria, California
Flandreau Santee Sioux Tribe of South Dakota
Forest County Potawatomi Community, Wisconsin

Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
Fort Bidwell Indian Community of the Fort Bidwell Reservation of California
Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California
Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon
Fort McDowell Yavapai Nation, Arizona
Fort Mojave Indian Tribe of Arizona, California & Nevada
Fort Sill Apache Tribe of Oklahoma
Gila River Indian Community of the Gila River Indian Reservation, Arizona
Grand Traverse Band of Ottawa and Chippewa Indians, Michigan
Greenville Rancheria of Maidu Indians of California
Grindstone Indian Rancheria of Wintun-Wailaki Indians of California
Guidiville Rancheria of California
Habematolel Pomo of Upper Lake, California
Hannahville Indian Community, Michigan
Havasupai Tribe of the Havasupai Reservation, Arizona
Ho-Chunk Nation of Wisconsin
Hoh Indian Tribe of the Hoh Indian Reservation, Washington
Hoopa Valley Tribe, California
Hopi Tribe of Arizona
Hopland Band of Pomo Indians of the Hopland Rancheria, California
Houlton Band of Maliseet Indians of Maine
Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona
Iipay Nation of Santa Ysabel, California (formerly the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation)
Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California
Ione Band of Miwok Indians of California
Iowa Tribe of Kansas and Nebraska
Iowa Tribe of Oklahoma
Jackson Rancheria of Me-Wuk Indians of California
Jamestown S'Klallam Tribe of Washington
Jamul Indian Village of California
Jena Band of Choctaw Indians, Louisiana
Jicarilla Apache Nation, New Mexico
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona
Kalispel Indian Community of the Kalispel Reservation, Washington
Karuk Tribe of California
Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California
Kaw Nation, Oklahoma
Keweenaw Bay Indian Community, Michigan
Kialegee Tribal Town, Oklahoma
Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas
Kickapoo Tribe of Oklahoma
Kickapoo Traditional Tribe of Texas
Kiowa Indian Tribe of Oklahoma
Klamath Tribes, Oregon
Kootenai Tribe of Idaho
La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California
La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California
Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin
Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin
Lac Vieux Desert Band of Lake Superior Chippewa Indians, Michigan
Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada
Little River Band of Ottawa Indians, Michigan
Little Traverse Bay Bands of Odawa Indians, Michigan
Lower Lake Rancheria, California
Los Coyotes Band of Cahuilla and Cupeno Indians, California (formerly the Los Coyotes Band of Cahuilla & Cupeno Indians of the Los Coyotes Reservation)
Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada
Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota
Lower Elwha Tribal Community of the Lower Elwha Reservation, Washington
Lower Sioux Indian Community in the State of Minnesota
Lummi Tribe of the Lummi Reservation, Washington
Lytton Rancheria of California
Makah Indian Tribe of the Makah Indian Reservation, Washington
Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, California
Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California
Mashantucket Pequot Tribe of Connecticut
Mashpee Wampanoag Tribe, Massachusetts
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan
Mechoopda Indian Tribe of Chico Rancheria, California
Menominee Indian Tribe of Wisconsin
Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California
Mescalero Apache Tribe of the Mescalero Reservation, New Mexico
Miami Tribe of Oklahoma
Miccosukee Tribe of Indians of Florida
Middletown Rancheria of Pomo Indians of California
Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band)
Mississippi Band of Choctaw Indians, Mississippi
Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada
Modoc Tribe of Oklahoma
Mohegan Indian Tribe of Connecticut
Mooretown Rancheria of Maidu Indians of California
Morongo Band of Mission Indians, California (formerly the Morongo Band of Cahuilla Mission Indians of the Morongo Reservation)
Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington
Muscogee (Creek) Nation, Oklahoma
Narragansett Indian Tribe of Rhode Island
Navajo Nation, Arizona, New Mexico & Utah
Nez Perce Tribe, Idaho (previously listed as Nez Perce Tribe of Idaho)
Nisqually Indian Tribe of the Nisqually Reservation, Washington
Nooksack Indian Tribe of Washington
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana
Northfork Rancheria of Mono Indians of California
Northwestern Band of Shoshoni Nation of Utah (Washakie)
Nottawaseppi Huron Band of the Potawatomi, Michigan (formerly the Huron Potawatomi, Inc.)
Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota
Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan)
Omaha Tribe of Nebraska
Oneida Nation of New York
Oneida Tribe of Indians of Wisconsin
Onondaga Nation of New York
Osage Nation, Oklahoma (formerly the Osage Tribe)
Ottawa Tribe of Oklahoma
Otoe-Missouria Tribe of Indians, Oklahoma
Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes) (formerly Paiute Indian Tribe of Utah (Cedar City Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes))
Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California

Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada
Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California
Pala Band of Luiseno Mission Indians of the Pala Reservation, California
Pascua Yaqui Tribe of Arizona
Paskenta Band of Nomlaki Indians of California
Passamaquoddy Tribe of Maine
Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California
Pawnee Nation of Oklahoma
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California
Penobscot Tribe of Maine
Peoria Tribe of Indians of Oklahoma
Picayune Rancheria of Chukchansi Indians of California
Pinoleville Pomo Nation, California (formerly the Pinoleville Rancheria of Pomo Indians of California)
Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek and Roaring Creek Rancherias)
Poarch Band of Creek Indians of Alabama
Pokagon Band of Potawatomi Indians, Michigan and Indiana
Ponca Tribe of Indians of Oklahoma
Ponca Tribe of Nebraska
Port Gamble Indian Community of the Port Gamble Reservation, Washington
Potter Valley Tribe, California
Prairie Band of Potawatomi Nation, Kansas
Prairie Island Indian Community in the State of Minnesota
Pueblo of Acoma, New Mexico
Pueblo of Cochiti, New Mexico
Pueblo of Jemez, New Mexico
Pueblo of Isleta, New Mexico
Pueblo of Laguna, New Mexico
Pueblo of Nambe, New Mexico
Pueblo of Picuris, New Mexico
Pueblo of Pojoaque, New Mexico
Pueblo of San Felipe, New Mexico
Pueblo of San Ildefonso, New Mexico
Pueblo of Sandia, New Mexico
Pueblo of Santa Ana, New Mexico
Pueblo of Santa Clara, New Mexico
Pueblo of Santo Domingo, New Mexico
Pueblo of Taos, New Mexico
Pueblo of Tesuque, New Mexico
Pueblo of Zia, New Mexico
Puyallup Tribe of the Puyallup Reservation, Washington
Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada
Quapaw Tribe of Indians, Oklahoma
Quartz Valley Indian Community of the Quartz Valley Reservation of California
Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona
Quileute Tribe of the Quileute Reservation, Washington
Quinault Tribe of the Quinault Reservation, Washington
Ramona Band or Village of Cahuilla Mission Indians of California
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
Red Lake Band of Chippewa Indians, Minnesota
Redding Rancheria, California
Redwood Valley Rancheria of Pomo Indians of California
Reno-Sparks Indian Colony, Nevada
Resighini Rancheria, California
Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California
Robinson Rancheria of Pomo Indians of California
Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
Round Valley Indian Tribes of the Round Valley Reservation, California
Rumsey Indian Rancheria of Wintun Indians of California
Sac & Fox Tribe of the Mississippi in Iowa
Sac & Fox Nation of Missouri in Kansas and Nebraska
Sac & Fox Nation, Oklahoma
Saginaw Chippewa Indian Tribe of Michigan
St. Croix Chippewa Indians of Wisconsin
Saint Regis Mohawk Tribe, New York (formerly the St. Regis Band of Mohawk Indians of New York)
Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona
Samish Indian Tribe, Washington
San Carlos Apache Tribe of the San Carlos Reservation, Arizona
San Juan Southern Paiute Tribe of Arizona
San Manuel Band of Mission Indians, California (previously listed as the San Manual Band of Serrano Mission Indians of the San Manual Reservation)
San Pasqual Band of Diegueno Mission Indians of California
Santa Rosa Indian Community of the Santa Rosa Rancheria, California
Santa Rosa Band of Cahuilla Indians, California (formerly the Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation)
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California
Santee Sioux Nation, Nebraska
Sauk-Suiattle Indian Tribe of Washington
Sault Ste. Marie Tribe of Chippewa Indians of Michigan
Scotts Valley Band of Pomo Indians of California
Seminole Nation of Oklahoma
Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations)
Seneca Nation of New York
Seneca-Cayuga Tribe of Oklahoma
Shakopee Mdewakanton Sioux Community of Minnesota
Shawnee Tribe, Oklahoma
Sherwood Valley Rancheria of Pomo Indians of California
Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California
Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington
Shoshone Tribe of the Wind River Reservation, Wyoming
Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota
Skokomish Indian Tribe of the Skokomish Reservation, Washington
Skull Valley Band of Goshute Indians of Utah
Smith River Rancheria, California
Snoqualmie Tribe, Washington
Soboba Band of Luiseno Indians, California
Sokaogon Chippewa Community, Wisconsin
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado
Spirit Lake Tribe, North Dakota
Spokane Tribe of the Spokane Reservation, Washington
Squaxin Island Tribe of the Squaxin Island Reservation, Washington
Standing Rock Sioux Tribe of North & South Dakota
Stockbridge Munsee Community, Wisconsin
Stillaguamish Tribe of Washington
Summit Lake Paiute Tribe of Nevada
Suquamish Indian Tribe of the Port Madison Reservation, Washington
Susanville Indian Rancheria, California
Swinomish Indians of the Swinomish Reservation, Washington
Sycuan Band of the Kumeyaay Nation
Table Mountain Rancheria of California
Te-Moak Tribe of Western Shoshone Indians of Nevada (Four constituent bands: Battle Mountain Band; Elko Band; South Fork Band and Wells Band)
Thlopthlocco Tribal Town, Oklahoma
Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota
Tohono O'odham Nation of Arizona
Tonawanda Band of Seneca Indians of New York
Tonkawa Tribe of Indians of Oklahoma
Tonto Apache Tribe of Arizona
Torres Martinez Desert Cahuilla Indians, California (formerly the Torres-

Martinez Band of Cahuilla Mission Indians of California)
Tule River Indian Tribe of the Tule River Reservation, California
Tulalip Tribes of the Tulalip Reservation, Washington
Tunica-Biloxi Indian Tribe of Louisiana
Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California
Turtle Mountain Band of Chippewa Indians of North Dakota
Tuscarora Nation of New York
Twenty-Nine Palms Band of Mission Indians of California
United Auburn Indian Community of the Auburn Rancheria of California
United Keetoowah Band of Cherokee Indians in Oklahoma
Upper Sioux Community, Minnesota
Upper Skagit Indian Tribe of Washington
Ute Indian Tribe of the Uintah & Ouray Reservation, Utah
Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah
Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California
Walker River Paiute Tribe of the Walker River Reservation, Nevada
Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts
Washoe Tribe of Nevada & California (Carson Colony, Dresslerville Colony, Woodfords Community, Stewart Community, & Washoe Ranches)
White Mountain Apache Tribe of the Fort Apache Reservation, Arizona
Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma
Wilton Rancheria, California
Winnebago Tribe of Nebraska
Winnemucca Indian Colony of Nevada
Wiyot Tribe, California (formerly the Table Bluff Reservation—Wiyot Tribe)
Wyandotte Nation, Oklahoma
Yankton Sioux Tribe of South Dakota
Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona
Yavapai-Prescott Tribe of the Yavapai Reservation, Arizona
Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada
Yomba Shoshone Tribe of the Yomba Reservation, Nevada
Ysleta Del Sur Pueblo of Texas
Yurok Tribe of the Yurok Reservation, California
Zuni Tribe of the Zuni Reservation, New Mexico

Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs

Native Village of Afognak
Agdaagux Tribe of King Cove
Native Village of Akhiok
Akiachak Native Community
Akiak Native Community
Native Village of Akutan
Village of Alakanuk
Alatna Village
Native Village of Aleknagik
Algaaciq Native Village (St. Mary's)
Allakaket Village
Native Village of Ambler
Village of Anaktuvuk Pass
Yupiit of Andreafski
Angoon Community Association
Village of Aniak
Anvik Village
Arctic Village (See Native Village of Venetie Tribal Government)
Asa'carsarmiut Tribe
Native Village of Atka
Village of Atmautluak
Atqasuk Village (Atkasook)
Native Village of Barrow Inupiat Traditional Government
Beaver Village
Native Village of Belkofski
Village of Bill Moore's Slough
Birch Creek Tribe
Native Village of Brevig Mission
Native Village of Buckland
Native Village of Cantwell
Native Village of Chenega (aka Chanega)
Chalkyitsik Village
Cheesh-Na Tribe (formerly the Native Village of Chistochina)
Village of Chefornak
Chevak Native Village
Chickaloon Native Village
Chignik Bay Tribal Council (formerly the Native Village of Chignik)
Native Village of Chignik Lagoon
Chignik Lake Village
Chilkat Indian Village (Klukwan)
Chilkoot Indian Association (Haines)
Chinik Eskimo Community (Golovin)
Native Village of Chitina
Native Village of Chuathbaluk (Russian Mission, Kuskokwim)
Chuloonawick Native Village
Circle Native Community
Village of Clarks Point
Native Village of Council
Craig Community Association
Village of Crooked Creek
Curyung Tribal Council
Native Village of Deering
Native Village of Diomede (aka Inalik)
Village of Dot Lake
Douglas Indian Association
Native Village of Eagle
Native Village of Eek
Egegik Village
Eklutna Native Village
Native Village of Ekuk
Ekwok Village
Native Village of Elim
Emmonak Village
Evansville Village (aka Bettles Field)
Native Village of Eyak (Cordova)
Native Village of False Pass
Native Village of Fort Yukon
Native Village of Gakona
Galena Village (aka Louden Village)
Native Village of Gambell
Native Village of Georgetown
Native Village of Goodnews Bay
Organized Village of Grayling (aka Holikachuk)
Gulkana Village
Native Village of Hamilton
Healy Lake Village
Holy Cross Village
Hoonah Indian Association
Native Village of Hooper Bay
Hughes Village
Huslia Village
Hydaburg Cooperative Association
Igiugig Village
Village of Iliamna
Inupiat Community of the Arctic Slope
Iqurmuit Traditional Council
Ivanoff Bay Village
Kaguyak Village
Organized Village of Kake
Kaktovik Village (aka Barter Island)
Village of Kalskag
Village of Kaltag
Native Village of Kanatak
Native Village of Karluk
Organized Village of Kasaan
Kasigluk Traditional Elders Council
Kenaitze Indian Tribe
Ketchikan Indian Corporation
Native Village of Kiana
King Island Native Community
King Salmon Tribe
Native Village of Kipnuk
Native Village of Kivalina
Klawock Cooperative Association
Native Village of Kluti Kaah (aka Copper Center)
Knik Tribe
Native Village of Kobuk
Kokhanok Village
Native Village of Kongiganak
Village of Kotlik
Native Village of Kotzebue
Native Village of Koyuk
Koyukuk Native Village
Organized Village of Kwethluk
Native Village of Kwigillingok
Native Village of Kwinhagak (aka Quinhagak)
Native Village of Larsen Bay
Levelock Village
Lesnoi Village (aka Woody Island)
Lime Village
Village of Lower Kalskag
Manley Hot Springs Village
Manokotak Village
Native Village of Marshall (aka Fortuna Ledge)
Native Village of Mary's Igloo
McGrath Native Village
Native Village of Mekoryuk
Mentasta Traditional Council
Metlakatla Indian Community, Annette Island Reserve
Native Village of Minto
Naknek Native Village

Native Village of Nanwalek (aka English Bay)
Native Village of Napaimute
Native Village of Napakiak
Native Village of Napaskiak
Native Village of Nelson Lagoon
Nenana Native Association
New Koliganek Village Council
New Stuyahok Village
Newhalen Village
Newtok Village
Native Village of Nightmute
Nikolai Village
Native Village of Nikolski
Ninilchik Village
Native Village of Noatak
Nome Eskimo Community
Nondalton Village
Noorvik Native Community
Northway Village
Native Village of Nuiqsut (aka Nooiksut)
Nulato Village
Nunakauyarmiut Tribe
Native Village of Nunam Iqua (formerly the Native Village of Sheldon's Point)
Native Village of Nunapitchuk
Village of Ohogamiut
Village of Old Harbor
Orutsararmuit Native Village (aka Bethel)
Oscarville Traditional Village
Native Village of Ouzinkie
Native Village of Paimiut
Pauloff Harbor Village
Pedro Bay Village
Native Village of Perryville
Petersburg Indian Association
Native Village of Pilot Point
Pilot Station Traditional Village
Native Village of Pitka's Point
Platinum Traditional Village
Native Village of Point Hope
Native Village of Point Lay
Native Village of Port Graham
Native Village of Port Heiden
Native Village of Port Lions
Portage Creek Village (aka Ohgsenakale)
Pribilof Islands Aleut Communities of St. Paul & St. George Islands
Qagan Tayagungin Tribe of Sand Point Village
Qawalangin Tribe of Unalaska
Rampart Village
Village of Red Devil
Native Village of Ruby
Saint George Island (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Native Village of Saint Michael
Saint Paul Island (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Village of Salamatoff
Native Village of Savoonga
Organized Village of Saxman
Native Village of Scammon Bay
Native Village of Selawik
Seldovia Village Tribe
Shageluk Native Village
Native Village of Shaktoolik
Native Village of Shishmaref
Native Village of Shungnak
Sitka Tribe of Alaska
Skagway Village
Village of Sleetmute
Village of Solomon
South Naknek Village
Stebbins Community Association
Native Village of Stevens
Village of Stony River
Sun'aq Tribe of Kodiak (formerly the Shoonaq' Tribe of Kodiak)
Takotna Village
Native Village of Tanacross
Native Village of Tanana
Native Village of Tatitlek
Native Village of Tazlina
Telida Village
Native Village of Teller
Native Village of Tetlin
Central Council of the Tlingit & Haida Indian Tribes
Traditional Village of Togiak
Tuluksak Native Community
Native Village of Tuntutuliak
Native Village of Tununak
Twin Hills Village
Native Village of Tyonek
Ugashik Village
Umkumiute Native Village
Native Village of Unalakleet
Native Village of Unga
Village of Venetie (See Native Village of Venetie Tribal Government)
Native Village of Venetie Tribal Government (Arctic Village and Village of Venetie)
Village of Wainwright
Native Village of Wales
Native Village of White Mountain
Wrangell Cooperative Association
Yakutat Tlingit Tribe

[FR Doc. E9–19124 Filed 8–10–09; 8:45 am]
BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2009-N142; 96300-1671-0000-P5]

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species and/or marine mammals.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358-2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

TABLE: ENDANGERED SPECIES

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
011646	Kootenai Tribe of Idaho	74 FR 21816; May 11, 2009	July 30, 2009
062075, 064075, 068236, 068237, 068238, 068349, 088955, 088956, 088957, 088958, 088959, 088960, 119894, 120319, 213635, 213636, and 213637.	Hawthorn Corporation	74 FR 21817; May 11, 2009	June 30, 2009

TABLE: ENDANGERED SPECIES—Continued

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
128999 and 211013	George Carden Circus Intl., Inc.	74 FR 23201; May 18, 2009	June 30, 2009
196694	Omaha's Henry Doorly Zoo	74 FR 21817; May 11, 2009	July 1, 2009
197528	Minnesota Zoological Garden	74 FR 21817; May 11, 2009	July 1, 2009
206206	Fred H. Gage, Salk Institute for Biological Studies	74 FR 21817; May 11, 2009	June 30, 2009
207590	Dr. Richard A. Miller, University of Michigan	74 FR 20339; May 1, 2009	July 17, 2009
210720	Oregon Zoo	74 FR 23201; May 18, 2009	July 17,2009
212201	Dr. Paul D. Bieniasz	74 FR 25767; May 29, 2009	July 7, 2009
213427	Brian H. Welker	74 FR 28523; June 16, 2009	July 20, 2009

TABLE: MARINE MAMMALS

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
212570	National Marine Mammal Laboratory	74 FR 21817; May 11, 2009	July 22, 2009
690038	U.S. Geological Survey, Alaska Science Center	74 FR 17210; April 14, 2009	July 30, 2009
801652	U.S. Geological Survey, Alaska Science Center	74 FR 20339; May 1, 2009	July 31, 2009

Dated: July 31, 2009

Lisa J. Lierheimer

Senior Permit Biologist, Branch of Permits, Division of Management Authority

[FR Doc. E9–19229 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT000000.L11200000.DD0000.241A.00]

Notice of Public Meeting, Twin Falls District Resource Advisory Council, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA), the Federal Advisory Committee Act of 1972 (FACA), and the Federal Lands Recreation Enhancement Act of 2004 (FLREA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Twin Falls District Resource Advisory Council (RAC) will attend a tour as indicated below.

DATES: September 16, 2009. The Twin Falls District RAC meeting will begin at 9 a.m. (MST) and end no later than 4 p.m. at the Ameritel Inn in Twin Falls, Idaho, located at 539 Poleline Road. The public comment period for the RAC meeting will take place 9:15 a.m. to 9:45 a.m.

FOR FURTHER INFORMATION CONTACT: Heather Tiel-Nelson, Twin Falls District, Idaho, 2536 Kimberly Road, Twin Falls, Idaho 83301, (208) 736–2352.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. During this meeting, the Twin Falls District RAC members will discuss joint Resource Advisory Council meetings, the fire/fuels team report, and energy projects within the Twin Falls District. Additional topics may be added and will be included in local media announcements. More information is available at *http://www.blm.gov/id/st/en/res/resource_advisory.3.html*.

RAC meetings are open to the public. For further information about the meeting, please contact Heather Tiel-Nelson, Public Affairs Specialist for the Twin Falls District, BLM at (208) 736–2352

Dated: August 4, 2009.

Jenifer Arnold,

District Manager (Acting).

[FR Doc. E9–19176 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–921–05–1320–EL; COC–70615]

Notice of Public Meeting, To Receive Comments on an Environmental Analysis, Finding of No Significant Impact, Maximum Economic Recovery Report, and Fair Market Value for Coal Lease Application COC–70615

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: Bureau of Land Management (BLM), Colorado State Office, Lakewood, Colorado, hereby gives notice that the a public meeting will be held to receive comments on the Environmental Analysis (EA), Finding of No Significant Impact (FONSI), Maximum Economic Recovery (MER), and Fair Market Value (FMV) of Federal coal to be offered for a competitive lease sale. Coal Lease By Application (LBA) COC–70615 was filed by Oxbow Mining, LLC. The BLM plans to offer for competitive lease 785.79 acres of Federal coal in Gunnison County, Colorado.

DATES: The public meeting will be held at 7 p.m., Wednesday, September 9, 2009. Written comments should be received no later than September 25, 2009.

ADDRESSES: The public meeting will be held in the Paonia Town Hall located at 214 Grand Avenue, Paonia, Colorado. Written comments should be addressed to the Uncompahgre Field Office Manager, Uncompahgre Field Office, 2505 South Townsend Avenue, Montrose, Colorado 81401.

FOR FURTHER INFORMATION CONTACT: Field Office Manager, Uncompahgre Field Office at the address above, or by telephone at 970–240–5300.

SUPPLEMENTARY INFORMATION: BLM hereby gives notice that a public meeting will be held on Wednesday, September 9, 2009, at 7 p.m., at the Paonia Town Hall at the address given above. An LBA was filed by Oxbow Mining, LLC. The BLM offers for competitive lease Federal coal in the lands outside established coal production regions described as:

T. 13 S., R. 90 W., 6th P.M.,

Sections 3, 4, 5, more particularly described as follows: Beginning at a point on the North section line at the section Corner common to sections 4 and 5; thence S. 87 degrees 22′08″ E. 5291.34 feet; thence S. 87degrees 32′05″ E. 1604.94 feet; thence S. 0 degrees 04′31″ W. 4246.44 feet; thence N. 86 degrees 45′23″ W. 1558.38 feet; thence N. 84 degrees 12′17″ W. 5148.60 feet; thence N. 86 degrees 44′37″ W. 1321.91 feet; to the existing lease line for Coal lease COC–61357; thence along said existing lease line N. 10 degrees 00′13″ W. 1382.68 feet; thence N. 86 degrees 08′20″ W. 390.65 feet; thence N. 00 degrees 1135.85 feet; to the southeasterly boundary of Tract 4; thence N. 14 degrees 36′45″ E. 1463.19 feet; along said southeasterly boundary of Tract 4; thence S. 87 degrees 18′59″ E. 1375.63 feet; along the north section line of section 5 to the Point of beginning.

Containing approximately 785.79 acres more or less, in Gunnison County, Colorado.

The coal resource to be offered is limited to coal recoverable by underground mining methods.

One purpose of the meeting is to obtain public comments on the following items:

(1) The method of mining to be employed to obtain maximum economic recovery of the coal,

(2) The impact that mining the coal in the proposed leasehold may have on the area,

(3) The methods of determining the fair market value of the coal to be offered, and

(4) EA and the FONSI.

In addition, the public is invited to submit written comments concerning the MER and FMV of the coal resource. Public comments will be utilized in establishing FMV for the coal resource in the described lands. Comments should address specific factors related to fair market value including, but not limited to:

1. The quality and quantity of the coal resource.

2. The price that the mined coal would bring in the market place.

3. The cost of producing the coal.

4. The interest rate at which anticipated income streams would be discounted.

5. Depreciation and other accounting factors.

6. The mining method or methods which would achieve maximum economic recovery of the coal.

7. Documented information on the terms and conditions of recent and similar coal land transactions in the lease area, and

8. Any comparable sales data of similar coal lands in the lease area.

Written requests to testify orally at the September 9, 2009, public meeting should be received at the Uncompahgre Field Office prior to the close of business September 9, 2009. Those who indicate they wish to testify when they register at the meeting may have an opportunity if time is available.

If any information submitted as comments are considered to be proprietary by the commenter, the information should be labeled as such and stated in the first page of the submission. Written comments on the MER and FMV should be sent to the Uncompahgre Field Office at the above address prior to the close of business on September 25, 2009, the end of the 30 day public comment period.

Substantive comments, whether written or oral, will receive equal consideration prior to any lease offering. The MER Report is available from the Uncompahgre Field Office upon request.

A copy of the MER Report, the case file, and the comments submitted by the public, except those portions identified as proprietary by the commenter and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection after September 25, 2009, at the Colorado State Office, 2850 Youngfield, Lakewood, Colorado 80215.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: August 5, 2009.

Kurt M. Barton,

Solid Minerals LLE.

[FR Doc. E9–19175 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–JB–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 June 8, to June 12, 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: August 4, 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.

ARKANSAS

Randolph County,

Pocahontas Commercial Historic District, roughly bounded by Rice, Thomasville, Jordan and McDonald Sts., Pocahontas, 09000315, Listed, 6/12/09.

CALIFORNIA

Los Angeles County,

27th Street Historic District, Along 27th St., Los Angeles, 09000399, Listed, 6/11/09 (African Americans in Los Angeles).

Los Angeles County,

52nd Place Historic District, Along E. 52nd Pl., Los Angeles, 09000398, Listed, 6/11/09 (African Americans in Los Angeles).

IOWA

Floyd County,

Tyden Farm No. 6 Farmstead Historic District, 1145 300th St., Dougherty vicinity, 09000401, Listed, 6/11/09.

Polk County,

Earle & LeBosquet Block, 407–409 Court Ave., Des Moines, 09000402, Listed, 6/11/09.

Polk County,

Hotel Randolph, 200–204 4th St., Des Moines, 09000403, Listed, 6/11/09.

Polk County,

Murillo Flats, 605 16th St., Des Moines, 09000404, Listed, 6/09/09.

Polk County,

Youngerman Block, 206–208 4th St., Des Moines, 09000405, Listed, 6/10/09.

MINNESOTA

Ramsey County,

Minnesota Building, 46 E. 4th St., Saint Paul, 09000408, Listed, 6/10/09.

MISSOURI

Chariton County,

Salisbury Square Historic District, 402, 404, 406, 407, 408, 502, 504, 506, 508 S. Broadway, Salisbury, 09000409, Listed, 6/11/09.

St. Louis Independent City,

Medart's, 7036 Clayton Ave., St. Louis, 09000410, Listed, 6/11/09.

St. Louis Independent City,

Railway Exchange Building, 600 Locust St., St. Louis, 09000411, Listed, 6/11/09

OHIO

Franklin County,

Hayden Building, 20 E. Broad St., Columbus, 09000412, Listed, 6/11/09.

Franklin County,

New Hayden Building, 16 E. Broad St., Columbus, 09000413, Listed, 6/11/09.

SOUTH DAKOTA

Hughes County,

Pierre Masonic Lodge, 201 W. Capitol Ave., Pierre, 09000447, Listed, 6/10/09.

VIRGINIA

Fredericksburg Independent City,

Idlewild, 1501 Gateway Blvd., Fredericksburg, 09000415, Listed, 6/08/09.

Louisa County,

Shady Grove School, 2925 Three Chopt Rd., Gum Spring, 09000416, Listed, 6/11/09 (Rosenwald Schools in Virginia MPS).

Orange County,

Chestnut Hill, 236 Caroline St., Orange, 09000417, Listed, 6/11/09.

South Boston Independent City,

South Boston Historic District Boundary Increase, Neighborhoods of Marshall Ave., New Brick Warehouse, Mizpah Church, N. Main St., South Boston, 09000418, Listed, 6/11/09.

[FR Doc. E9–19103 Filed 8–10–09; 8:45 am]

BILLING CODE P

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 July 25, 2009. Pursuant to § 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 August 26, 2009.

J. Paul Loether,

Chief, National Register of Historic Places/National, Historic Landmarks Program.

ARIZONA

Pima County

Steam Pump Ranch, (Cattle Ranching in Arizona MPS) 10901 Oracle Rd., Oro Valley, 9000668

COLORADO

Montrose County

Denver & Rio Grande Western Railroad Boxcar No. 3132, Approx. 1 mi. N. by NE. of US 50 at Cimarron, near Marrow Point Dam Rd., Curecanti National Recreation Center, Cimarron, 09000669

FLORIDA

Lee County

Menge-Hansen Marine Ways, 5605 Palm Beach Blvd., Fort Myers, 09000670

Manatee County

Helm, Johnson, House, 2104 53rd St., Bradenton, 09000671

Orange County

Atha, S. Howard, House, 1101 W. Princeton St., Orlando, 09000672

KANSAS

Dickinson County

Abilene Downtown Historic District, Roughly bounded by NE 4th, W. 1st, S. Walnut, and N. Olive St., Abilene, 09000673

Douglas County

Plymouth Congregational Church, (Lawrence, Kansas MPS) 925 Vermont St., Lawrence, 09000674

Sedgwick County

Newbern-Gore House, (Residential Resources of Wichita, Sedgwick County, Kansas 1870–1957) 400 S. Roosevelt, Wichita, 09000675

Powell House, (Residential Resources of Wichita, Sedgwick County, Kansas 1870–1957) 330 N. Crestway, Wichita, 09000676

Woodburn House, (Residential Resources of Wichita, Sedgwick County, Kansas 1870–1957) 574 N. Brookfield, Wichita, 09000677

MICHIGAN

Berrien County

Buchanan Downtown Historic District, Front St., between 117 W. and 256 E.; parts of Main St., between 108 and 210–212; Oak St. between 114 N., Buchanan, 09000678

Mason County

SS BADGER (carferry), 700 S. William St., Ludington, 09000679

Wayne County

Dry Dock Engine Works—Detroit Dry Dock Company Complex, 1801–1803 Atwater St. and 1900 Atwater St., Detroit, 09000680

MISSOURI

Howard County

Fayette Residential Historic District, (Historic and Architectural Resources of Fayette, issouri) Roughly bounded by Church St., W. Morrison St. and Cleveland Ave., Fayette, 09000681

Jackson County

Dean, O.H., Building, 3625–3635 Main St., Kansas City, 09000682

MONTANA

Mineral County

Point of Rocks Historic Transportation Corridor, 2 mi. W. of Alberton, Alberton, 09000683

NORTH CAROLINA

Lenoir County

Kennedy Memorial Home Historic District, 2557 Ceder Dell La., Kinston, 09000684

McDowell County

Brown, Henry Seawell, and Mary Jane English, Farmstead, 15956 US 221 N., Ashford, 09000685

OKLAHOMA

Oklahoma County

Jewel Theater, 904 NE 4th St., Oklahoma City, 09000686

Tulsa County

Sixth Street Commercial/Residential Historic District, Roughly along E. 6th St. from S. Peoria Ave. to the N./S. Alley between Quaker and Quincy Aves., Tulsa, 09000687

VIRGINIA

Arlington County

Arlington Ridge Park, (Parkways of the National Capital Region MPS) NW corner of N. Meade St. and Marshall Dr., Arlington, 09000688

King and Queen County

Providence Plantation and Farm, 1302 Roundabout Rte., Newtown, 09000689

Norfolk Independent city

American Cigar Company, 1148 E. Princess Anne Rd., Norfolk, 09000690

Request for REMOVAL has been made for the following resources:

UTAH

Millard County

Millard High School Gymnasium, 35 N. 200 W., Fillmore, 85000808

Salt Lake County

Building at 592–98 West 200 South, 592–98 W. 200 S., Salt Lake City, 82004134

Sevier County

Ramsay, Ralph, House, 57 E. 2nd N., Richfield, 75001824

Utah County

Stratton House–Orem City Hall, 870 W. Center, Orem, 98000674

[FR Doc. E9–19118 Filed 8–10–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Rate Adjustment for Indian Irrigation Project

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of rate adjustment for San Carlos Irrigation Project—Joint Works, Arizona.

SUMMARY: The Bureau of Indian Affairs (BIA) owns and operates the San Carlos Irrigation Project—Joint Works (SCIP–JW) located with the project office in Coolidge, Arizona. We are required to establish irrigation assessment rates to recover the costs to administer, operate, maintain, and rehabilitate this project. We are notifying you that we have adjusted the irrigation assessment rate at the SCIP–JW to reflect current costs of administration, operation, maintenance, and rehabilitation.

DATES: Effective September 10, 2009.

FOR FURTHER INFORMATION CONTACT: Bryan Bowker, Project Manager, P.O. Box 250, Coolidge, AZ 85228, telephone: (520) 723–6216.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rate Adjustment was published in the **Federal Register** (74 FR 19981) on April 30, 2009, to propose an adjustment to the irrigation assessment rate at the SCIP–JW for 2011. The public and interested parties were provided an opportunity to submit written comments during the 30-day period that ended June 1, 2009.

Does this notice affect me?

This notice affects you if you own or lease land within the assessable acreage of the SCIP–JW or if you have a carriage agreement with this irrigation project.

What irrigation assessments or charges are adjusted by this notice?

The rate table below contains the current rate for SCIP–JW, where we recover costs of administering, operating, maintaining, and rehabilitating the project. The table also contains the final rate for the 2011 season.

WESTERN REGION RATE TABLE

Project name	Rate category	Final 2009 rate	Final 2010 rate	Final 2011 rate
San Carlos Irrigation Project (Joint Works) (See Note #1)	Basic per acre	$21.00	$21.00	$25.00

Note #1. The 2010 rate was established by final notice published in the **Federal Register** on April 22, 2009 (74 FR 18402).

Did the BIA change the proposed rate increase?

Yes. The BIA proposed a $30/acre operation and maintenance (O&M) assessment rate for the SCIP–JW in 2011. This would have been a $9/acre increase from the 2010 O&M assessment rate of $21/acre. After further consideration, the BIA is establishing the 2011 O&M assessment rate at $25/acre. This $5/acre change in the proposed rate increase would extend, from two to three years, the time period required for BIA to collect from the water users the funds needed to replace the Coolidge Dam cylinder gates.

Did the BIA receive any comments on the proposed irrigation assessment rate adjustments?

Yes. Written comments relating to the proposed rate adjustment for the SCIP–JW were received by letter dated May 29, 2009, from one entity, the San Carlos Irrigation and Drainage District (District).

What issues were of concern to the commenter?

The District raised the following comments in its letter. The BIA's response is provided immediately after each comment statement.

(1) *Comment:* The BIA has not employed a reasonable methodology for determining an appropriate O&M charge for 2011.

Response: The methodology used by the BIA to estimate an 2011 O&M budget and determine an appropriate rate for 2011 was reasonable. Based on a review of historical income receipts and expenditures, a budget of projected income receipts and expenditures is developed approximately two years before the O&M income is collected and expenses are incurred. The BIA relies on financial reports generated by the Federal Finance System for reviewing past expenditures and projecting a future budget and expenditures. Procurement files and records maintained by the SCIP–JW are also reviewed and considered. For example, with regard to development of the 2011 O&M budget, the BIA reviewed: (1) The year-end reconciled income and expenditure information for 2008; (2) available income and expenditure information 2009; (3) previous budget projections for 2010; and (4) other information relevant to potential future activities, such as the cost information for replacement of the Coolidge Dam cylinder gates.

The SCIP–JW staff and District representatives discussed the pertinent budget information during several meetings held between November 13, 2008 and March 30, 2009. The District was provided with pertinent budget information during this time period.

(2) *Comment:* The BIA has provided the District with conflicting information about current and projected staffing levels for the Irrigation Division of the Project, and the allocation of $615,000 in 2011 for personnel is excessive and unreasonable.

Response: The BIA does not believe that it has provided the District with conflicting information about current and projected staffing levels for the Irrigation Division of the SCIP–JW. The projected 2011 personnel budget for the Irrigation O&M staff is based on actual expenditures incurred by the SCIP–JW in 2008 and 2009 for the staff positions the SCIP–JW anticipates to be in its employment in 2010 and 2011, with modest cost of living increases. The base information for these staff positions and salary and wage grade scales was

provided to the District in December 2008.

In anticipation of the reduction-in-force resulting from the transfer of the SCIP–JW maintenance duties to the Joint Control Board (JCB) required by the Arizona Water Settlements Act (Pub. L. 108–451, 118 Stat. 3478, 3499 (Dec. 10, 2004)) and the Related Joint Control Board Agreement signed by the District and the Secretary of the Interior, the SCIP–JW will be updating its Irrigation Organization Chart. At that time, the District will be provided a copy of the revised Irrigation Organization Chart and associated salary table.

The reduction-in-force is in progress and the BIA estimates this action will result in an annual personnel cost savings of approximately $400,000. This savings is accounted for in the 2010 and 2011 O&M budgets for the SCIP–JW and was identified to the District on or before March 30, 2009. Although the Supervisory Civil Engineer position was vacant from August 2008 through May 2009, the position has now been filled. The BIA disagrees with the District's assertion that only a half-time Civil Engineer position is needed. There are extensive construction activities planned for SCIP–JW facilities pursuant to the Arizona Water Settlements Act by the District, the Gila River Indian Community, and the U.S. Bureau of Reclamation. These activities require the attention of the Supervisory Civil Engineer, in addition to the duties retained by the SCIP–JW after the transfer of maintenance duties to the JCB.

Similarly, the BIA disagrees with the District's estimate of how many irrigation system operators the SCIP–JW needs to perform the water delivery duties. The SCIP–JW has a vast geographical territory, and the irrigation system operators are regularly called on to perform water delivery duties after normal working hours and on weekends and holidays.

BIA notes that the District reiterates its request for the SCIP–JW to assign the well maintenance function to the JCB. The agreement applicable to the JCB requires the BIA to continue maintenance of project wells until such time as the wells become a ''District Rehabilitation Responsibility'' as defined in sections 9.1 and 9.4 of the Joint Control Board Agreement. There may be other options available for consideration by BIA in response to this request, such as a Federal procurement action or an Indian Self-Determination contract action. However, consideration of these options would take time to discuss and evaluate and cannot be resolved in the context of the 2011 O&M rate process. Regardless, implementation of other options for maintenance of project wells does not eliminate the costs; it only changes the way the costs are covered.

(3) *Comment:* The BIA's 2011 budget estimate for utilities, services, and supplies is excessive.

Response: The BIA does not believe the 2011 budget estimate for these categories is excessive. This conclusion is based on the best historical information available to the BIA for these expenditures. The details concerning these budget items were provided to the District earlier this calendar year. These categories primarily include expenditures to pay for repair and maintenance of the 98 wells owned and operated by the SCIP–JW. This is a high priority in the O&M budget because the groundwater supplied from these wells contributes significantly to the annual water apportionment in the project. Another significant expenditure in this category is the Federal environmental compliance costs incurred by the SCIP–JW to: (1) Evaluate encroachment actions on SCIP–JW facilities due to non-irrigation development by District landowners; and (2) to comply with other applicable Federal environmental requirements in the course of O&M activities retained by the BIA under the Arizona Water Settlements Act and Joint Board Agreement.

(4) *Comment:* The replacement of the Coolidge Dam cylinder gates constitutes ''betterment'' and requires the consent of the District because the purpose for replacing these gates is to extend the useful life of Coolidge Dam.

Response: The BIA disagrees with the District's assertion that replacement of the Coolidge Dam cylinder gates is ''betterment.'' Coolidge Dam is the asset and the cylinder gates are components of the dam. Replacing the gates does not increase the life of the dam; the replacement only allows the BIA to operate the asset (Coolidge Dam) properly. The BIA considers the gate replacement to be deferred maintenance which needs to be completed as soon as the requisite funds to pay for the replacement costs can be collected through the O&M assessment rate process. The BIA provided extensive technical information about the condition of the cylinder gates to the District twice since 2006 and sought review and comment from the District about the problem and the replacement plan. See the report completed in July 2004 by the Bureau of Reclamation for the BIA titled: ''Coolidge Dam, Comprehensive Dam Review, Bureau of Indian Affairs—Safety of Dams Program, Western Region, San Carlos Indian Reservation, 2004.'' This report includes an additional document titled: ''Examination Report, Special Examination, Coolidge Dam, San Carlos, Arizona,'' which documents the findings and recommendations relating to the Coolidge Dam cylinder gates. The District has not submitted substantive comments to the BIA on this matter in response to this technical information.

These reports provide the following information: a buckling failure of a cylinder gate while closed, due to large hydrostatic loads on a reduced steel section (from corrosion), could prevent re-opening of the gate for reservoir releases and also present a dam safety concern. A single nine-foot-diameter circular bulkhead gate could be fabricated for installation by a crane onto either cylinder gate seat within each intake tower for maintenance and inspection purposes, replacing the function of the cylinder gates at a reasonable cost. Failure of either cylinder gate is considered likely within the next 30 years under normal operating heads and immediate measures should be taken to lock both gates in the fully open position until they are removed. Based on this technical review and information, BIA decided to lock the existing cylinder gates in a fully open position and the gates are no longer available to be closed under any circumstance. This prevents inspection and maintenance of the emergency guard gate and sections of the conduit through the dam upstream of the emergency guard gate.

Based on this information, the BIA believes it is appropriate as the owner/operator of Coolidge Dam, as well as the steward of the water supply delivered from Coolidge Dam, to move forward with the actions required to replace the cylinder gates. In order to reduce the cost burden to the District landowners, the BIA will reduce the 2011 O&M rate from $30/acre to $25/acre and collect the funds for this purpose over a three-year period rather than a two-year period.

(5) *Comment:* The BIA's emergency reserve fund should be maintained at $200,000, not $600,000.

Response: The BIA disagrees with the District's analysis of the emergency reserve fund. During calendar year 2006, when the BIA engaged in water user meetings with the District and the Indian water users about the proposed O&M rate for 2008 and 2009, extensive discussion ensued concerning the amount of the emergency reserve fund and the separate reserve fund maintained by the SCIP–JW for well replacement. In response to the

concerns expressed by the District in these meetings, the BIA abolished the separate reserve fund for the well replacement contingencies and the BIA decided to use the emergency reserve fund to replace wells as needed and will replenish the reserve fund if it is used for well replacement. A single well replacement is estimated to cost between $250,000 and $300,000. The BIA believes a reserve fund sufficient to replace two wells should be maintained. As such, the BIA believes it is reasonable to maintain the SCIP–JW emergency reserve fund at $600,000. This amount complies with the BIA's policy for irrigation project reserve funds.

(6) *Comment:* The District requests copies of all information that was used to prepare the proposed budget and O&M charge for 2011.

Response: The development of the 2011 O&M budget estimate is logically an outgrowth of the extensive discussions between BIA and the District about the O&M income and expenditures in 2008 and 2009 and the projected O&M budget for 2010. These discussions also included fiscal and programmatic issues and information related to the transfer of SCIP–JW maintenance duties to the JCB, as required by the Arizona Water Settlements Act and the Joint Control Board Agreement signed by the District and the Secretary of the Interior.

Examples of the information provided to the District include: staff position titles; staff position salary and wage grade scales; projected and actual expenditures for FY 2009; projected expenditures for 2010; final income and expenditure information for the reconciled year-end 2008 O&M budget (including volumes of documentation from the Federal Finance System and General Ledger); SCIP–JW budget spreadsheets displaying historical expenditure data for nearly the last ten years; and detailed descriptions of the O&M activities and performance standards for the SCIP–JW.

Additionally, the SCIP–JW provided the District with access to all of its contract files as part of the pending litigation in *San Carlos Irrigation and Drainage District* v. *United States,* No. 06–576C, U.S. Court of Federal Claims. These contract files contained information pertaining to current SCIP–JW obligations and payments for contract obligations relating to large outlays, such as well maintenance and repair and environmental compliance costs associated with O&M of the SCIP–JW.

Where can I get information on the regulatory and legal citations in this notice?

You can contact the appropriate office(s) stated in the table for the SCIP–JW, or you can use the Internet site for the Government Printing Office at *http://www.gpo.gov.*

What authorizes you to issue this notice?

Our authority to issue this notice is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has, in turn, delegated this authority to the Assistant Secretary—Indian Affairs under Part 209, Chapter 8.1A, of the Department of the Interior's Departmental Manual.

Who can I contact for further information?

The following table contains the regional and project/agency contacts for the SCIP–JW.

WESTERN REGION CONTACTS

Allen Anspach, Regional Director, Bureau of Indian Affairs, Western Regional Office, Two Arizona Center, 400 N. 5th Street, 12th floor, Phoenix, AZ 85004, Telephone: (602) 379–6600

Project Name	Project/Agency Contacts
San Carlos Irrigation Project—Joint Works	Bryan Bowker, Project Manager, P.O. Box 250, Coolidge, AZ 85228, Telephone: (520) 723–6216

Consultation and Coordination With Tribal Governments (Executive Order 13175)

To fulfill its consultation responsibility to tribes and tribal organizations, BIA communicates, coordinates, and consults on a continuing basis with these entities on issues of water delivery, water availability, costs of administration, operation, maintenance, and rehabilitation of projects that concern them. This is accomplished at the individual irrigation project by project, BIA, and regional representatives, as appropriate, in accordance with local protocol and procedures. This notice is one component of our overall coordination and consultation process to provide notice to, and request comments from, these entities when we adjust irrigation assessment rates.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

This rate adjustment will have no adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies) as this rate adjustment is implemented. This is a notice for rate adjustment at a BIA-owned and operated irrigation project.

Regulatory Planning and Review (Executive Order 12866)

This rate adjustment is not a significant regulatory action and does not need to be reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

This rate adjustment is not a rule for the purposes of the Regulatory Flexibility Act because it establishes ''a rule of particular applicability relating to rates.'' 5 U.S.C. 601(2).

Unfunded Mandates Reform Act of 1995

This rate adjustment does not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or on the private sector, of more than $130 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. Therefore, the Department of the Interior (Department) is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Takings (Executive Order 12630)

The Department has determined that rate adjustments do not have significant ''takings'' implications.

Federalism (Executive Order 13132)

The Department has determined that rate adjustments do not have significant Federalism effects because they will not affect the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among various levels of government.

Civil Justice Reform (Executive Order 12988)

In issuing this rule, the Department has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988.

Paperwork Reduction Act of 1995

This rate adjustment does not affect the collections of information that have been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the Paperwork Reduction Act of 1995. The OMB Control Number is 1076–0141 and expires August 31, 2009.

National Environmental Policy Act

The Department has determined that this rate adjustment does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(d)).

Data Quality Act

In developing this notice, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. No. 106–554).

Dated: July 28, 2009.

George T. Skibine,

Acting Principal Deputy, Assistant Secretary—Indian Affairs.

[FR Doc. E9–19115 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2009-N161; 96300-1671-0000-P5]

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for permits to conduct certain activities with endangered species. The Endangered Species Act requires that we invite public comment on these permit applications.

DATES: Written data, comments or requests must be received by September 10, 2009

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358-2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Submit your written data, comments, or requests for copies of the complete applications to the address shown in **ADDRESSES**.

Applicant: Archie Carr Center for Sea Turtle Research, University of Florida, Gainesville, FL, PRT-724540

The applicant requests an amendment to an existing permit to import biological samples collected from captive-bred green sea turtles (*Chelonia mydas*) from the Cayman Turtle Farm, Cayman Islands, for the purpose of scientific research. Samples are to be collected from live or salvaged specimens. This notification covers activities conducted by the applicant over the remainder of the 5–year period of the permit.

Applicant: University of California, Santa Cruz, CA, PRT-215732

The applicant requests a permit to acquire from Coriell Institute of Medical Research, Camden, NJ, in interstate commerce fibroblast cell line cultures from gorillas (*Gorilla gorilla*) and orangutan (*Pongo abelli*) for the purpose of scientific research.

The following applicants request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Vance D. Coffman, Pebble Beach, CA, PRT-219600

Applicant: Clint Chamberlain, Yukon, OK, PRT-219627

Applicant: Thomas A. Fraley, Newburg, MO, PRT-219683

Applicant: Eric L. Nysse, New Holstein, WI, PRT-219947

Applicant: Gregory G. Rodriguez, Sugar Land, TX, PRT-220498

Applicant: Randall R. Foster, Midland, TX, PRT-220517

Applicant: James M. Beier, Rochester, MN, PRT-220669

Applicant: James R. Boyd, Rapid City, SD, PRT-220718

Applicant: Robert M. Bensinger, Akron, OH, PRT-220877

Dated: July 31, 2009

Lisa J. Lierheimer

Senior Permit Biologist, Branch of Permits, Division of Management Authority

[FR Doc. E9–19221 Filed 8–10–09; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

August 5, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor-ETA, Office of Management and Budget, Room 10235,

Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register.** In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Employment and Training Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Weekly Claims and Extended Benefits Data and Weekly Initial and Continued Weeks Claimed.

OMB Control Number: 1205–0028.

Agency Form Number: ETA–538 and ETA–539.

Affected Public: State Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Annual Burden Hours: 3,675.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: These data are necessary for the determination of the beginning, continuance, or termination of an Extended Benefit (EB) period in any State, which determine the EB trigger rate. Also, data on initial and continued claims are used to help determine economic indicators. For additional information, see related notice published at Volume 74 FR 24039 on May 22, 2009.

Agency: Employment and Training Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Statement of Expenditures and Financial Adjustment of Federal Funds for Unemployment Compensation for Federal Employees and Ex-Servicemembers.

OMB Control Number: 1205–0162.

Agency Form Number: ETA–191.

Affected Public: State Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Annual Burden Hours: 1,272.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: Federal and military agencies must reimburse the Federal Employees Compensation Account for the amount expended for benefits to former Federal (civilian) employees and ex-servicemembers. The report informs ETA of the amount to bill such agencies. For additional information, see related notice published at Volume 74 FR 14579 on March 31, 2009.

Agency: Employment and Training Administration.

Type of Review: Revision of a currently approved collection.

Title of Collection: Unemployment Insurance Title XII Advances and Voluntary Repayment Process.

OMB Control Number: 1205–0199.

Agency Form Number: N/A.

Affected Public: State Governments.

Total Estimated Number of Respondents: 27.

Total Estimated Annual Burden Hours: 243.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: This information collection's purpose is to maintain a process for State governors for requesting advances and repaying advances through their correspondence with the Secretary of Labor. The report informs ETA of the amount to bill such agencies. For additional information, see related notice published at Volume 74 FR 24041 on May 22, 2009.

Agency: Employment and Training Administration.

Type of Review: Revision of a currently approved collection.

Title of Collection: Plan for Evaluation of the Trade Adjustment Assistance Program.

OMB Control Number: 1205–0460.

Agency Form Number: N/A.

Affected Public: Individuals or households.

Total Estimated Number of Respondents: 1,357.

Total Estimated Annual Burden Hours: 940.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: This data collection is for an evaluation of the Trade Adjustment Assistance (TAA) Program. The evaluation is comprised of an impact analysis using a comparison group methodology. A process is also included to determine what programmatic and administrative features may affect performance. Data collection includes: baseline and follow-up surveys of TAA participants and comparison group members, site visits to States and local areas, and an Internet/phone survey of local TAA coordinators. The report informs ETA of the amount to bill such agencies. For additional information, see related notice published at Volume 74 FR 14159 on March 30, 2009.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E9–19191 Filed 8–10–09; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

August 5, 2009.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—ETA, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–5806 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register.** In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Employment and Training Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Weekly Claims and Extended Benefits Data and Weekly Initial and Continued Weeks Claimed.

OMB Control Number: 1205–0028.

Agency Form Number: ETA–538 and ETA–539.

Affected Public: State Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Annual Burden Hours: 3,675.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: These data are necessary for the determination of the beginning, continuance, or termination of an Extended Benefit (EB) period in any State, which determine the EB trigger rate. Also, data on initial and continued claims are used to help determine economic indicators. For additional information, see related notice published at Volume 74 FR 24039 on May 22, 2009.

Agency: Employment and Training Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Statement of Expenditures and Financial Adjustment of Federal Funds for Unemployment Compensation for Federal Employees and Ex-Servicemembers.

OMB Control Number: 1205–0162.

Agency Form Number: ETA–191.

Affected Public: State Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Annual Burden Hours: 1,272.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: Federal and military agencies must reimburse the Federal Employees Compensation Account for the amount expended for benefits to former Federal (civilian) employees and ex-servicemembers. The report informs ETA of the amount to bill such agencies. For additional information, see related notice published at Volume 74 FR 14579 on March 31, 2009.

Agency: Employment and Training Administration.

Type of Review: Revision of a currently approved collection.

Title of Collection: Unemployment Insurance Title XII Advances and Voluntary Repayment Process.

OMB Control Number: 1205–0199.

Agency Form Number: N/A.

Affected Public: State Governments.

Total Estimated Number of Respondents: 27.

Total Estimated Annual Burden Hours: 243.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: This information collection's purpose is to maintain a process for State governors for requesting advances and repaying advances through their correspondence with the Secretary of Labor. The report informs ETA of the amount to bill such agencies. For additional information, see related notice published at Volume 74 FR 24041 on May 22, 2009.

Agency: Employment and Training Administration.

Type of Review: Revision of a currently approved collection.

Title of Collection: Plan for Evaluation of the Trade Adjustment Assistance Program.

OMB Control Number: 1205–0460.

Agency Form Number: N/A.

Affected Public: Individuals or households.

Total Estimated Number of Respondents: 1,357.

Total Estimated Annual Burden Hours: 940.

Total Estimated Annual Costs Burden (does not include hour costs): $0.

Description: This data collection is for an evaluation of the Trade Adjustment Assistance (TAA) Program. The evaluation is comprised of an impact analysis using a comparison group methodology. A process is also included to determine what programmatic and administrative features may affect performance. Data collection includes: baseline and follow-up surveys of TAA participants and comparison group members, site visits to States and local areas, and an Internet/phone survey of local TAA coordinators. The report informs ETA of the amount to bill such agencies. For additional information, see related notice published at Volume 74 FR 14159 on March 30, 2009.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E9–19197 Filed 8–10–09; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Period for New Hampshire

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: This notice announces a change in benefit period eligibility under the EB program for New Hampshire.

The following change has occurred since the publication of the last notice regarding New Hampshire's EB status:

• New Hampshire's total unemployment rate (TUR) for June 2009, released on July 17, 2009, by the Bureau of Labor Statistics, brought its three-month average seasonally adjusted TUR to the threshold for triggering ''on'' to an extended benefit period. Beginning with the week of August 2, 2009, eligible unemployed workers will be able to collect up to an additional 13 weeks of Unemployment Insurance benefits.

Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the States by the U.S. Department of Labor. In the case of a State beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13 (c)(1)). Persons who believe they may be entitled to EB or who wish to inquire about their rights under the program should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg. Room S–4231, Washington, DC 20210, telephone

number (202) 693–3008 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 4th day of August, 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–19196 Filed 8–10–09; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Period for Texas

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: This notice announces a change in benefit period eligibility under the EB program for Texas.

The following change has occurred since the publication of the last notice regarding Texas' EB status:

• Texas has modified its law by adding a total unemployment rate (TUR) trigger retroactive to February 1, 2009. As a result, Texas has retroactively triggered ''on'' to an extended benefit period for weeks of unemployment beginning May 3, 2009. Eligible claimants will be able to collect up to an additional 13 weeks of Unemployment Insurance benefits.

Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)). Persons who believe they may be entitled to EB or who wish to inquire about their rights under the program should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg., Room S–4231, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 4th day of August, 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–19203 Filed 8–10–09; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Period for Arizona, Delaware, and New York

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: This notice announces a change in benefit period eligibility under the EB program for Arizona, Delaware, and New York.

The following change has occurred since the publication of the last notice regarding these States' EB statuses:

• Total unemployment rate (TUR) data for June 2009, released on July 17, 2009, by the Bureau of Labor Statistics, brought the three-month average seasonally adjusted TURs in Arizona, Delaware, and New York to the threshold for triggering ''on'' to a high unemployment period (HUP) under the EB program. Beginning on August 2, 2009, eligible claimants will be able to collect up to 20 weeks of additional Unemployment Insurance benefits. A **Federal Register** notice must be issued shortly, announcing the change in the EB status for these states.

Information for Claimants

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning a HUP period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who may be eligible for increased benefits due to the HUP (20 CFR 615.13 (c) (1)).

Persons who wish to inquire about their rights under the program should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue, NW., Frances Perkins Bldg., Room S–4231, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 6th day of August, 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–19201 Filed 8–10–09; 8:45 am]

BILLING CODE 4510–FW–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0347]

Biweekly Notice Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 16, 2009, to July 29, 2009. The last biweekly notice was published on July 28, 2009 (74 FR 37245).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), section 50.92, this means that operation of the facility in accordance with the proposed amendment would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from

any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch (RDB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RDB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E–Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E–Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E–Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by calling (301) 415–1677, to request (1) A digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E–Submittal server for any proceeding in which it is

participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ 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 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 using the agency's adjudicatory e-filing system may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC Meta-System Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The Meta-System Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov.*

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, 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 request and/or petition should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. 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 submissions.

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of amendment request: June 10, 2009.

Description of amendment request: The proposed amendment would amend the Fermi 2 Plant Operating License, Appendix A, Technical Specifications (TS) to revise Technical Specification Table 3.3.8.1–1, Function 2 (Degraded Voltage). The change identifies an additional time delay as a result of a plant modification to address the backfit issues discussed in Reference 3. Specifically, this proposed amendment adds a new time delay logic associated with Function 2 for a degraded voltage concurrent with a Loss of Coolant Accident (LOCA). This will bring Fermi 2 into full compliance with 10 CFR part 50, Appendix A, General Design Criterion (GDC)–17, ''Electric Power Systems.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below.

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Providing the additional logic ensures the timely transfer of plant safety system loads to the Emergency Diesel Generators in the event sustained degraded bus voltage is present with a Loss of Coolant Accident (LOCA) signal. This ensures that Emergency Core Cooling System (ECCS) equipment is powered from the emergency diesel generators in a timely manner. This change is needed to bring Fermi 2 into full compliance with 10 CFR part 50, Appendix A, General Design Criterion–17, ''Electric Power Systems,'' and to meet the requirements of NUREG–0800 Rev. 2, Branch Technical Position (BTP) Power Systems Branch (PSB)–1. The shorter time delay supports the time assumed in the accident analysis for water injection into the reactor vessel under degraded voltage conditions. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of

accident from any accident previously evaluated.

The proposed change does not affect any of the current degraded voltage logic schemes or any other equipment provided to mitigate accidents. It utilizes existing logic systems to isolate safety buses from the grid and repower those safety buses using the onsite emergency power system. The change adds logic to ensure that in the case of a sustained degraded voltage condition concurrent with a LOCA signal, the safety electrical power buses will be transferred from the offsite power system to the onsite power system in a timely manner to ensure water is injected into the reactor vessel in the time assumed and evaluated in the accident analysis. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

This proposed change implements a new design for a reduced time delay to isolate safety buses from offsite power if a Loss of Coolant Accident were to occur concurrent with a sustained degraded voltage condition. This ensures that emergency core cooling system pumps inject water into the reactor vessel within the time assumed and evaluated in the accident analysis, consistent with the requirements of BTP PSB–1 section B.1.b. and 10 CFR part 50, Appendix A, General Design Criterion–17, ''Electric Power Systems.'' Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David G. Pettinari, Legal Department, 688 WCB, Detroit Edison Company, 2000 2nd Avenue, Detroit, Michigan 48226–1279.

NRC Branch Chief: Lois M. James.

Duke Energy Carolinas, LLC, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of amendment request: February 27, 2009.

Description of amendment request: The proposed amendments would revise the Technical Specifications to be consistent with Revision 0 of Technical Specification Task force (TSTF) TSTF 511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR [*Code of Federal Regulations*] part 26.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR part 26, subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. The proposed change does not involve any physical changes to plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Lisa F. Vaughn, Associate General Counsel and Managing Attorney, Duke Energy Carolinas, LLC, 526 South Church Street, EC07H, Charlotte, NC 28202.

NRC Branch Chief: Undine Shoop.

Duke Energy Carolinas, LLC, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of amendment request: February 27, 2009.

Description of amendment request: The proposed amendments would revise the Technical Specifications to be consistent with Revision 0 of Technical Specification Task force (TSTF) TSTF 511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR [*Code of Federal Regulations*] part 26.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR part 26, subpart I, requirements. The proposed change does not impact the physical

configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. The proposed change does not involve any physical changes to plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Lisa F. Vaughn, Associate General Counsel and Managing Attorney, Duke Energy Carolinas, LLC, 526 South Church Street, EC07H, Charlotte, NC 28202.

NRC Branch Chief: Undine Shoop.

Duke Energy Carolinas, LLC, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of amendment request: February 27, 2009.

Description of amendment request: The proposed amendments would revise the Technical Specifications to be consistent with Revision 0 of Technical Specification Task Force (TSTF) TSTF 511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR [*Code of Federal Regulations*] part 26.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR part 26, subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. The proposed change does not involve any physical changes to plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Lisa F. Vaughn, Associate General Counsel and Managing Attorney, Duke Energy Carolinas, LLC, 526 South Church Street, EC07H, Charlotte, NC 28202.

NRC Branch Chief: Undine Shoop.

Exelon Generation Company, LLC, Docket No. 50–461, Clinton Power Station, Unit No.1, DeWitt County, Illinois

Date of amendment request: April 22, 2009.

Description of amendment request: The proposed amendment would revise the inservice testing (IST) requirements from the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel (BPV) Code, Section XI, to the ASME Code for Operation and Maintenance of Nuclear Power Plants (OM Code) and applicable addenda. This change would eliminate the ASME Code inconsistency between the IST program and the technical specification (TS) as required by Title 10 of the *Code of Federal Regulations* (10 CFR) 50.55a(f)(5)(ii). Additionally, the amendment would extend the applicability of surveillance requirement (SR) 3.0.2 provisions to other normal and accelerated frequencies specified as 2 years or less in the IST program. Finally, the amendment will remove the phrase ''including applicable supports'' from TS section 5.5.6. TS section 5.5.6, IST Program, and the associated TS Bases would be revised under this TS amendment.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes revise [technical specification] TS 5.5.6 for [Clinton Power Station] CPS Unit 1 to conform to the requirements of 10 CFR 50.55a, ''Codes and standards,'' paragraph (f) regarding the inservice testing of pumps and valves beginning with the Third 10-year Interval. The current TS reference the [American Society of Mechanical Engineers] ASME Boiler and Pressure Vessel Code, Section XI, requirements for the inservice testing of ASME Code Class 1, 2, and 3 components, including applicable supports. The proposed changes would reference the ASME [Operation and Maintenances of Nuclear Power Plants] OM Code, which is consistent with 10 CFR 50.55a, paragraph (f), ''Inservice testing requirements,'' and approved for use by the NRC. In addition, provisions modifying TS 5.5.6, item b, clarify that [surveillance requirement] SR 3.0.2 is only applied to those inservice testing frequencies of two years or less. The definitions of the frequencies are not changed by this license amendment request. The change removing the phrase ''including applicable supports'' clarifies the scope of components in the [in-service testing] IST Program.

The proposed changes do not affect any accident initiators, do not affect the ability of CPS to successfully respond to previously evaluated accidents and do not affect radiological assumptions used in the evaluations. Thus, the radiological consequences of any accident previously evaluated are not increased.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes revise TS 5.5.6 for CPS Unit 1 to conform to the requirements of 10 CFR 50.55a(f) regarding the inservice testing of pumps and valves beginning with the Third 10-year Interval. The current TS reference the ASME Boiler and Pressure Vessel Code, section XI, requirements for the inservice testing of ASME Code Class 1, 2, and 3 components, including applicable supports. The proposed changes would reference the ASME OM Code, which is consistent with the 10 CFR 50.55a(f) and approved for use by the NRC. In addition, provisions modifying TS 5.5.6, item b, clarify that SR 3.0.2 is only applied to those inservice testing frequencies of two years or less. The definitions of the frequencies are not changed by this license amendment request. The change removing the phrase ''including applicable supports'' clarifies the scope of components in the IST Program.

The proposed changes to TS section 5.5.6 do not affect the performance of any CPS structure, system, or component credited with mitigating any accident previously evaluated and do not introduce any new modes of system operation or failure mechanisms. In addition, the proposed changes do not revise the frequency or method of testing the components covered by the IST program.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes revise TS 5.5.6 for CPS Unit 1 to conform to the requirements of 10 CFR 50.55a(f) regarding the inservice testing of pumps and valves beginning with the Third 10-year Interval. The current TS reference the ASME Boiler and Pressure Vessel Code, section XI, requirements for the inservice testing of ASME Code Class 1, 2, and 3 components, including applicable supports. The proposed changes would reference the ASME OM Code, which is consistent with the 10 CFR 50.55a(f) and approved for use by the NRC. In addition, provisions modifying TS 5.5.6, item b, clarify that SR 3.0.2 is only applied to those inservice testing frequencies of two years or less. The definitions of the frequencies are not changed by this license amendment request. The change removing the phrase ''including applicable supports'' clarifies the scope of components in the IST Program.

The proposed changes do not modify the safety limits or setpoints at which proactive actions are initiated and do not change the requirements governing operation or availability of safety equipment assumed to operate to preserve the margin of safety.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Bradley J. Fewell, Associate General Counsel, Exelon Nuclear, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Stephen J. Campbell.

Indiana Michigan Power Company (the licensee), Docket No. 50–316, Donald C. Cook Nuclear Plant, Unit 2 (CNP–2), Berrien County, Michigan

Date of amendment request: March 19, 2009.

Description of amendment request: The proposed amendment would adopt a new analysis of a large break loss-of-coolant accident (LBLOCA) for CNP–2. The new analysis is performed using the NRC-approved methodology set forth in Westinghouse Topical Report WCAP–16009–P–A, ''Realistic Large-Break LOCA Evaluation Methodology Using the Automated Statistical Treatment of Uncertainty Method (ASTRUM).'' The licensee proposed to endorse this methodology by a revision to Technical Specification (TS) 5.6.5, ''Core Operating Limits Report (COLR).''

The licensee is also requesting NRC approval to revise TS 3.4.1, ''RCS [Reactor Coolant System] Pressure, Temperature, and Flow Departure from Nucleate Boiling Limits,'' to change the minimum reactor coolant system (RCS) total flow rate from 366,400 to 354,000 gallons per minute (gpm). The current value is a minimum measured flow value which includes allowances for flow uncertainty. Current practice is that the thermal design flow value, which does not include allowances for flow measurement uncertainty, be specified in TSs. The minimum measured flow is specified in the COLR. That value is currently 354,000 gpm and is also reflected in the new LBLOCA analyses.

The licensee also proposes to amend TS 3.5.2, ''ECCS—Operating.'' Condition D allows the unit to be in Mode 1, 2, or 3 for an unlimited amount of time if a Safety Injection (SI) system cross-tie valve is closed, provided that thermal power is reduced to less than or

equal to a specified value. The new LBLOCA analysis being proposed does not address a condition in which an SI cross-tie valve is closed. Therefore, the allowance provided by Condition D will be deleted, as well as reference to Condition D in TS 3.5.2, Conditions A and C.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability of occurrence or Consequences of an Accident Previously Evaluated?

Response: No.

The current minimum departure from nucleate boiling ratio Technical Specification (TS) specify a minimum measured flow value in the Reactor Coolant System (RCS) total flow requirement. I&M is proposing to replace this minimum measured flow value with a thermal design flow value. The current minimum departure from nucleate boiling ratio TS also require that RCS total flow meet the requirements in the Core Operating Limits Report (CORL). The COLR specifies the minimum measured flow value. Consequently, the minimum measured flow value will continue to be met. This proposed change does not alter any system or actual flow value.

I&M is proposing to delete a TS provision that allows the unit to operate for an unlimited amount of time with a Safety Injection (SI) system cross tie valve closed, provided that thermal power is reduced. As discussed below, I&M is proposing to adopt a new large break loss-of-coolant accident (LBLOCA) analysis. The new analysis does not evaluate plant operation with an SI system cross-tie valve closed. The position of the SI system cross connect valve does not affect the likelihood of an accident. This proposed change will assure the plant will be operated within the new LBLOCA analysis.

I&M is proposing to modify the TS such that it identifies the new LBLOCA analysis methodology rather than the analysis methodology being replaced. This TS change is administrative in that it will identify the new methodology following approval of the new methodology by the Nuclear Regulatory Commission (NRC).

I&M is proposing to adopt a new LBLOCA analysis which uses a plant-specific adaptation of a best-estimate methodology using automated statistical treatment of uncertainty methodology (ASTRUM). The analysis is based on the current plant configuration and the plant will be operated within the assumptions of the analysis. The analysis demonstrates that the current emergency core cooling system design performance conforms to the criteria contained in 10 CFR 50.46.b. An LBLOCA is the only accident involved in this change. No changes are being made to any reactor protection system or engineered safeguards features actuation system setpoints.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the TS will not result in the operation of any structure, system, or component in a new or different manner. Adoption of a plant-specific adaptation of the ASTRUM methodology will not create any new failure modes that could lead to a different kind of accident.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

It has been shown that the analytical technique used in the analysis realistically describes the expected behavior of the Donald C. Cook Nuclear Plant Unit 2 reactor system during a postulated LBLOCA. Uncertainties have been accounted for as required by 10 CFR 50.46. A sufficient number of loss-of-coolant accidents (LOCAs) with different break sizes, different locations, and other variations in properties have been analyzed to provide assurance that the most severe postulated LOCAs were analyzed. *W*COBRA/TRAC validation with the revised downcomer noding has been found acceptable for application of the ASTRUM methodology, with no changes to the uncertainty treatment. The analysis has demonstrated that all acceptance criteria contained in 10 CFR 50.46, Paragraph b, continue to be satisfied.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Senior Nuclear Counsel, Indiana Michigan Power Company, One Cook Place, Bridgman, MI 49106.

NRC Branch Chief: Lois M. James.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Date of amendment request: June 10, 2009.

Description of amendment request: The amendments would delete those portions of the Technical Specifications (TSs) for San Onofre Nuclear Generating Station, Units 2 and 3 that are superseded by the new requirements regarding working hours for nuclear plant staff in 10 CFR part 26, subpart I. This change is consistent with U.S. Nuclear Regulatory Commission (NRC)-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specification change traveler, TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.'' The availability of this TS improvement was announced in the **Federal Register** on December 30, 2008 (73 FR 79923), as part of the Consolidated Line Item Improvement Process (CLIIP).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR part 26, subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Accident Previously Evaluated

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant

equipment to be installed, alter accident analysis assumptions, add any initiators, or effect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. The proposed change does not involve any physical changes to the plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on that review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: Douglas K. Porter, Esquire, Southern California Edison Company, 2244 Walnut Grove Avenue, Rosemead, California 91770.

NRC Branch Chief: Michael T. Markley.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

Date of amendment request: May 19, 2009.

Brief description of amendment request: The proposed amendment would revise Technical Specification (TS) 5.5.9, ''Steam Generator (SG) Program,'' to exclude portions of the tubes within the tubesheet from periodic SG inspections. In addition, this amendment proposes to revise TS 5.6.10, ''Steam Generator Tube Inspection Report'' to remove reference to previous interim alternate repair criteria and provide reporting requirements specific to the permanent alternate repair criteria. The proposed change defines the safety significant portion of the tube that must be inspected and repaired.

Date of publication of individual notice in the Federal Register: June 18, 2009 (74 FR 28962).

Expiration date of individual notice: July 18, 2009 (public comments). August 18, 2009 (hearing requests).

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of application for amendments: August 29, 2008, as supplemented by letters dated December 3, two letters dated December 29, December 30, 2008, February 17, February 18, March 10, May 7, and June 11, 2009.

Brief description of amendments: These amendments revise the Renewed Facility Operating License and Technical Specifications to reflect an increase in the rated thermal power from 2,700 megawatts thermal (MWt) to 2,737 MWt (1.38 percent increase). The increase is based upon increased feedwater flow measurement accuracy achieved by using high-accuracy Caldon CheckPlus™ Leading Edge Flow Meter ultrasonic flow measurement instrumentation.

Date of issuance: July 22, 2009.

Effective date: As of the date of issuance. Unit No. 1 shall be implemented within 180 days following completion of the 2009 refueling outage and Unit No. 2 shall be implemented within 180 days following completion of the 2010 refueling outage.

Amendment Nos.: 291 and 267.

Renewed Facility Operating License Nos. DPR–53 and DPR–69: Amendments revised the License and Technical Specifications.

Date of initial notice in Federal Register: November 4, 2008 (73 FR 65688). The letters dated December 3, two letters dated December 29, December 30, 2008, February 17, February 18, March 10, May 7, and June 11, 2009, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of these amendments is contained in a Safety Evaluation dated July 22, 2009.

No significant hazards consideration comments received: No.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of application for amendment: March 30, 2009.

Brief description of amendment: The changes deleted those portions of Technical Specifications (TSs) superseded by Title 10 of the *Code of Federal Regulations* (10 CFR) part 26, subpart I, consistent with U.S. Nuclear Regulatory Commission-approved TS Task Force (TSTF) change traveler TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.''

Date of issuance: July 28, 2009.

Effective date: As of its date of issuance and shall be implemented by October 1, 2009.

Amendment No.: 213.

Facility Operating License No. NPF–21: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in Federal Register: May 5, 2009 (74 FR 20743).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 28, 2009.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of application for amendment: August 21, 2008.

Brief description of amendment: The amendment modified Technical Specification (TS) 6.5.16, ''Containment Leakage Rate Testing Program,'' to allow a one-time extension to the 10-year frequency for next containment integrated leakage rate test (ILRT) or Type A test at the Arkansas Nuclear One, Unit No. 2. The ILRT is required to be performed every 10 years. The amendment permitted the existing ILRT frequency to be extended from 10 years (120 months) to 135 months.

Date of issuance: July 20, 2009.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: 284.

Renewed Facility Operating License No. NPF–6: Amendment revised the Technical Specifications/license.

Date of initial notice in Federal Register: November 4, 2008 (73 FR 65694).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 20, 2009.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Units 1 and 2 (Braidwood), Will County, Illinois

Docket Nos. STN 50–454 and STN 50–455, Byron Station, Unit Nos. 1 and 2 (Byron), Ogle County, Illinois

Date of application for amendment: July 29, 2008.

Brief description of amendment: The amendments remove time, cycle, or modification-related items from the operating licenses (OLs) and technical specifications (TSs) at both stations. Additionally, the amendments correct typographical errors introduced into the TSs at both stations in previous amendments. The time, cycle, or modification-related items have been implemented or superseded, are no longer applicable, and no longer need to be maintained in their associated OLs or TSs.

Date of issuance: July 22, 2009.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: Braidwood Unit 1–160; Braidwood Unit 2–160; Byron Unit No. 1–165; and Byron Unit No. 2–165.

Facility Operating License Nos. NPF–72, NPF–77, NPF–37, and NPF–66: The amendments revise the TSs and Licenses.

Date of initial notice in Federal Register: September 9, 2008 (73 FR 52417).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 22, 2009.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS), Beaver County, Pennsylvania

Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit No. 1 (DBNPS), Ottawa County, Ohio

Docket No. 50–440, Perry Nuclear Power Plant, Unit No. 1 (PNPP), Lake County, Ohio

Date of application for amendments: March 25, 2009.

Brief description of amendments: The amendments delete paragraph d of TS 5.2.2, ''Unit Staff,'' for BVPS and DBNPS, and paragraph e for PNPP. The application is consistent with NRC-approved Revision 0 to Technical Specification Task Force (TSTF) Improved Standard Technical Specification Change Traveler, TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.'' The availability of this TS improvement was announced in the **Federal Register** (FR) on December 30, 2008 (73 FR 79923) as part of the Consolidated Line Item Improvement Process.

Date of issuance: July 16, 2009.

Effective date: As of the date of issuance, and shall be implemented by September 30, 2009.

Amendment Nos.: 284, 169, 280, 152.

Facility Operating License Nos. DPR–66, NPF–73, NPF–3, and NPF–58: The amendments revised the Technical Specifications/License.

Date of initial notice in Federal Register: May 5, 2009 (74 FR 20747).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 16, 2009.

No significant hazards consideration comments received: No.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: June 3, 2008, as supplemented on November 17, 2008, and by letters dated April 8 and May 22, 2009.

Brief description of amendment: The amendment revises the Crystal River Unit 3 (CR–3) Final Safety Analysis Report Sections 5.4.3, ''Structural Design Criteria'' and 5.4.5.3, ''Missile Analysis,'' to include a statement regarding the design of the east wall of the CR–3 Auxiliary Building. The amendment changes the methodology used to qualify the east wall of the Auxiliary Building. The current methodology uses the methods in American Concrete Institute (ACI)

Standard 318–63, ''Building Code Requirements for Reinforced Concrete,'' June 1963. The revised methodology is based on ACI 349–97, ''Code Requirements for Nuclear Safety Related Concrete Structures,'' as endorsed by NRC's Standard Review Plan (NUREG 0800), Revision 2—March 2007, Section 3.8.4 ''Other Seismic Category 1 Structures.''

Date of issuance: July 24, 2009.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 235.

Facility Operating License No. DPR–72: Amendment revises the Facility Operating License and authorizes revisions to the CR–3 FSAR sections 5.4.3 and 5.4.5.3.

Date of initial notice in Federal Register: June 23, 2009 (74 FR 29732).

The Commission's related evaluation and final no significant hazards consideration determination of the amendment is contained in a Safety Evaluation dated July 24, 2009.

No significant hazards consideration comments received: No.

FPL Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: February 18, 2009.

Description of amendment request: This amendment eliminates Working Hour Restrictions from Technical Specification 6.2.2 to support compliance with Title 10 of the *Code of Federal Regulations* (10 CFR) part 26, subpart I.

Date of issuance: July 21, 2009.

Effective date: As of its date of issuance and shall be implemented by October 1, 2009.

Amendment No.: 121.

Facility Operating License No. NPF–86: The amendment revised the License and Technical Specifications.

Date of initial notice in Federal Register: May 5, 2009 (74 FR 20749).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 21, 2009.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of application for amendments: March 19, 2009, as supplemented on April 17, 2009.

Brief description of amendments: The amendments delete those portions of the Technical Specifications (TS) superseded by Title 10 of the *Code of Federal Regulations* (10 CFR), part 26, ''Fitness for Duty Programs,'' subpart I, ''Managing Fatigue.'' The change is consistent with Nuclear Regulatory Commission (NRC)-approved Technical Specification Task Force (TSTF) Improved Standard TS Change Traveler, TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.'' Revision 0.

Date of issuance: July 24, 2009.

Effective date: As of the date of issuance, to be implemented by October 1, 2009.

Amendment Nos.: Unit 1—310; Unit 2—292.

Facility Operating License Nos. DPR–58 and DPR–74: The amendments revised the TSs and the Licenses.

Date of initial notice in Federal Register: May 5, 2009 (74 FR 20750). An April 17, 2009, supplement was issued to provide the State of Michigan the enclosure and attachments associated with the original March 19, 2009, application, as required pursuant to 10 CFR 50.91(b). Therefore, the April 17, 2009, supplement did not expand the scope of the application as originally noticed, and did not change the staff's proposed no significant hazards consideration published in the **Federal Register** on May 5, 2009.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 24, 2009.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: August 19, 2008.

Brief description of amendment: The amendment revised Technical Specification (TS) requirements for mode change limitations in accordance with U.S. Nuclear Regulatory Commission (NRC)-approved TS Task Force (TSTF) traveler TSTF–359, Revision 9, ''Increase Flexibility in MODE Restraints,'' and revised TS section 1.4, ''Frequency,'' in accordance with NRC-approved traveler TSTF–485, Revision 0, ''Correct Example 1.4–1.''

Date of issuance: July 28, 2009.

Effective date: As of the date of issuance and shall be implemented within 90 days of issuance.

Amendment No.: 233.

Facility Operating License No. DPR–46: Amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in Federal Register: October 21, 2008 (73 FR 62565).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 28, 2009.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket Nos. 50–220 and 50–410, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2 (NMP 1 and 2), Oswego County, New York

Date of application for amendment: February 11, 2009.

Brief description of amendments: The amendments delete those portions of the Technical Specifications (TSs) superseded by Title 10 of the *Code of Federal Regulations* (10 CFR), part 26, subpart I. This change is consistent with Nuclear Regulatory Commission (NRC) approved Technical Specification Task Force (TSTF) Improved Standard Technical Specifications Change Traveler TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.'' These changes were described in a Notice of Availability for Consolidated Line Item Improvement Process TSTF–511 published in the **Federal Register** on December 30, 2008 (73 FR 79923).

Date of issuance: July 27, 2009.

Effective date: As of the date of issuance to be implemented by October 1, 2009.

Amendment Nos.: 203 and 131.

Renewed Facility Operating License Nos. DPR–063 and NPF–069: The amendments revise the License and TSs.

Date of initial notice in Federal Register: April 21, 2009 (73 FR 18255).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 27, 2009.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: October 31, 2008.

Brief description of amendment: The amendment modifies Technical Specification 3.6(3), ''Containment Recirculating Air Cooling and Filtering System,'' by adding two new Surveillance Requirements (SRs) and modifying SRs 3.6(3)b, e and f. In addition, the amendment removed the license conditions related to the replacement and testing of containment air cooling and filtering (CACF) unit high-efficiency particulate air filters and surveillance testing of the CACF unit

relief ports. These license conditions committed to by the licensee in its letter dated April 10, 2008, and were implemented via Technical Specification Amendment No. 255.

Date of issuance: July 22, 2009.

Effective date: As of the date of issuance and shall be implemented within 180 days from the date of issuance.

Amendment No.: 260.

Renewed Facility Operating License No. DPR–40: The amendment revised the Technical Specifications.

Date of initial notice in Federal Register: April 7, 2009 (74 FR 15773).

The Commission's related evaluation of the amendment is contained in a safety evaluation dated July 22, 2009.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: July 31, 2008, as supplemented by letter dated May 8, 2009.

Brief description of amendment: The amendment modified the transformer allowed outage time in Technical Specification (TS) Sections 2.7(2)a., 2.7(2)b., and 2.7(2)c., and deleted the associated 2.7(2) special reporting requirements in TS 5.9.3j.

Date of issuance: July 24, 2009.

Effective date: As of the date of issuance and shall be implemented within 120 days from the date of issuance.

Amendment No.: 261.

Renewed Facility Operating License No. DPR–40: The amendment revised the Technical Specifications.

Date of initial notice in Federal Register: February 10, 2009 (74 FR 6666). The supplemental letter dated May 8, 2009, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a safety evaluation dated July 24, 2009.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: January 30, 2009.

Brief description of amendment: The amendment deleted paragraph e of Technical Specification (TS) 5.2.2, ''Unit Staff,'' consistent with NRC-approved Technical Specification Task Force (TSTF) change traveler TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26.'' All administrative deviations from the model application were addressed in the application. The availability of the TS improvement was published in the **Federal Register** on December 30, 2008 (73 FR 79923), as part of the consolidated line item improvement process.

Date of issuance: July 24, 2009.

Effective date: As of the date of issuance and shall be implemented within 180 days from the date of issuance.

Amendment No.: 262.

Renewed Facility Operating License No. DPR–40: The amendment revised the Technical Specifications.

Date of initial notice in Federal Register: April 7, 2009 (74 FR 15775).

The Commission's related evaluation of the amendment is contained in a safety evaluation dated July 24, 2009.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of application for amendment: July 30, 2008, as supplemented by letter dated February 6, 2009.

Brief description of amendment: The amendment: (1) Relocates Technical Specification (TS) 3/4.7.5, ''Snubbers,'' to the Technical Requirements Manual (TRM); (2) relocates TS 6.10.3.I, which specifies retention requirements for records of snubber service life monitoring, to the TRM; (3) adds new TS Limiting Condition for Operation (LCO) 3.0.8, ''Inoperability of Snubbers;'' and (4) modifies LCO 3.0.1 to reference LCO 3.0.8.

Date of issuance: July 15, 2009.

Effective date: As of the date of issuance, to be implemented within 90 days.

Amendment No.: 179.

Facility Operating License No. NPF–57: The amendment revised the TSs and the License.

Date of initial notice in Federal Register: October 7, 2008 (73 FR 58677). The letter dated February 6, 2009, provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application beyond the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 15, 2009.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket No. 50–390, Watts Bar Nuclear Plant (WBN), Unit 1, Rhea County, Tennessee

Date of application for amendment: April 30, 2009.

Brief description of amendment: The amendment revised WBN Unit 1 Technical Specification (TS) 5.7, ''Procedures, Programs, and Manuals,'' to correct a typographical error in the TS numbering from 5.2.7.20 to 5.7.2.20.

Date of issuance: July 21, 2009.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 78.

Facility Operating License No. NPF–90: Amendment revised TS 5.7.

Date of initial notice in Federal Register: May 19, 2009 (74 FR 23449).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 21, 2009.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 3rd day of August 2009.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–18946 Filed 8–10–09; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of August 10, 17, 24, 31, September 7, 14, 2009.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

Week of August 10, 2009

Tuesday, August 11, 2009

9:30 a.m.

Briefing on Research and Test Reactor Challenges (Public Meeting). (Contact: Duane Hardesty, 301 415–3724.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of August 17, 2009—Tentative

There are no meetings scheduled for the week of August 17, 2009.

Week of August 24, 2009—Tentative

There are no meetings scheduled for the week of August 24, 2009.

Week of August 31, 2009—Tentative

Thursday, September 3, 2009

9:30 a.m.

Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Andrea Jones, 301 415–2309).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of September 7, 2009—Tentative

There are no meetings scheduled for the week of September 7, 2009.

Week of September 14, 2009—Tentative

There are no meetings scheduled for the week of September 14, 2009.

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

Additional Information

Affirmation of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP–09–3 (Ruling on Standing and Contention Admissibility) previously postponed from July 23, 2009, was held on July 31, 2009.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.*, braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: August 6, 2009.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. E9–19294 Filed 8–7–09; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0350]

Withdrawal of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Withdrawal of Regulatory Guide 1.16, ''Reporting of Operating Information—Appendix A Technical Specifications.''

FOR FURTHER INFORMATION CONTACT: Carl S. Schulten, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1192 or e-mail *Carl.Schulten@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide (RG) 1.16, ''Reporting of Operating Information—Appendix A Technical Specifications.'' Revision 4 of the Regulatory Guide was issued for comment in August 1975 and never finalized. The guide provides a description of each of the periodic reports licensees are required to submit to demonstrate compliance with the reporting requirements listed in Appendix A, ''Technical Specifications Related to Health and Safety'' of the license.

Regulatory Guide 1.16 is being withdrawn because it is no longer needed. Technical specification reporting requirements for licensees are contained in Title 10 of the Code of Federal Regulations, Part 50, ''Domestic Licensing of Production and Utilization Facilities'' (10 CFR Part 50) as well as other parts of 10 CFR Chapter I, ''Nuclear Regulatory Commission.'' Guidance on the content and frequency of required reports is contained in Chapter 5, ''Administrative Controls,'' of the standard technical specifications in the following NUREGs:

- NUREG–1430, Volume 1, ''Standard Technical Specifications, Babcock and Wilcox Plants,''
- NUREG–1431, Volume 1, ''Standard Technical Specifications, Westinghouse Plants,''
- NUREG–1432, Volume 1, ''Standard Technical Specifications, Combustion Engineering Plants,''
- NUREG–1433, Volume 1, Standard Technical Specifications, General Electric Plants, BWR/4,'' and
- NUREG–1434, Volume 1, Standard Technical Specifications, General Electric Plants, BWR/6.''

II. Further Information

Withdrawal of RG 1.16 does not, in and of itself, alter any prior or existing licensing commitments based on its use. The guidance provided in this RG is no longer necessary. Regulatory Guides may be withdrawn when their guidance is superseded by Congressional action, the methods or techniques described in the Regulatory Guide no longer describe a preferred approach, or the Regulatory Guide does not provide useful information.

Regulatory guides are available for inspection or downloading through the NRC's public Web site under ''Regulatory Guides'' in the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* Regulatory guides are also available for inspection at the NRC's Public Document Room (PDR), Room O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738. The PDR's mailing address is US NRC PDR, Washington, DC 20555–0001. You can reach the staff by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 4th day of August, 2009.

For the Nuclear Regulatory Commission.

John N. Ridgely,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E9–19211 Filed 8–10–09; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Customer Satisfaction Surveys and Focus Groups

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intention to request extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (''PBGC'') intends to request that the Office of Management and Budget (''OMB'') extend its approval of a collection of information

under the Paperwork Reduction Act. The purpose of the information collection, which will be conducted through focus groups and surveys over a three-year period, is to help PBGC assess the efficiency and effectiveness with which it serves its customers and to design actions to address identified problems. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments should be submitted by October 13, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

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

E-mail: paperwork.comments@pbgc.gov.

Fax: 202–326–4224.

Mail or Hand Delivery: Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026. PBGC will make all comments available on its Web site at *http://www.pbgc.gov.*

Copies of the collections of information may be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel of PBGC at the above address or by visiting that office or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Thomas H. Gabriel, Attorney, Legislative & Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and request connection to 202–326–4024.

SUPPLEMENTARY INFORMATION: PBGC intends to request that OMB extend its approval, for a three-year period, of a generic collection of information consisting of customer satisfaction focus groups and surveys (OMB control number 1212–0053; expires 12/31/2009). The information collection will further the goals of Executive Order 12862, Setting Customer Service Standards, which states the Federal Government must seek to provide ''the highest quality of service delivered to customers by private organizations providing a comparable or analogous service.''

PBGC uses customer satisfaction focus groups and surveys to find out about the needs and expectations of its customers and assess how well it is meeting those needs and expectations. By keeping these avenues of communication open, PBGC can continually improve service to its customers, including plan participants and beneficiaries, plan sponsors and their affiliates, plan administrators, pension practitioners, and others involved in the establishment, operation and termination of plans covered by PBGC's insurance program. Because the areas of concern to PBGC and its customers vary and may quickly change, it is important that PBGC have the ability to evaluate customer concerns quickly by developing new vehicles for gathering information under this generic approval.

Participation in the focus groups and surveys will be voluntary. PBGC will consult with OMB regarding each specific information collection during the approval period. 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.

PBGC estimates that the annual burden for this collection of information will total 710 hours for 2,000 respondents. PBGC further estimates that the cost to respondents per burden hour will average $72, resulting in a total cost of $51,120 ($72 × 710).

PBGC is specifically seeking public comments to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of PBGC's functions, including whether the information will have practical utility;

(2) evaluate the accuracy of the 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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology *e.g.,* permitting electronic submission of responses.

Issued at Washington, DC, this 5th day of August 2009.

John H. Hanley,

Director, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation.

[FR Doc. E9–19173 Filed 8–10–09; 8:45 am]

BILLING CODE 7709–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Regulation S–P; OMB Control No. 3235–0537; SEC File No. 270–480.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in the following rule: Regulation S–P (17 CFR part 248) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

The Commission adopted Regulation S–P (17 CFR part 248) under the authority set forth in section 504 of the Gramm-Leach-Bliley Act (15 U.S.C. 6804), sections 17 and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78q, 78w), sections 31 and 38 of the Investment Company Act of 1940 (15 U.S.C. 80a–30(a), 80a–37), and sections 204 and 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–4, 80b–11). Regulation S–P implements the requirements of Title V of the Gramm-Leach-Bliley Act (''GLBA''), which include the requirement that at the time of establishing a customer relationship with a consumer and not less than annually during the continuation of such relationship, a financial institution shall provide a clear and conspicuous disclosure to such consumer of such financial institution's policies and practices with respect to disclosing nonpublic personal information to affiliates and nonaffiliated third parties (''privacy notice''). Title V of the GLBA also provides that, unless an exception applies, a financial institution may not disclose nonpublic personal information of a consumer to a nonaffiliated third party unless the financial institution clearly and conspicuously discloses to the consumer that such information may be disclosed to such third party; the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and the consumer is given an explanation of how the consumer can exercise that nondisclosure option (''opt out notice''). The privacy notices required by the GLBA are mandatory.

The opt out notices are not mandatory for financial institutions that do not share nonpublic personal information with nonaffiliated third parties except as permitted under an exception to the statute's opt out provisions. Regulation S–P implements the statute's privacy notice requirements with respect to broker-dealers, investment companies, and registered investment advisers (''covered entities''). The Act and Regulation S–P also contain consumer reporting requirements. In order for consumers to opt out, they must respond to opt out notices. At any time during their continued relationship, consumers have the right to change or update their opt out status. Most covered entities do not share nonpublic personal information with nonaffiliated third parties and therefore are not required to provide opt out notices to consumers under Regulation S–P. Therefore, few consumers are required to respond to opt out notices under the rule.

Compliance with Regulation S–P is necessary for covered entities to achieve compliance with the consumer financial privacy notice requirements of Title V of the GLBA. The required consumer notices are not submitted to the Commission. Because the notices do not involve a collection of information by the Commission, Regulation S–P does not involve the collection of confidential information. Regulation S–P does not have a record retention requirement per se, although the notices to consumers it requires are subject to the recordkeeping requirements of Rules 17a–3 and 17a–4 (17 CFR 240.17a–3 and 17a–4).

The Commission estimates that approximately 20,065 covered entities (approximately 5,326 registered broker-dealers, 4,571 investment companies, and, out of a total of 11,266 registered investment advisers, 10,168 registered investment advisers that are not also registered broker-dealers) that must prepare or revise their annual and initial privacy notices will spend an average of approximately 12 hours per year complying with Regulation S–P. Thus, the total compliance burden is estimated to be approximately 240,780 burden-hours per year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to (1) the Desk Officer for the SEC, Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *shagufta_ahmed@omb.eop.gov*; and (ii) Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: August 5, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19121 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60451; August 5, 2009]

Notice Regarding the Requirement To Use eXtensible Business Reporting Language Format To Make Publicly Available the Information Required Pursuant to Rule 17g–2(d) of the Exchange Act

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

SUMMARY: The Commission today is providing notice that an NRSRO subject to the disclosure provisions of paragraph (d) of Rule 17g–2 can satisfy the requirement to make publicly available ratings history information in an XBRL format by using an XBRL format or any other machine-readable format, until such time as the Commission provides further notice.

DATES: The compliance date for Rule 17g–2(d) is August 10, 2009.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Deputy Associate Director, at (202) 551–5521; Randall W. Roy, Assistant Director, at (202) 551–5522; Joseph I. Levinson, Special Counsel, at (202) 551–5598; or Rebekah E. Goshorn, Attorney, at (202), 551–5514; Division of Trading and Markets, Securities and Exchange Commission; 100 F Street, NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

I. Background

The Credit Rating Agency Reform Act of 2006 (''Rating Agency Act'')[1] defined the term ''nationally recognized statistical rating organization'' (''NRSRO'') and provided authority for the Securities and Exchange Commission (''Commission'') to implement registration, recordkeeping, financial reporting, and oversight rules with respect to registered credit rating agencies. The regulations implemented by the Commission pursuant to this mandate include Securities Exchange Act of 1934 (''Exchange Act'') Rule 17g–2,[2] which requires an NRSRO to make and retain certain records relating to its business and to retain certain other business records made in the normal course of business operations.

On February 2, 2009, the Commission adopted amendments to its NRSRO rules imposing additional requirements on NRSROs in order to address concerns about the integrity of their credit rating procedures and methodologies.[3] Among other things, the rule amendments added new paragraphs (a)(8) and (d) to Rule 17g–2. New paragraph (a)(8) of Rule 17g–2 requires an NRSRO to make and retain a record for each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor.[4] New paragraph (d) of Rule 17g–2 requires an NRSRO to make publicly available, on a six-month delayed basis, the ratings histories for a random sample of 10% of the credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated (''issuer-paid credit ratings'') pursuant to paragraph (a)(8) of Rule 17g–2 for each class of credit rating for which the NRSRO is registered and has issued 500 or more issuer-paid credit ratings.[5]

Paragraph (d) of Rule 17g–2 further requires that this information be made public on the NRSRO's corporate Internet Web site in eXtensible Business Reporting Language (''XBRL'') format.[6] The rule provides that in preparing the XBRL disclosure, an NRSRO must use the List of XBRL Tags for NRSROs as specified on the Commission's Web site.[7] The Commission established a

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[1] Public Law 109–291 (2006).

[2] 17 CFR 240.17g–2.

[3] *See Amendments to Rules for Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 59342 (February 2, 2009), 74 FR 6456 (''February 2009 Adopting Release'').

[4] 17 CFR 240.17g–2(a)(8).

[5] 17 CFR 240.17g–2(d).

[6] *Id.*

[7] *Id.* The *February 2009 Adopting Release* specified a compliance date of 180 days after publication in the **Federal Register**.

compliance date of August 10, 2009 for this provision.

The Commission today is providing notice that an NRSRO subject to the disclosure provisions of paragraph (d) of Rule 17g–2 can satisfy the requirement to make publicly available ratings history information in an XBRL format by using an XBRL format or any other machine-readable format, until such time as the Commission provides further notice.

II. Discussion

The Commission adopted Rule 17g–2 and the amendments thereto, in part, under authority to require NRSROs to make and keep for specified periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[8] In adopting new paragraph (d) to Rule 17g–2, the Commission noted that although NRSROs generally make their issuer-paid credit ratings publicly available for free, it can be difficult to compile the actions and compare them across NRSROs.[9] The Commission therefore adopted the new disclosure requirements of paragraph (d) with the expectation that making this information more accessible will advance the Commission's goal of fostering accountability and comparability among NRSROs with respect to their issuer-paid credit ratings.[10] Requiring NRSROs to publicly disclose rating action histories for a limited percentage of their outstanding issuer-paid credit ratings will allow market participants, academics and others to use the information to perform analysis comparing how the NRSROs subject to the disclosure rule perform in the classes of credit ratings for which they are registered.[11]

As noted above, Rule 17g–2(d) provides that the ratings histories required under the rule must be made public on the NRSRO's corporate Internet Web site using an XBRL format.[12] Further, the rule requires an NRSRO to use the List of XBRL Tags for NRSROs published on the Commission's Web page. The List of XBRL Tags currently is not available. Therefore, the Commission is providing notice to NRSROs that they can satisfy the requirement in Rule 17g–2(d) to make publicly available ratings history information in an XBRL format by using an XBRL format or any other machine readable format, until such time as the Commission provides further notice. The Commission has every intention of providing notice as soon as practicable, once the List of XBRL Tags for NRSROs is available, that an XBRL format is the sole means by which an NRSRO may satisfy this requirement. Examples of other types of machine-readable formats include pipe delimited text data (''PDTD'') and eXtensible Markup Language (''XML''). Data that is provided in a machine-readable format must be easily downloadable into commercially available spreadsheets or database programs.

The Commission also notes that the requirement in Exhibit 1 to Form NRSRO which states that ''If the Applicant/NRSRO is required to make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format a sample of ratings action information pursuant to the requirements of 17 CFR 240.17g–2(d), provide in this Exhibit the Web site address where this information is, or will be, made publicly available'' can be satisfied by providing the Web site address where the information is made publicly available in an XBRL format or any other machine readable format, until such time as the Commission provides further notice.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–19125 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[8] *See* Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

[9] *See February 2009 Adopting Release*, 74 FR at 6461.

[10] *Id.* at 6460.

[11] *Id.* at 6461.

[12] 17 CFR 240.17g–2(d).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60426; File No. SR–NYSE–2009–74]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 103B to Modify the Composition of the Exchange Selection Panel; and Prohibit Any Ex Parte Communications During and Regarding the Selection Process Between the DMM Units and the Individuals Serving on the Exchange Selection Panel

August 4, 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 July 27, 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 and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule 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 Rule 103B (''Security Allocation and Reallocation'') to: (1) Modify the composition of the Exchange Selection Panel; and 2) prohibit any ex parte communications during and regarding the selection process between the DMM units and the individuals serving on the Exchange Selection Panel. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*.[4]

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

The New York Stock Exchange LLC (''NYSE'' or ''Exchange'') proposes to amend NYSE Rule 103B (''Security Allocation and Reallocation'') to: (1) Modify the composition of the Exchange Selection Panel; and (2) prohibit any *ex parte* communications during and regarding the selection process between

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Commission notes that the Exchange inadvertently marked certain portions of the rule text incorrectly. Specifically, in paragraph (III)(B)(1) of Rule 103B the Exchange failed to indicate the deletion of a comma after ''his or her designee''and failed to mark ''; (b)'' as new text. In addition, the Exchange marked as new text one letter in a sentence being deleted from paragraph (III)(B)(1) of Rule 103B.

the DMM units and the individuals serving on the Exchange Selection Panel.

The Exchange notes that parallel changes are proposed to be made to the rules of NYSE Amex LLC (formerly the American Stock Exchange).[5]

Background

Currently, pursuant to NYSE Rule 103B, an issuer may select the DMM unit that will be assigned its security or delegate the selection of the DMM unit to the Exchange. If the issuer authorizes the Exchange to select the DMM unit to trade its security, an Exchange Selection Panel (the ''ESP'' or the ''Panel'') is convened to select the DMM unit based on a review of all information that would be available to the issuer. The Panel is comprised of three members of the Exchange's Senior Management, as designated by the Chief Executive Officer (''CEO'') of the Exchange or his or her designee, one non-DMM Executive Floor Governor (''EFG'') and two non-DMM Floor Governors (''FGs''). The non-DMM EFG and non-DMM FGs are designated on a rotating basis. The Panel's decision is made by majority vote. In the event of a tie, the CEO of the Exchange or his/her designee makes the final decision. The Exchange then informs the issuer of the DMM unit selected by the Panel.

Proposed Amendments

The Exchange proposes to amend NYSE Rule 103B to modify the composition of the Panel in order to ensure consistent Floor participation in the selection process and minimize delays due to scheduling conflicts.

The current composition of the Panel has proven difficult when scheduling the required participants within five days of the issuer's request. The Exchange therefore seeks to amend NYSE Rule 103B to modify the representation on the Panel to include: (1) At least one member of the Exchange's Senior Management; (2) any combination of two Exchange Senior Management or Exchange Floor Operations Staff, to be designated by the Executive Vice-President of Exchange Floor Operations or his/her designee; and (3) any combination of three non-DMM EFGs or non-DMM FGs for a total of six members.

Finally, to reinforce the integrity and objectivity of the ESP selection process, the Exchange proposes to amend NYSE Rule 103B to explicitly prohibit any communications regarding the selection process between the Panelists and the DMM units. The Exchange proposes to have communication regarding the selection process cease from the time the issuer delegates the selection responsibility to the Exchange until the Panel selects the DMM unit to trade the issuer's security.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5),[6] which requires that an exchange have rules that are designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendments are consistent with these objectives. The amendments sought herein seek to streamline and facilitate the process of assigning securities to DMM units by allowing for more flexibility in composing the Panel which ultimately facilitates and expedites the allocation and ultimately the trading of securities on the Exchange. Furthermore, the proposed amendment to prohibit communications between the Panel and the DMM units preserves the integrity and impartiality of the allocation process and therefore protects the public interest.

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)[7] of the Act and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[10] 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, as specified in Rule 19b–4(f)(6)(iii),[11] which would make the rule change operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the Exchange to immediately streamline the process of allocating securities to DMM units. In addition, by prohibiting communications regarding the selection process between members of the Panel and DMM units, the Exchange will be able to immediately reinforce impartiality and fairness during the selection process.[12] Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

At any time within 60 days of the filing of such 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:

[5] *See* SR–NYSEAmex–2009–49.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 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 this requirement.

[9] *Id.*

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] *Id.*

[12] 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).

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–2009–74 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–2009–74. 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 will also be available for inspection and copying at the principal office of the self-regulatory organization. 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–2009–74 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19119 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60442; File No. SR–ISE–2009–57]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Amending the Direct Edge ECN Fee Schedule

August 5, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 31, 2009, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been 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 amend Direct Edge ECN's (''DECN'') fee schedule for ISE Members[3] to (i) create a new tier, called the Full Sweep Tier, to provide a rebate for ISE Members that use ROUT orders that meet a volume theshold for amount of liquidity added on EDGX and to (ii) adopt new fees and rebates.

All of the changes described herein are applicable to ISE Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On July 1, 2009,[4] the Exchange adopted a new Ultra Tier Rebate, as defined below, whereby ISE Members are provided a $0.0032 rebate per share for securities priced at or above $1.00 when ISE Members add liquidity on EDGX if the attributed MPID satisfies one of the following criteria on a daily basis, measured monthly: (i) Adding 100,000,000 shares or more on EDGX; or (ii) adding 50,000,000 shares or more of liquidity to EDGX, so long as added liquidity on EDGX is at least 20,000,000 shares greater than the previous calendar month. The rebate described above is referred to as an ''Ultra Tier Rebate'' on the DECN fee schedule.

The Exchange is now proposing to establish an additional tier called the Full Sweep Tier, whereby ISE Members are provided a $0.0035 rebate per share for securities priced at or above $1.00 when ISE Members add liquidity on EDGX if the attributed MPID use of the ROUT order type adds 50,000,000 shares or more of liquidity to EDGX on a daily basis, measured monthly. A ROUT order type that is sent to EDGX is an order type that does a full sweep of the EDGX book, before being exposed to Enhanced Liquidity Providers (''ELPs'').[5] This order type will then route to away market centers if there is additional unexecuted liquidity. This order type is primarily used for agency orders, especially retail order flow. The rebate is designed to encourage the use of this particular type of liquidity.

The Exchange also proposes to adopt additional fees and rebates. First, the Exchange proposes to adopt a fee of $0.0024 per share for securities priced at or above $1.00 which add liquidity to LavaFlow ECN (''LavaFlow'') and are routed from either EDGX or EDGA. Such a strategy is deemed a ROLF routing strategy, which is a destination specific routing strategy that will first sweep the EDGA or EDGX order book before being delivered to LavaFlow. A conforming amendment will be made to the fee schedule to yield an ''M'' flag to account

[4] *See* Securities and Exchange Act Release No. 60232 (July 2, 2009), 74 FR 33309 (July 10, 2009) (SR–ISE–2009–43).

[5] DECN currently operates a program known as the ''Enhanced Liquidity Provider'' (''ELP'') program on its two trading platforms, EDGX and EDGA, pursuant to which parties entering orders into DECN can elect to display their marketable orders to designated liquidity providers before the order is routed or cancelled.

for this fee. Conversely, for liquidity that is routed through either EDGA or EDGX and removes liquidity from LavaFlow, ISE members will be charged $0.0029 per share for securities priced at or above $1.00. Such situation will yield a flag of ''U.'' However, if an ISE member posts an average of 50,000 shares or more using a ROLF routing strategy, yielding flag M, then such ISE member's fee, when removing liquidity from LavaFlow, will decrease to $0.0022 per share and yield flag U. Finally, the Exchange proposes to rebate $0.0025 per share for securities priced at or above $1.00 when ISE members add liquidity on EDGX via an EDGA-originated ROUC routing strategy.[6] Such situation will yield liquidity Flag ''P.''

The fee changes discussed in this filing will become operative on August 1, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[7] in general, and furthers the objectives of Section 6(b)(4),[8] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, adopting the Full Sweep Tier Rebate provides pricing incentives to market participants who route orders to DECN, allowing DECN to remain competitive. ISE notes that DECN operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to DECN. ISE believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to DECN rather than competing venues.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act[9] and Rule 19b–4(f)(2)[10] thereunder. At any time within 60 days of the filing of such 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–ISE–2009–57 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–ISE–2009–57. 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 ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2009–57 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19186 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[6] ROUC designated orders are multi-destination orders that sweep the internal order book and ELP destinations before any unfilled quantity is routed to low cost destinations.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60443; File No. SR–ISE–2009–58]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Amounts That Direct Edge ECN, in Its Capacity as an Introducing Broker for Non-ISE Members, Passes Through to Such Non-ISE Members

August 5, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 31, 2009, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by ISE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the amounts that Direct Edge ECN (''DECN''), in its capacity as an introducing broker for non-ISE Members, passes through to such non-ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On July 31, 2009, the ISE filed for immediate effectiveness a proposed rule change to: (i) Amend DECN's fee schedule for ISE Members [3] to create a new tier, called the Full Sweep Tier, which provides a rebate for ISE Members that use ROUT orders that meet a volume threshold for amount of liquidity added on EDGX; [4] and (ii) adopt new fees and rebates.[5] The fee changes made pursuant to SR–ISE–2009–57 became operative on August 1, 2009.

In its capacity as a member of ISE, DECN currently serves as an introducing broker for the non-ISE Member subscribers of DECN to access EDGX and EDGA. DECN, as an ISE Member and introducing broker, receives rebates and is assessed charges from DECN for transactions it executes on EDGX or EDGA in its capacity as introducing broker for non-ISE Members. Since the amounts of such rebates and charges were changed pursuant to SR–ISE–2009–57, DECN wishes to make corresponding changes to the amounts it passes through to non-ISE Member subscribers of DECN for which it acts as introducing broker. As a result, the per share amounts that non-ISE Member subscribers receive and are charged will be the same as the amounts that ISE Members receive and are charged.

ISE is seeking accelerated approval of this proposed rule change, as well as a retroactive effective date of August 1, 2009. ISE represents that this proposal will ensure that both ISE Members and non-ISE Members (by virtue of the pass-through described above) will in effect receive and be charged equivalent amounts and that the imposition of such amounts will begin on the same August 1, 2009 start date.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[6] in general, and furthers the objectives of Section 6(b)(4),[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, this proposal will ensure that dues, fees and other charges imposed on ISE Members are equitably allocated to both ISE Members and non-ISE Members (by virtue of the pass-through described above).

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. 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 No. SR–ISE–2009–58 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–ISE–2009–58. 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 Commissions 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

[3] References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

[4] In SR–ISE–2009–57, the Exchange created a new tier, effective August 1, 2009, called the Full Sweep Tier in which ISE Members are provided a $0.0035 rebate per share for securities priced at or above $1.00 when ISE Members add liquidity on EDGX if the attributed MPID use of the ROUT order type adds 50,000,000 shares or more of liquidity to EDGX on a daily basis, measured monthly. A ROUT order type that is sent to EDGX is an order type that does a full sweep of the EDGX book, before being exposed to Enhanced Liquidity Providers (''ELPs''). This order type will then route to away market centers if there is additional unexecuted liquidity. This order type is primarily used for agency orders, especially retail order flow. The rebate is designed to encourage the use of this particular type of liquidity.

[5] In SR–ISE–2009–57, the Exchange also adopted additional fees and rebates. First, the Exchange adopted a fee of $0.0024 per share for securities priced at or above $1.00 which add liquidity to LavaFlow ECN (''LavaFlow'') and are routed from either EDGX or EDGA. Such a strategy is deemed a ROLF routing strategy, which is a destination specific routing strategy that will first sweep the EDGA or EDGX order book before being delivered to LavaFlow. A conforming amendment was made to the fee schedule to yield an ''M'' flag to account for this fee. Conversely, for liquidity that is routed through either EDGA or EDGX and removes liquidity from LavaFlow, the Exchange adopted a fee for ISE members of $0.0029 per share for securities priced at or above $1.00. Such situation will yield a flag of ''U.'' However, if an ISE member posts an average of 50,000 shares or more using a ROLF routing strategy, yielding flag M, then such ISE member's fee, when removing liquidity from LavaFlow, will decrease to $0.0022 per share and yield flag U. Finally, the Exchange established a rebate of $0.0025 per share for securities priced at or above $1.00 when ISE members add liquidity on EDGX via an EDGA-originated ROUC routing strategy. ROUC designated orders are multi-destination orders that sweep the internal order book and ELP destinations before any unfilled quantity is routed to low cost destinations. Such situation will yield liquidity Flag ''P.''

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

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 ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2009–58 and should be submitted on or before September 1, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities.

As described more fully above, ISE recently amended DECN's fee schedule for ISE Members to, among other things, adopt a new Full Sweep Tier Rebate and adopt new fees and rebates in connection with the use of the ROLF and ROUC routing strategies.[10] The fee changes made pursuant to the Member Fee Filing became operative on August 1, 2009. DECN receives rebates and is charged fees for transactions it executes on EGDX or EDGA in its capacity as an introducing broker for its non-ISE member subscribers.

The current proposal, which will apply retroactively to August 1, 2009, will allow DECN to pass through the revised rebates and fees to the non-ISE member subscribers for which it acts an introducing broker. The Commission finds that the proposal is consistent with the Act because it will provide rebates and charge fees to non-ISE member subscribers that are equivalent to those established for ISE member subscribers in the Member Fee Filing.[11]

ISE has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice of filing thereof in the **Federal Register.** As discussed above, the proposal will allow DECN to pass through to non-ISE member subscribers the revised rebate and fees established for ISE member subscribers in the Member Fee Filing, resulting in equivalent rebates and fees for ISE member and non-member subscribers. In addition, because the proposal will apply the revised rebates and fees retroactively to August 1, 2009, the revised rebates and fees will have the same effective date, thereby promoting consistency in the DECN's fee schedule. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register.**

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–ISE–2009–58) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19185 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[8] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b)(4).

[10] *See* File No. SR–ISE–2009–57 (the ''Member Fee Filing'').

[11] *Id.*

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60436; File No. SR–NYSE–2009–77]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Modify Certain Equity Transaction Fees and Rebates

August 5, 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 July 30, 2009, New York Stock Exchange LLC (the ''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule changes as described in Items I, II and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make a number of changes to its schedule of equity transaction fees and rebates, with effect from August 1, 2009. The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 these statements may be examined at the places specified in Item IV below. The NYSE 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 make a number of changes to its schedule of equity transaction fees, with effect from August 1, 2009.

The following are the proposed changes:

- The Exchange is introducing a new pricing tier of $0.0017 per share when taking liquidity from the NYSE for member organizations which have an average daily trading volume (''ADV'') on the NYSE in the applicable month of at least 130 million shares, including (i) providing liquidity of an ADV of at least 30 million shares and (ii) an ADV of at least 15 million shares total in market at-the-close (''MOC'') and limit at-the-

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b–4.

close (''LOC'') orders. Member organizations meeting these trading volume criteria will also qualify for a new pricing tier for MOC and LOC orders of $0.0006 per share. For transactions in stocks with a trading price below $1.00, member organizations that qualify for the new pricing tier will be charged (i) the lesser of 0.3% of the total dollar value of the transaction and $0.0017 per share when taking liquidity from the Exchange and (ii) the lesser of 0.3% of the total dollar value of the transaction or $0.0006 per share for MOC and LOC orders. The Exchange is setting the volume requirements for these pricing tiers at the specified levels for August in expectation of the typical cyclical reduction of trading activity in that month and intends to increase the volume requirements in September.

- The transaction fee per share for market at-the-close and limit at-the-close orders will increase from $.0005 to $0.0007 per share. The $120 trading fee cap per transaction for MOC and LOC orders will be eliminated.
- Executions at the open, which are currently free of charge, will be subject to a transaction fee of $0.0005 per share, subject to a monthly cap of $10,000 per member organization. For transactions in stocks with a trading price below $1.00, member will be charged the lesser of 0.3% of the total dollar value of the transaction and $0.0005 per share for executions at the open, subject to the $10,000 monthly cap. Executions at the open will continue to be free of charge for DMMs.
- The transaction fee per share for executions of odd-lots and the odd-lot portions of partial round lots will increase from $0.0005 per share to $0.0018 per share.
- The rebate per share paid to Designated Market Makers for executions of odd-lots and the odd-lot portions of partial round lots will be increased from $0.0004 per share to $0.0011 per share.
- The per share charge for transactions in stocks with a price of less than $1.00, which is the lesser of 0.3% of the dollar value of the transaction or $0.0018 per share, is being moved to the end of the applicable section of the Price List, as it is a more logical placement for it. The fee itself is not changing.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 [4] of the Act in general and furthers the objectives of Section 6(b)(4) [5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of dues, fees and other charges as all member organizations will be subject to the same fee structure.

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 purpose of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [6] of the Act and Rule 19b–4(f)(2) [7] thereunder.

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–2009–77 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–2009–77. 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 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–2009–77 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19184 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[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. 34–60445; File No. SR–CBOE–2009–055]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Temporary Membership Status and Interim Trading Permit Access Fees

August 5, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on

[1] 15 U.S.C. 78s(b)(1).

July 31, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status (''Temporary Members'') pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 (''Rule 3.19.02'') and (ii) the monthly access fee for Interim Trading Permit (''ITP'') holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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 CBOE 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 current access fee for Temporary Members under Rule 3.19.02 [2] and the current access fee for ITP holders under Rule 3.27 [3] are both $11,552 per month. Both access fees are currently set at the indicative lease rate (as defined below) for July 2009. The Exchange proposes to adjust both access fees effective at the beginning of August 2009 to be equal to the indicative lease rate for August 2009 (which is $11,310). Specifically, the Exchange proposes to revise both the Temporary Member access fee and the ITP access fee to be $11,310 per month commencing on August 1, 2009.

The indicative lease rate is defined under Rule 3.27(b) as the highest clearing firm floating monthly rate [4] of the CBOE Clearing Members that assist in facilitating at least 10% of the CBOE transferable membership leases.[5] The Exchange determined the indicative lease rate for August 2009 by polling each of these Clearing Members and obtaining the clearing firm floating monthly rate designated by each of these Clearing Members for that month.

The Exchange used the same process to set the proposed Temporary Member and ITP access fees that it used to set the current Temporary Member and ITP access fees. The only difference is that the Exchange used clearing firm floating monthly rate information for the month of August 2009 to set the proposed access fees (instead of clearing firm floating monthly rate information for the month of July 2009 as was used to set the current access fees) in order to take into account changes in clearing firm floating monthly rates for the month of August 2009.

The Exchange believes that the process used to set the proposed Temporary Member access fee and the proposed Temporary Member access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–12 with respect to the original Temporary Member access fee.[6] Similarly, the Exchange believes that the process used to set the proposed ITP access fee and the proposed ITP access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–77 with respect to the original ITP access fee.[7]

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act [8] to modify the applicable access fee or the applicable status (*i.e.,* the Temporary Membership status or the ITP status) is terminated. Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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 rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and subparagraph (f)(2) of Rule 19b–4[12] thereunder. At any time within 60 days

[2] *See* Securities Exchange Act Release No. 56458 (September 18, 2007), 72 FR 54309 (September 24, 2007) (SR–CBOE–2007–107) for a description of the Temporary Membership status under Rule 3.19.02.

[3] *See* Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008) (SR–CBOE–2008–40) for a description of the Interim Trading Permits under Rule 3.27.

[4] Rule 3.27(b) defines the clearing firm floating monthly rate as the floating monthly rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

[5] The concepts of an indicative lease rate and of a clearing firm floating month rate were previously utilized in the CBOE rule filings that set and adjusted the Temporary Member access fee. Both concepts are also codified in Rule 3.27(b) in relation to ITPs.

[6] *See* Securities Exchange Act Release No. 57293 (February 8, 2008), 73 FR 8729 (February 14, 2008) (SR–CBOE–2008–12), which established the original Temporary Member access fee, for detail regarding the rationale in support of the original Temporary Member access fee and the process used to set that fee, which is also applicable to this proposed change to the Temporary Member access fee as well.

[7] *See* Securities Exchange Act Release No. 58200 (July 21, 2008), 73 FR 43805 (July 28, 2008) (SR–CBOE–2008–77), which established the original ITP access fee, for detail regarding the rationale in support of the original ITP access fee and the process used to set that fee, which is also applicable to this proposed change to the ITP access fee as well.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

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–CBOE–2009–055 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–CBOE–2009–055. 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 No. SR–CBOE–2009–055 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19149 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60438; File No. SR–NYSEAmex–2009–53]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC To Change the Transaction Fee for Market At-the-Close and Limit At-the-Close Orders

August 5, 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 July 30, 2009, NYSE Amex LLC (''NYSE Amex'' 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 change the transaction fee for market at-the-close and limit at-the-close orders. 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Amex currently charges a transaction fee of $0.0005 per share for execution of market at-the-close and limit at-the-close orders. Effective August 1, 2009, this fee will change to a fee of $0.0007 per share.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

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 NYSE Amex.

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.

[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. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

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–NYSEAmex–2009–53 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–NYSEAmex–2009–53. 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 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–NYSEAmex–2009–53 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19148 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60437; File No. SR–FINRA–2009–052]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 2264 (Margin Disclosure Statement) in the Consolidated FINRA Rulebook

August 5, 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 July 29, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items substantially have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt NASD Rule 2341 (Margin Disclosure Statement) with minor changes as FINRA Rule 2264 in the consolidated FINRA rulebook. The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''),[3] FINRA is proposing to adopt NASD Rule 2341 (Margin Disclosure Statement) with minor changes as FINRA Rule 2264 in the Consolidated FINRA Rulebook.

NASD Rule 2341 requires members that open margin accounts for or on behalf of non-institutional customers[4] to deliver to such customers, prior to or at the time of opening the account, a specified margin disclosure statement to highlight the risks involved in trading securities in a margin account. Members must disclose that the securities purchased on margin are the firm's collateral for the loan and that, if the securities in the margin account decline in value, the firm can take action, such as issuing a margin call and/or selling securities or other assets in any of the customer's other accounts, to maintain the required equity in the account.

The disclosure statement includes six specific points of information that must be disclosed to non-institutional customers before or at the time a margin account is opened for or on behalf of such customer:

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] For purposes of the rule, a non-institutional customer means a customer that does not qualify as an ''institutional account'' under NASD Rule 3110(c)(4). NASD rule 3110(c)(4) provides, ''the term 'institutional account' shall mean the account of: (A) A bank, savings and loan association, insurance company, or registered investment company; (B) an investment adviser registered either with the Securities and Exchange Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (C) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.'' FINRA is proposing to adopt NASD Rule 3110(c)(4) as FINRA Rule 4512(c). *See Regulatory Notice* 08–25 (May 2008).

• *You can lose more funds than you deposit in the margin account.* A decline in the value of securities that are purchased on margin may require you to provide additional funds to the firm that has made the loan to avoid the forced sale of those securities or other securities or assets in your account(s).

• *The firm can force the sale of securities or other assets in your account(s).* If the equity in your account falls below the maintenance margin requirements, or the firm's higher ''house'' requirements, the firm can sell the securities or other assets in any of your accounts held at the firm to cover the margin deficiency. You also will be responsible for any short fall in the account after such a sale.

• *The firm can sell your securities or other assets without contacting you.* Some investors mistakenly believe that a firm must contact them for a margin call to be valid, and that the firm cannot liquidate securities or other assets in their accounts to meet the call unless the firm has contacted them first. This is not the case. Most firms will attempt to notify their customers of margin calls, but they are not required to do so. However, even if a firm has contacted a customer and provided a specific date by which the customer can meet a margin call, the firm can still take necessary steps to protect its financial interests, including immediately selling the securities without notice to the customer.

• *You are not entitled to choose which securities or other assets in your account(s) are liquidated or sold to meet a margin call.* Because the securities are collateral for the margin loan, the firm has the right to decide which security to sell in order to protect its interests.

• *The firm can increase its ''house'' maintenance margin requirements at any time and is not required to provide you advance written notice.* These changes in firm policy often take effect immediately and may result in the issuance of a maintenance margin call. Your failure to satisfy the call may cause the member to liquidate or sell securities in your account(s).

• *You are not entitled to an extension of time on a margin call.* While an extension of time to meet margin requirements may be available to customers under certain conditions, a customer does not have a right to the extension.

Members also must provide the margin disclosure statement (or an abbreviated version as provided by the rule) to non-institutional margin account customers not less than once a calendar year. The rule provides members with the flexibility to use an alternative disclosure statement to the language specified in the rule provided that the alternative disclosures are substantially similar to the disclosures specified in the rule. Members must deliver the initial and annual disclosure statement, in writing or electronically, to customers covered by the rule on an individual basis.

In addition, the rule requires members that permit non-institutional customers to open accounts online, or engage in transactions in securities online, to post the margin disclosure statement on their Web sites in a clear and conspicuous manner. This provision was added to NASD Rule 2341 in 2002 based on a recommendation by the General Accountability Office (GAO) as a means to allow a broader array of persons to review the disclosures.

NASD Rule 2341 was approved by the SEC on April 26, 2001, and was the product of notice and comment rulemaking. FINRA proposes to adopt the requirements set forth in NASD Rule 2341 as FINRA Rule 2264 in the Consolidated FINRA Rulebook with minor changes. The minor changes, consistent with prior interpretive guidance, clarify that the initial margin disclosure statement may be furnished to customers in a separate document (or contained by itself on a separate page as part of another document), and that the annual disclosure statement may be provided within other documentation, such as the account statement, and does not have to be on a separate page.[5] In addition, FINRA is proposing a minor change to clarify and update the rule text provisions stating that disclosure statements may be provided to individuals either ''in writing or electronically.'' Because electronic documents may be considered a form of ''writing,'' FINRA is proposing to amend the text to state that the documents may be provided ''in paper or electronic form.''

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the required margin disclosures provide investors with important information with which they can better understand the operation of margin accounts and the risks associated with margin trading.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–052 on the subject line.

[5] In 2001, FINRA issued interpretive guidance that, while the rule requires the initial disclosure statement to be provided in a separate document, the disclosure statement can be provided with or as part of another document provided that it is contained by itself on a separate page. The interpretation also clarified that the annual disclosure statement may be provided within other documentation, such as the account statement, and does not have to be on a separate page. *Regulatory and Compliance Alert* (Summer 2001).

[6] 15 U.S.C. 78*o*–3(b)(6).

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–FINRA–2009–052. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2009–052 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19147 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60444; File No. SR–BX–2009–044]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fee Schedule of the Boston Options Exchange Facility To Implement The Non-Penny Pilot Class Pricing Structure

August 5, 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 July 30, 2009, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) 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 from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX''). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/*.

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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add the Non-Penny Pilot Class Pricing Structure as Section 8 of the BOX Fee Schedule. The Non-Penny Pilot Class Pricing Structure will apply to all classes listed for trading on BOX that are not included in the Penny Pilot Program, as referenced in Chapter V, Section 33 of the BOX Rules (''Non-Penny Pilot Classes'').[5] The Exchange requests that the effective date of the proposed rule change be August 3, 2009.

In proposed Section 8, for Non-Penny Pilot Classes, the Exchange will charge a fee of $0.30 for transactions that add liquidity to the BOX Book and provide a credit of $0.30 for transactions that remove liquidity from the BOX Book. These fees and credits will apply equally to all account types, whether Public Customer, Firm or Market Maker and will be in addition to any applicable 'standard' trading fees and/or volume discounts, as described in Sections 1 through 4 of the BOX Fee Schedule.[6]

For example, a Public Customer order is entered into the BOX Trading Host and executes against a Broker Dealer's order resting on the BOX Book. The Public Customer is the remover of liquidity and the Broker Dealer is the adder of liquidity. The Public Customer will receive a $0.30 credit and the Broker Dealer will be charged a $0.30 fee according to the Non-Penny Pilot Class pricing structure. The Public Customer will receive a $0.30 credit and the broker dealer will be charged $0.50 (the $0.30 Non-Penny Pilot Class Pricing Structure removal fee in addition to the standard $0.20 transaction fee).

The Exchange believes that the proposed fees are competitive, fair and reasonable, and non-discriminatory in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A recent proposal submitted by the Exchange for immediately effectiveness removed the following three (3) exchange-traded fund share classes from the Liquidity Make or Take pricing structure: (1) Standard & Poor's Depositary Receipts® (SPY); (2) Powershares® QQQ Trust Series 1 (QQQQ); and (3) iShares Russell 2000® Index Fund (IWM). *See* Securities Exchange Act Release No. 60221 (July 1, 2009), 74 FR 32996 (July 9, 2009) (SR–BX–2009–033). These three classes will remain subject only to 'standard' fees.

[6] Corresponding changes to Sections 1, 2, 3, and 4 of the Fee Schedule are being proposed to reflect the addition of the Non-Penny Pilot Class Pricing Structure. The Volume Discount will continue to be applicable for classes not included in The Liquidity Make or Take Pricing Structure of Section 7 of the Fee Schedule.

that they apply equally to all BOX Participants and customers. This proposal is in response to various 'Payment for Order Flow' programs currently in operation on other options exchanges. The Exchange will monitor the trading of options on these Non-Penny Pilot Classes to ensure that the proposal is operating in a fashion that promotes the interests of investors.

The Exchange also proposes to make a non-substantive change to Section 3 of the Fee Schedule to reflect that the differentiation between Market Maker volume in assigned and unassigned classes is no longer pertinent for billing purposes.[7]

2. Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[8] in general, and Section 6(b)(4) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. In particular, the proposed change will allow the fees charged on BOX to remain competitive with other exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[10] and Rule 19b–4(f)(2) thereunder,[11] because it establishes or changes a due, fee, or other charge applicable only to a member.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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–BX–2009–044 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–BX–2009–044. 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–BX–2009–044 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19146 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[7] *See* Securities Exchange Act Release No. 59865 (May 5, 2009), 74 FR 22198 (May 12, 2009) (SR–BX–2009–022).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60429; File No. SR–NYSE–2009–71]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 1000 To Allow Exchange Systems To Access CCS Interest To Partially Fill an Incoming Limit Order

August 4, 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 July 20, 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 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 amend NYSE Rule 1000 to allow Exchange systems to access CCS interest to partially fill an incoming limit order. 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,

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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

New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') proposes to amend NYSE Rule 1000 to make available additional liquidity to partially fill an incoming limit order.

The Exchange notes that parallel changes are proposed to be made to the rules of NYSE Amex LLC (formerly the American Stock Exchange).[4]

a. Background

The NYSE implemented sweeping changes to its market rules and execution technology designed to improve execution quality on the Exchange. Among the elements of the enhanced Exchange market model, the NYSE eliminated the function of specialists on the Exchange creating a new category of market participant, the Designated Market Maker or DMM. The DMM, like specialists, have affirmative obligations to make an orderly market, including continuous quoting requirements and obligations to re-enter the market when reaching across to execute against trading interest. The NYSE also recognized that in view of the NYSE's electronic execution functionality, the DMM, unlike the specialist, would no longer be deemed the agent for every incoming order. The NYSE also responded to customer demand to create additional undisplayed reserve interest.

In another enhancement to the Exchange's market model, designed to encourage DMMs to add liquidity, the Exchange implemented a system change that allowed DMMs to create a schedule of additional non-displayed liquidity at various price points where the DMM is willing to interact with interest and provide price improvement to orders in the Exchange's system. This schedule is known as the DMM Capital Commitment Schedule (''CCS'').[5] CCS provides the Display Book®[6] with the amount of shares that the DMM is willing to trade at price points outside, at and inside the Exchange BBO. CCS interest is separate and distinct from other DMM interest in that it serves as the interest of last resort.

When an order is entered for an amount of shares that exceeds the liquidity available at the Exchange BBO, Exchange systems review all the liquidity available on the Display Book including CCS interest to determine the final price point at which the order can be fully executed (the ''completion price''). Exchange systems determine the completion price by calculating the unfilled volume of the incoming order (*i.e.*, the volume of the incoming order that exceeds the volume available to execute against it that is then present in the Exchange bid or offer) and reviewing the additional displayed and non-displayed interest available in the Display Book, which may be at more than one price point, including the CCS interest submitted by the DMM unit that is available at the completion price if the CCS interest were to participate at the completion price. Exchange systems also review any protected bids or offers on markets other than the Exchange (''away interest'') and determines the price at which the remaining volume of the contra side order can be executed in full.

Exchange systems then review the amount of liquidity offered by CCS to determine if the number of shares provided via the DMM's CCS at the completion price is less than the number of CCS shares provided at the next different price that has interest that is one minimum price variation (''MPV'') (as that term is defined in Exchange Rule 62[7]) or more higher (in the case of an order to sell) or at the next different price that has interest that is one MPV or more lower (in the case of an order to buy) (hereinafter collectively referred to as ''better price'').

Price of order or interest	Minimum price variation
Less Than $1.00	$.0001
$1.00 to 99,999.99	.01
$100,000 or greater	.10

If the volume of CCS interest that would be accessed is the same at the completion price and the better price, Exchange systems access CCS interest at the completion price with CCS interest yielding to any other interest in Exchange systems at the completion price.

If the number of shares that would be allocated to the CCS interest at the better price is more than the number of shares that would be allocated to the DMM's CCS interest at the completion price, then Exchange systems will access the CCS liquidity available at the better price with CCS interest yielding to any other interest in Exchange systems (both displayed and undisplayed reserve interest) at the better price. Any remaining balance of the incoming order is executed at the completion price against displayable and non-displayable interest pursuant to NYSE Rule 72 (''Priority of Bids and Offers and Allocation of Executions'').[8]

Exchange systems can access CCS interest only once to participate in the execution of an incoming order. As such, CCS interest that may exist at the completion price is inaccessible to Exchange systems to trade with any remaining balance of the incoming order if Exchange systems included the DMM's CCS interest in the execution of any portion of such order at the better price. Moreover, Exchange systems will only access CCS interest to participate in the execution of an incoming order where the incoming order will be executed in full.

b. Proposed Amendment to NYSE Rule 1000

The Exchange proposes to allow Exchange systems to access CCS interest to participate in executions where the incoming order will only be partially executed. The purpose of this change is to provide additional liquidity to the incoming order.

As illustrated in the example below, because Exchange systems are permitted to access CCS interest only where an incoming order would be executed in full, there are times when the incoming order exhausts the displayed and reserve interest on the Display Book at various price points and the remaining

[4] *See* SR–NYSE Amex–2009–46.

[5] The provisions of NYSE Rule 1000 relating to CCS are in effect pursuant to a pilot that commenced on October 2008 and is scheduled to end on October 1, 2009.

[6] The Display Book® system is an order management and execution facility. The Display Book system receives and displays orders to the DMMs, contains the order information, and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. The Display Book system is connected to a number of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems.

[7] *See* NYSE Rule 62, Supplementary Material .10, which provides that the minimum price variation (MPV) for quoting and entry of orders in equity securities admitted to dealings on the Exchange shall be as stated in the table above.

[8] Pursuant to NYSE Rule 72 round-lot executions on the Exchange are allocated on an equal basis, *i.e.* parity, among market participants at a price point unless one of the participants has established priority. Priority is established when the participant is the only interest displayed at the price point when such price is or becomes the best bid or offer published by the Exchange. A participant that establishes priority for the displayed portion of his or her order is allocated the first 15% of any execution (a minimum of one round lot). Any DMM non-CCS interest included in the displayed quantity and non-displayed quantity is also executed pursuant to NYSE Rule 72.

shares of the order are quoted. In these instances Exchange systems cannot access the CCS interest available at the price point where the remaining shares of the order will be quoted to partially fill the incoming limit order.

Example of Current CCS Operation

The Exchange Market is 200 shares bid at the price of $20.05 and 200 shares offered at a price of $20.10. At the price points of $20.04, $20.03, $20.02, $20.01 and $20.00 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at each of those price points as well. A customer sends the Exchange a sell order for 1200 shares with a limit price of $20.00. Given the current operation of CCS, the order will execute against the 200 shares at the Exchange bid price of $20.05 and all the shares indicated in *italic* typeface at each price point down to the orders limit price of $20.00 will be executed against the order for a total execution of 700 shares. The remaining 500 shares of the order will be filed in Display Book at its limit price of $20.00.

CCS Interest	Shares bid	Bid price	Offer price	Shares offered	CCS interest
	.....	.....	$20.10	200	200
200	200	$20.05			
200	*100*	20.04			
200	*100*	20.03			
200	*100*	20.02			
200	*100*	20.01			
200	*100*	20.00			

The Exchange proposes to modify the operation of CCS interest to allow Exchange systems to access and execute CCS interest designated to partially fill an incoming limit order. This will create an additional processing action for Exchange systems. Exchange systems will continue to review all the liquidity available on the Display Book and any away market centers; however, once it determines that the order cannot be executed in full, it will also review the DMM CCS interest file to determine if any of the liquidity is eligible to partially fill the incoming limit order at the price where any remaining shares of the order would be quoted.

In order for the DMM CCS interest to participate in a partial execution of an incoming limit order that exceeds the liquidity available at the Exchange BBO the DMM must designate interest available in the CCS interest file eligible for partial execution by including a ''PF'' indicator on the shares provided at the price point. All liquidity provided in the CCS interest file will continue to be eligible to participate in executions of incoming limit orders in full. Only DMM CCS interest containing the PF indicator will be available to participate in an execution to provide a partial execution of an incoming limit order that exceeds the liquidity available at the Exchange BBO. In this way incoming limit orders will have another opportunity to receive fuller executions prior to quoting.

Example of Proposed CCS Partial Fill at the Price the Remaining Shares Will Be Quoted

The Exchange Market is 200 shares bid at the price of $20.05 and 200 shares offered at a price of $20.10. At the price points of $20.04, $20.03, $20.02, $20.01 and $20.00 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at each of those price points as well. The CCS interest at $20.00 is designated for partial fill. A customer sends the Exchange a sell order for 1200 shares with a limit price of $20.00. Enabling Exchange systems to access CCS interest to partially fill the order, the incoming limit order will execute against the 200 shares at the Exchange bid price of $20.05. The order would then execute against all the shares bid, indicated in *italic* typeface at each price point down to the orders limit price of $20.00, Exchange systems would execute an additional 200 shares of the order against the CCS interest at $20.00 designated for partial fill. The incoming limit order receives a total execution of 900 shares and the remaining 300 shares of the order will be filed in the Display Book at its limit price of $20.00.

CCS Interest	Shares bid	Bid price	Offer price	Shares offered	CCS interest
	.....	.....	$20.10	200	200
200	200	$20.05			
200	*100*	20.04			
200	*100*	20.03			
200	*100*	20.02			
200	*100*	20.01			
200PF	*100*	20.00			

When Exchange systems access the CCS interest in order to provide a partial execution of an incoming order, CCS interest will participate at the price point where the remaining shares will be quoted as illustrated in the example above. If, however, the incoming order reaches a Liquidity Replenishment Point (''LRP'')[9] prior to being executed in full, then Exchange systems will execute the CCS interest at the LRP price, as illustrated in the example below, and the remaining shares of the order will be quoted thereafter at its limit price. In the case of a market order it will be quoted at the LRP price.

[9] LRPs are pre-determined price points that temporarily convert the automatic Exchange market to an auction market in order to dampen volatility when the market is experiencing a large price movement based on a security's typical trading characteristics or market conditions over short periods of time during the trading day. LRPs allow the DMM to solicit additional liquidity.

Example of Proposed CCS Partial Fill at the LRP Price

CCS Partial Fill at the LRP #1

The Exchange Market is 200 shares bid at the price of $20.10 and 200 shares offered at a price of $20.15. The price

point of $20.05 is a designated LRP. At the price points of $20.09 down to $20.05 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at the price points of $20.09 down to $20.05.[10] In addition, the CCS interest file indicates that the interest at the prices $20.08, $20.07 and $20.05 is available to provide a partial fill. A customer sends the Exchange a sell order for 1200 shares with a limit price of $20.00. Enabling Exchange systems to access CCS interest to partially fill the order, the incoming limit order would execute against the 200 shares at the Exchange bid price of $20.10. The order would then execute against all the shares bid (indicated in *italic* typeface) at each price point down to the LRP price of $20.05. Exchange systems would execute an additional 200 shares of the order against the CCS interest at the LRP price of $20.05 for a total 900 shares of the incoming limit order executed. The original order will execute a total of 900 shares above its limit price before the remaining 300 shares of the order is posted on the Display Book at its limit price of $20.00.

CCS Interest	Shares bid	Bid price	Offer price	Shares offered	CCS Interest
	.....	.....	*$20.15*	*200*	200
200	*200*	$20.10			
200	*100*	20.09			
200 *PF*	*100*	20.08			
200 *PF*	*100*	20.07			
200	*100*	20.06			
200 PF	*100*	20.05 *LRP*			
0	0	20.04			
0	0	20.03			
0	0	20.02			
0	0	20.01			
0	0	20.00			

CCS Partial Fill at the LRP # 2

The Exchange Market is 200 shares bid at the price of $20.10 and 200 shares offered at a price of $20.15. The price point of $20.05 is a designated LRP. At the price points of $20.09 and $20.08 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at the price points of $20.09 down to $20.05. In addition, the CCS interest file indicates that the interest at the prices $20.08, $20.07 and $20.05 is available to provide a partial fill. A customer sends the Exchange a sell order for 700 [11] shares with a limit price of $20.00. Enabling Exchange systems to access CCS interest to partially fill the order, the incoming limit order would execute against the 200 shares at the Exchange bid price of $20.10. The order would then execute 100 shares against the shares bid at $20.09 and $20.08. Exchange systems would execute an additional 200 shares of the order against the CCS interest at the LRP price of $20.05 for a total 600 shares of the incoming limit order executed. The remaining 100 shares of the order will be posted on the Display Book at its limit price of $20.00.

CCS interest	Shares bid	Bid price	Offer rice	Shares offered	CCS interest
	.....	.....	*20.15*	*200*	200
200	*200*	*$20.10*	.....	.....	.....
200	*100*	20.09	.....	.....	.....
200*PF*	*100*	20.08	.....	.....	.....
200*PF*	0	20.07	.....	.....	.....
200	0	20.06	.....	.....	.....
200PF	0	20.05*LRP*	.....	.....	.....
0	0	20.04	.....	.....	.....
0	0	20.03	.....	.....	.....
0	0	20.02	.....	.....	.....
0	0	20.01	.....	.....	.....
0	0	20.00	.....	.....	.....

When accessing CCS interest to partially execute an order, Exchange systems will not review the liquidity available at one minimum price variation better than the execution price to determine if the number of shares that CCS interest is willing to provide at the better price is greater than the number of shares at the price point where the order would execute and then post. The order will be executed against the CCS interest where the remaining shares of the order will ultimately be quoted or in the event an LRP is reached, at the LRP price.[12]

Whether the order is executed at the price where the remaining shares will be quoted or at the LRP price, Exchange systems will not access CCS interest designated PF until all other interest on

[10] A DMM cannot provide CCS interest past the LRPs because that interest will not be executed. Pursuant to current NYSE Rules, once an LRP is reached interest may not trade through the price point.

[11] If the order were for 600 shares Exchange systems would have executed 200 shares at the bid price of $20.10, 100 shares at the price of $20.09. The Exchange will execute the remaining 300 shares at the price of $20.08 against the 100 shares of ''Shares Bid'' and CCS interest at the price point. However, because the 700 share order could not be completely filled at the price of $20.08 including CCS interest, it is executed based on the rules governing partial executions and will thus be executed as illustrated in the example.

[12] If the DMM did not designate the CCS interest eligible for partial fill, then the CCS interest would not participate in the execution and the remaining shares of the order would be quoted.

the Display Book up to the price point is executed in full. CCS interest therefore, remains the interest of last resort because Exchange systems will access CCS interest to provide a partial execution to an incoming limit order only after all it has satisfied protected interest on away market centers and all other interest on the Display Book eligible to be executed against the order is executed in full. In all instances where Exchange systems access CCS to provide a partial execution of an order, the customer order is afforded the ability for price improvement within the parameters of the rule.

The Exchange therefore proposes to amend NYSE Rule 1000, to allow Exchange systems to access available CCS interest in order to provide an incoming order with a fuller execution. The Exchange proposes to amend NYSE Rule 1000(e)(iii)(A)(4) to include this provision and renumber former subparagraph (e)(iii)(A)(4) to (e)(iii)(A)(5).

The Exchange believes that the instant proposal to maximize an order's partial execution by allowing Exchange systems to access CCS interest removes the current impediment from a limit order accessing all the liquidity available on the Display Book. The proposed modification increases the opportunities for executing a greater number of shares of the incoming order and exposes it to additional opportunity for price improvement. The Exchange believes that the proposal therefore contributes to perfect the mechanism of a free and open market and ultimately protects investors and the public interest.

Administrative Amendments to NYSE Rule 1000

The Exchange further proposes to delete legacy references to ''ITS Plan'' contained in NYSE Rule 1000 subparagraphs (e)(ii) and (e)(iii) and replace the concept of ITS commitments with appropriate language consistent with the current practice of routing orders to away market centers.

The Exchange also proposes to include references to its Do Not Ship Order [13] in NYSE Rule 1000 subparagraphs (e)(ii)(C) and (e)(iii)(A)(5) to illustrate the additional order type that requires the same execution handling as Reg. NMS-compliant IOC. NYSE Rule 1000 subparagraph (e)(ii)(D) is proposed for deletion because it restates the information contained in subparagraph (e)(ii) above it.

Finally, the Exchange proposes to delete the rule language of NYSE Rule 1000 Supplementary Material .10 that is no longer applicable, as it relates to a former pilot operated by the Exchange between May 12, 2006 and October 31, 2006. The Exchange proposes to reserve this rule section.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') [14] for these proposed rule changes is the requirement under Section 6(b)(5) [15] that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change supports these principles in that it seeks to protect the investor and the public interest by allowing an incoming limit order to execute against all the liquidity available on the Exchange.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. In addition, the Commission seeks comment on whether the proposed handling of incoming orders receiving partial fills that include CCS interest is consistent with the Act and, in particular, whether the proposed rule changes are designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

Specifically, in certain situations, the Exchange's proposal would allow the DMM's CCS interest to participate in partial fills at the best possible price (from the DMM's perspective), even when this price is inferior to all the non-CCS interest participating in the same execution. Currently, NYSE's rules allow for CCS participation only when the incoming order will be completely filled, and the DMM's CCS interest may not participate in an execution at a price inferior to the completion price.

The Commission notes the fact pattern presented above under the heading ''CCS Partial Fill at the LRP #2'' where, under NYSE's current rules, an incoming order of 600 shares would be completed at $20.08 (200, 100, and 100 shares of non-CCS interest at $20.10, $20.09, and $20.08 respectively, and 200 shares of CCS interest also at $20.08).[16] In contrast, under the proposal, an incoming order of 700 shares that outsizes the available non-CCS interest would be partially completed by CCS interest at the LRP price, and thus would receive an execution of 200 shares against CCS interest at $20.05, rather than $20.08, before the system quotes the residual 100 shares at $20.05, the LRP.[17]

Absent the proposed rule change, a 700-share incoming order would result in a partial fill without any CCS participation, with 300 shares unexecuted and quoting at the LRP. Thus, the Commission notes that the proposal may benefit the incoming order by immediately and automatically executing additional shares at the order's limit price or at the LRP price, as applicable. However, the Commission is interested in commenters' views on the proposed expansion of DMMs' CCS capabilities for partial fills and, in particular, on the proposed execution of CCS interest at the limit price of the order or the LRP price, as the case may be, even when no other interest resides at that price. To illustrate, in the ''CCS Partial Fill at the LRP #2'' example above, the proposal would result in a CCS interest execution at $20.05 (*i.e.,* the LRP price). Is another price more

[13] *See* NYSE Rule 13.

[14] 15 U.S.C. 78a.

[15] 15 U.S.C. 78f(b)(5).

[16] *See supra* note 11.

[17] *See supra* text accompanying note 11.

appropriate? For example, should such CCS interest be executed at $20.08 (the last price at which there is non-CCS interest)? Another price? Why or why not?

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–2009–71 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2009–71. 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–2009–71 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19145 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60433; File No. SR–NYSEArca–2009–69]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 7.31(oo)

August 5, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on July 17, 2009, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 modify NYSE Arca Equities Rule 7.31(oo) governing the Primary Until 9:45 Order. The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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

The Exchange proposes to modify NYSE Arca Equities Rule 7.31(oo) pertaining to the Primary Until 9:45 Order.

The Primary Until 9:45 Order permits NYSE Arca Users to submit an order that will be routed directly to the primary listing market until 9:45 am (Eastern Time). If the order is not executed on the primary market by 9:45 am (Eastern Time), the order will be cancelled from the primary market and a new order will be entered on the Arca Book for execution during the remainder of the Exchange's Core Trading Session.

Currently, a Primary Until 9:45 Order may be marked with a Time in Force of Day, Good Till Cancelled (''GTC''), or Good Till Date (''GTD''). However, potential confusion arises in that the Primary Until 9:45 Order is not designed to re-route to the primary if not executed on its initial day of entry. The Exchange proposes to eliminate the option to mark a Primary Until 9:45 Order as GTC or GTD. This change eliminates that potential confusion by allowing the Primary Until 9:45 Order to be marked as Day only.

The Exchange plans to implement this change on July 20, 2009 in conjunction with the implementation of the Primary Until 9:45 Order.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[3] of the Securities Exchange Act of 1934 (the ''Exchange Act''), in general, and furthers the objectives of Section 6(b)(5)[4] 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 changes are designed to accomplish these ends by eliminating order types from its rulebook which it can not currently support.

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[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

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: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [5] and Rule 19b–4(f)(6) thereunder.[6]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[7] However, Rule 19b–4(f)(6)(iii) [8] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may be operative in conjunction with the release of the Primary Until 9:45 Order in order to eliminate potential confusion associated with the GTC or GTD designation of a Primary Until 9:45 Order. The Commission believes such waiver is consistent with the protection of investors and the public interest.[9]

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–2009–69 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–2009–69. 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 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–NYSEArca–2009–69 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

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[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6).

[7] 17 CFR 240.19b–4(f)(6). 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 complied with this requirement.

[8] *Id.*

[9] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60431; File No. SR–Phlx–2009–59]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, Relating to the Exchange's By-Laws, Regulatory Oversight Committee and Referee Program

August 4, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on July 27, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On July 30, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its By-Laws to establish a regulatory oversight committee of the Board of Governors (the ''Board''); describe the office and responsibilities of the chief regulatory officer in the By-Laws; eliminate the audit committee and compensation committee of the Board, with their duties being assigned to other board committees of Phlx or its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX''); amend the Exchange's By-Laws to delete the Referee process and establish a new Options Trade Review Committee in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] By Amendment No. 1, the Exchange updated its proposal to reflect that The NASDAQ Stock Market LLC and NASDAQ OMX BX, Inc. have already eliminated their audit committees.

lieu thereof; and make conforming changes to the Exchange's Rules and Options Floor Procedure Advice.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Modifications to the Regulatory Oversight Structure of the Board of Governors

On July 24, 2008, Phlx was acquired by NASDAQ OMX. Following that acquisition, Phlx has been assessing means to improve its governance structure and conform it more closely to that of The NASDAQ Stock Market LLC (the ''NASDAQ Exchange''), an effort that has already resulted in the submission of several proposed rule changes to the Commission.[4] In addition, Phlx—together with the NASDAQ Exchange and NASDAQ OMX BX, Inc. (formerly the Boston Stock Exchange, and also an exchange subsidiary of NASDAQ OMX)—has been evaluating means to realize synergies in the operations of these three exchanges while maintaining the separate identity and member representation structures of each.

In making this evaluation, Phlx and its sister exchanges have given consideration to the experiences of their respective boards and have reviewed the governance documents of other exchanges. In particular, Phlx and the other exchanges have reviewed the board structures established by NYSE Euronext and its exchange subsidiaries. In Securities Exchange Act Release No. 55293,[5] the Commission approved a structure in which certain committees of the board of directors of NYSE Euronext, the public holding company, perform functions for exchange subsidiaries, which do not themselves have these committees. Specifically, the Commission's approval order states that ''the NYSE Euronext board of directors will have an audit committee, a human resource and compensation committee, and a nominating and governance committee. Each of the audit committee, human resource and compensation committee, and nominating and governance committee of the NYSE Euronext board of directors will consist solely of directors meeting the independence requirements of NYSE Euronext.

These committees also will perform relevant functions for NYSE Group,[6] the Exchange,[7] NYSE Market,[8] NYSE Regulation,[9] Archipelago,[10] NYSE Arca,[11] and NYSE Arca Equities,[12] as well as other subsidiaries of NYSE Euronext, except that the board of directors of NYSE Regulation will continue to have its own compensation committee and nominating and governance committee.''

Phlx and the other exchanges owned by NASDAQ OMX have also considered the experience of the NASDAQ Exchange in operating as a subsidiary of a public company since 2006. During the period, the board of each of the NASDAQ Exchange and its parent corporation (currently NASDAQ OMX, and formerly The Nasdaq Stock Market, Inc.) has appointed its own audit committee and management compensation committee. However, these committees at the NASDAQ Exchange level have generally found themselves duplicating the work of other committees at the exchange or holding company level. The NASDAQ OMX audit committee has broad authority to review the financial information that will be provided to shareholders and others, systems of internal controls, and audit, financial reporting and legal and compliance processes. Because NASDAQ OMX's financial statements are prepared on a consolidated basis that includes the financial results of NASDAQ OMX's subsidiaries, including Phlx and the other exchange subsidiaries, the NASDAQ OMX audit committee's purview necessarily includes these subsidiaries. The committee is composed of four or five directors, all of whom must be independent under the standards established by Section 10A(m) of the Act[13] and Rule 4200(a) of the NASDAQ Exchange. All committee members must be able to read and understand financial statements, and at least one member must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual's financial sophistication.

By contrast, the audit committee of the NASDAQ Exchange has a more limited role, focused solely on the exchange entity and its subsidiaries that operate as facilities of the NASDAQ Exchange. As described in the current By-Laws of the NASDAQ Exchange (which are, in this respect, virtually identical to the current By-Laws of Phlx), the primary functions of the audit committee are (i) oversight over financial reporting, (ii) oversight over the systems of internal controls established by management and the Board and the legal and compliance process, (iii) selection and evaluation of independent auditors, and (iv) direction and oversight of the internal audit function. However, to the extent that the committee reviews financial and accounting matters, its activities are duplicative of the activities of the NASDAQ OMX audit committee, which is also charged with providing oversight over financial reporting and independent auditor selection for NASDAQ OMX and all of its subsidiaries, including the NASDAQ Exchange, BX, and Phlx and their subsidiaries. Similarly, the NASDAQ

[4] *See* Securities Exchange Act Release No. 59764 (April 20, 2009), 74 FR 18761 (April 24, 2009) (SR–Phlx–2009–17) (approving proposal to modify the process for nominating Governors of the Exchange); Securities Exchange Act Release No. 59697 (April 4, 2009), 74 FR 16249 (April 9, 2009) (SR–Phlx–2009–23) (proposing to eliminate various standing committees of the Exchange and making other miscellaneous changes). The Commission notes that the latter filing was approved by the Commission on May 14, 2009. *See* Securities Exchange Act Release No. 59924 (May 14, 2009), 74 FR 23759 (May 20, 2009).

[5] Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120).

[6] NYSE Group, Inc., the former public holding company of NYSE Euronext's U.S. exchanges.

[7] New York Stock Exchange LLC (''NYSE''), a registered national securities exchange.

[8] NYSE Market, Inc., a subsidiary of NYSE to which it has delegated certain operational authority.

[9] NYSE Regulation, Inc., a subsidiary of NYSE to which it has delegated certain operational authority.

[10] Archipelago Holdings, Inc., formerly the public holding company of the entities now known as NYSE Arca, Inc. and NYSE Arca Equities, Inc.

[11] NYSE Arca, Inc., a registered national securities exchange.

[12] NYSE Arca Equities, Inc., a subsidiary of NYSE Arca to which it has delegated certain operational authority.

[13] 15 U.S.C. 78j–1(m).

OMX audit committee has general responsibility for oversight over internal controls and direction and oversight over the internal audit function for NASDAQ OMX and all of its subsidiaries. Thus, the responsibilities of the exchanges' audit committees are fully duplicated by the responsibilities of the NASDAQ OMX audit committee. Accordingly, the NASDAQ Exchange has eliminated its audit committee by amending Article III, Section 5 of the By-Laws.[14]

Similarly, drawing upon the model established by NYSE Euronext and the experience of the NASDAQ Exchange, Phlx is proposing to amend Section 10–9 of its By-Laws to eliminate its audit committee. While the committee formerly played a vital role in oversight of the preparation of Phlx's financial statements when Phlx was owned by a group of investors and sat at the top of a holding company structure, that role has been assumed by the NASDAQ OMX audit committee now that Phlx is a wholly owned subsidiary. Moreover, since Phlx does not currently have a regulatory oversight committee, Phlx is now proposing to establish such a committee so that regulatory oversight functions formerly performed by the audit committee may be assumed by the new committee.[15] The new committee will oversee the adequacy and effectiveness of Phlx's regulatory and self-regulatory organization responsibilities; assess Phlx's regulatory performance; and assist the Board and its standing committees in reviewing the regulatory plan and the overall effectiveness of Phlx's regulatory functions. In furtherance of its functions, the committee shall (a) review Phlx's regulatory budget and specifically inquire into the adequacy of resources available in the budget for regulatory activities; (b) meet regularly with Phlx's chief regulatory officer in executive session; and (c) be informed about the compensation and promotion or termination of the chief regulatory officer and the reasons therefor.[16] The committee shall consist of three members, each of whom shall be an independent governor.[17]

Phlx believes that even in light of the NASDAQ OMX audit committee's overall responsibilities for internal controls and the internal audit function, it is nevertheless important for the Phlx Board to maintain its own independent oversight over Phlx's controls and internal audit matters relating to Phlx's operations. In this regard, Phlx notes that its regulatory oversight committee, like the NASDAQ Exchange's regulatory oversight committee, will have broad authority to oversee the adequacy and effectiveness of Phlx's regulatory and self-regulatory organization responsibilities, and will therefore be able to maintain oversight over controls in tandem with the NASDAQ OMX audit committee's overall control oversight responsibilities. Similarly, it is already the practice of NASDAQ OMX's Internal Audit Department, which performs internal audit functions for all NASDAQ OMX subsidiaries, to report to the Phlx Board on all internal audit matters relating to Phlx. This practice will be formally reflected in the Department's written procedures, which will now direct such reports to the regulatory oversight committee. In addition, to ensure that the Phlx Board retains authority to direct the Department's activities with respect to Phlx, the Department's written procedures will be amended to stipulate that the Phlx regulatory oversight committee may, at any time, direct the Department to conduct an audit of a matter of concern to it and report the results of the audit both to the Phlx regulatory oversight committee and the NASDAQ OMX audit committee. Finally, although language regarding the audit committee's authority to conduct special reviews of any alleged improper conduct is being removed, Phlx believes that such authority is inherent in the powers of its Board, the NASDAQ OMX Board, and their respective committees. Accordingly, retaining this language for a specific committee is unnecessary.[18]

Although the position of chief regulatory officer has long existed, Phlx has concluded that the position should be formally described in the By-Laws. Accordingly, new Section 5–6 of the By-Laws will provide that the chief regulatory officer will have general supervision of Phlx's regulatory operations, including the responsibility for overseeing its surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which Phlx is a party. The chief regulatory officer shall meet with the regulatory oversight committee in executive session at regularly scheduled meetings, and at any time upon request of the chief regulatory officer or any member of the committee.

Phlx also proposes to amend Section 4–13 of the By-Laws in order to follow the NYSE Euronext model with respect to allowing the elimination of its compensation committee and the performance of its function by the NASDAQ OMX compensation committee and/or subsidiary boards.[19] The NASDAQ OMX By-Laws provide that its compensation committee considers and recommends compensation policies, programs, and practices for employees of NASDAQ OMX. Because many employees performing work for Phlx are also employees of NASDAQ OMX, its compensation committee already performs these functions for such employees. Moreover, certain of its senior officers are also officers of NASDAQ OMX and other NASDAQ OMX subsidiaries because their responsibilities relate to multiple entities within the NASDAQ OMX corporate structure. Accordingly, NASDAQ OMX pays these individuals and establishes compensation policy for them. Most notably, the former Chief Executive Officer of Phlx was also an ''executive officer'' of NASDAQ OMX within the meaning of NASDAQ Exchange Rule 4350.[20] Under that rule, the compensation of executive officers of an issuer of securities, such as the common stock of NASDAQ OMX, that is listed on the NASDAQ Exchange, must be determined by, or recommended to the board of directors for determination by, a majority of independent directors or a compensation committee comprised

[14] Securities Exchange Act Release No. 60276 (July 9, 2009), 74 FR 34840 (July 17, 2009) (SR–NASDAQ–2009–042) (''Release No. 34–60276''). Similarly, BX has eliminated its audit committee. Securities Exchange Act Release No. 60247 (July 17, 2009), 74 FR 33495 (July 13, 2009) (SR–BX–2009–021) (''Release No. 34–60247'').

[15] Section 10–9 of the By-Laws.

[16] The audit committee also currently performs functions relating to the Referee, who has authority to review certain decisions of Options Exchange Officials. As described below, the Exchange proposes to replace the Referee with a new Options Trade Review Committee.

[17] An independent governor is one who has no material relationship with Phlx or any affiliate of Phlx, any member of Phlx or any affiliate of such member, or any issuer of securities that are traded on Phlx or a facility of Phlx.

[18] Phlx also notes that authority of the audit committee with respect to the Exchange's Code of Conduct and whistleblowing regarding accounting practices have been assumed by NASDAQ OMX, which, as a public company, maintains a Code of Ethics program and anonymous whistleblower hotline for NASDAQ OMX and its subsidiaries in compliance with the requirements of the Sarbanes-Oxley Act, 15 U.S.C. 78j–1, 7264.

[19] The Commission notes that it recently approved proposals by BX and the NASDAQ Exchange to eliminate their compensation committees. *See* Release Nos. 34–60247 and 60276, *supra* note 14. These exchanges have eliminated those committees. *See* e-mail from Edith Hallahan, Counsel, Phlx, to Nancy Burke-Sanow, Assistant Director, Commission, dated August 3, 2009.

[20] The position of Chief Executive Officer of Phlx is currently vacant, pending selection of a successor.

solely of independent directors. Accordingly, the NASDAQ OMX board of directors and/or its compensation committee was legally required to establish the compensation for this individual. Although the individual recently resigned his positions with NASDAQ OMX and its subsidiaries in order to pursue another opportunity, it is likely that his successor as Chief Executive Officer of Phlx will serve in a similar position at NASDAQ OMX and therefore be subject to comparable compensation requirements. To the extent that policies, programs, and practices must also be established for any Phlx officers or employees who are not also NASDAQ OMX officers or employees, the Phlx Board will perform such actions without the use of a compensation committee (but subject to the recusal of the Chief Executive Officer and the Stockholder Governor).[21]

Replacement of the Exchange's Referee With an Options Trade Review Committee

The Exchange proposes to replace the current Referee process with an Options Trade Review Committee, which is similar to the processes of other exchanges, including the NASDAQ Exchange.[22] As explained further below, the Exchange believes that this committee should effectively provide fair and neutral review of Options Exchange Officials' rulings.

Currently, the Exchange's By-Laws and rules provide that the Referee is an Exchange employee (or independent contractor), supervised by the audit committee,[23] who reviews Options Exchange Official rulings concerning the nullification and/or adjustment of transactions. In addition, the Referee can act in the capacity of an Options Exchange Official respecting initial rulings concerning requests for relief from the requirements of certain Exchange rules, Equity Floor Procedure Advices and Option Floor Procedure Advices.[24]

The Exchange proposes to eliminate the Referee and replace that function with an Options Trade Review Committee, which will review Options Exchange Official rulings. Even though the Referee was able to, the Options Trade Review Committee will not act in the capacity of an Options Exchange Official; its function will be limited to reviewing such rulings.

In order to implement the Options Trade Review Committee, the Exchange is proposing to delete the By-Law provision that currently vests supervision over the Referee in the audit committee and generally defines the Referee's role and background.[25] Because the Exchange is proposing to eliminate its audit committee, and because appeals will now be handled by a committee, rather than an exchange employee (or independent contractor), the Exchange believes that the Options Trade Review Committee should be sufficiently neutral and independent of the regulatory processes and Options Exchange Officials. The Options Trade Review Committee will be appointed by the Board pursuant to new By-Law Article X, Section 10–10 as a standing committee of the Board and shall include a number of Member Representative members[26] that is equal to at least 20 percent of the total number of members of the Committee; furthermore, no more than 50 percent of its members shall be engaged in market making activity or employed by an Exchange Member Organization whose revenues from market making activity exceed ten percent of its total revenues.[27]

In addition, the Exchange proposes to amend various rules that refer to the Referee, including Rule 124, which currently outlines in detail the responsibilities of the Referee. Specifically, Rule 124 is being amended to establish the Options Trade Review Committee's role. In addition to the language in By-Law Article X, Section 10–10, proposed new language in Rule 124 will state that the Options Trade Review Committee may act through a panel with a minimum of three Committee members, of which no more than 50% can be engaged in market making activity or employed by an Exchange Member Organization whose revenues from market making activity exceed ten percent of its total revenues.[28] The Exchange anticipates that in light of the time sensitivity of rendering decisions in the trading context, neither the entire Options Trade Review Committee nor a quorum thereof should be required. The Exchange also anticipates that the panel will be selected by Exchange regulatory staff from the Committee members on a rotating basis, taking into consideration availability and prompt response as well as frequency of service, keeping in mind the importance of assembling a panel quickly. The staff is likely to use electronic means to do so, and the panels would convene via conference call. In addition, all appeals will be presented to the panel on an anonymous basis to reduce the risk of conflict or bias. The staff would provide to the panel a verbal and/or written information packet containing relevant documents. Member firm-identifying information within the packet would be redacted to make it difficult or impossible to identify the parties to the appeal. Regulatory staff will present the information included in the kit to the participants anonymously, which may include written information provided by any parties to the appeal.

Commentary .02 to Rule 124 is proposed to be deleted, because it details the role of the Referee. The details regarding who can serve as Referee, how the Referee is appointed, designation of a Backup Referee, what additional functions the Referee can perform, and how the Referee is supervised and evaluated are no longer needed.

Other than the role of the Referee, most aspects of the review process in Rule 124 are not being changed; for example, the time period to request a review, the fee for a review that sustains the ruling, and that rulings may be sustained, overturned or modified all remain unchanged. Decisions of the Options Trade Review Committee, like the Referee's decisions, would not be appealable. Because Advice F–27 corresponds to Rule 124, corresponding changes to Advice F–27 are also proposed.

Minor changes to Rule 124 include: (i) [sic] removing references to Referee decisions from Rule 124(b) in the sentence that deals with rulings being effective immediately and being complied with promptly, because the provision that Options Trade Review Committee decisions are effective immediately and must be complied with promptly will appear instead in the paragraph governing the Options Trade

[21] Two seats on the Phlx Board are reserved for the Chief Executive Officer and an officer, designee, director, or employee of NASDAQ OMX. To the extent that these Governors are officers or employees of both Phlx and NASDAQ OMX, they would be permitted to participate in discussions concerning compensation of Phlx employees, since the Phlx Board would not be responsible for setting their compensation. They would, however, recuse themselves from a vote on the subject to allow the determination to be made by directors that are not officers or employees of Phlx. If one of these Governors was an officer or employee of Phlx but not of NASDAQ OMX, that Governor would also absent himself or herself from any deliberations regarding his or her compensation.

[22] *See* NASDAQ Exchange By-Laws, Article III, Section 6(d).

[23] For the establishment of the Referee program, *see* Securities Exchange Act Release No. 54009 (June 16, 2006), 71 FR 36592 (June 27, 2006) (SR–Phlx–2005–42).

[24] *See* Rule 124.02(a)(i)–(iv).

[25] *See* By-Law Article X, Section 10–9(d).

[26] *See* By-Law Article I, Section 1–1(pp).

[27] *See* proposed By-Law Article X, Section 10–10.

[28] *See* NASDAQ Stock Market Rule 11890 and IM–11890–20 (Review by Panels of the MORC).

Review Committee, in proposed subparagraph (d)(v). In addition, subparagraph (d)(vi) is proposed to be deleted, because it duplicates a provision in paragraph (b). The Exchange is deleting the provision that an Options Exchange Official that fails to make any ruling in accordance with Exchange rules may be subject to possible disciplinary action by the Exchange, because this provision governs the Exchange's own personnel policies, which typically do not appear in exchange rules.

Rule 1092 is also being changed to refer to the Options Trade Review Committee, rather than the Referee in paragraphs (f)(iv) and (g), which relate to requesting a review of obvious error and catastrophic error determinations.

The changes to the remaining provisions are minor. Rule 1, Definitions, is being amended to state that the list of Options Exchange Officials will be maintained by the Chief Regulatory Officer rather than the Referee.[29] Rule 163, Erroneous Transactions, is also being amended to replace the Referee with the Options Trade Review Committee, but, as a practical matter, is not significant, because the Exchange no longer operates an equity trading system for which Rule 163 was adopted, such that Rule 163 cannot currently be invoked.

In summary, the Exchange believes that, under this proposal, the Options Trade Review Committee should further the goal of impartial, objective decisions, which should, in turn, result in fairness and certainty in the overall process of resolving trading disputes.

2. Statutory Basis

Phlx believes that its proposal is consistent with Section 6(b) of the Act[30] in general, and furthers the objectives of: (1) Section 6(b)(1) of the Act,[31] which requires a national securities exchange to be so organized and have the capacity to carry out purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; and (2) Section 6(b)(5) of the Act,[32] in that it is designed, among other things, 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. Specifically, the proposed rule change will eliminate two Board committees whose roles have been diminished by Phlx's new status as a wholly owned subsidiary of NASDAQ OMX, thereby allowing governors to focus greater attention on matters falling directly within the purview of the Board, including regulatory quality, market structure, new product initiatives, and review of proposed rule changes. In addition, the creation of a regulatory oversight committee and the inclusion of the chief regulatory officer in the By-Laws will underscore the importance of Phlx's regulatory function and specifically empower an independent committee of the Board to oversee regulation and meet regularly with the chief regulatory officer. Finally, the Exchange believes that replacing the Referee with a new Options Trade Review Committee should provide a prompt and objective process for reviewing rulings on trading disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2009–59 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–Phlx–2009–59. 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–Phlx–2009–59 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19143 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[29] Rule 1(pp) is also being amended to delete reference to the specific Web site address where the list of Options Exchange Officials is maintained, which has changed. The Exchange will continue to post the list on its Web site, but would prefer not to put the actual Web site address into the rule text.

[30] 15 U.S.C. 78f(b).

[31] 15 U.S.C. 78(b)(1).

[32] 15 U.S.C. 78f(b)(5).

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60439; File No. SR–NYSE–2009–78]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending a Temporary Equity Transaction Fee for Shares Executed on the NYSE MatchPoint[SM] System Through October 31, 2009

August 5, 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 July 31, 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 upon filing through October 31, 2009. 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 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] On February 26, 2009, the Exchange filed with the Commission a proposed rule change to extend this temporary equity transaction fee until April 30, 2009 (the ''March filing'').[5] On April 29, 2009, the Exchange filed with the Commission a proposed rule change to further extend this temporary equity transaction fee until June 30, 2009 (the ''April filing'').[6] On July 6, 2009, the Exchange filed with the Commission a proposed rule change to further extend this temporary equity transaction fee until July 31, 2009 (the ''July filing'').[7] Through this filing, the Exchange proposes to extend this equity transaction fee to be effective upon filing through October 31, 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 March, April and July filings proposed to continue this fee schedule.

The Exchange believes that the extension of the fee schedule through October 31, 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.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') [8] 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 that the March, April and July filings extended, 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) [9] of the Act and subparagraph (f)(2) of Rule 19b–4 [10] 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 59229 (January 12, 2009) 74 FR 3119 (January 16, 2009) (SR–NYSE–2009–01).

[5] *See* Securities Exchange Act Release No. 59491 (March 3, 2009) 74 FR 10107 (March 9, 2009) (SR–NYSE–2009–20).

[6] *See* Securities Exchange Act Release No. 59864 (May 5, 2009) 74 FR 22194 (May 12, 2009) (SR–NYSE–2009–44).

[7] *See* Securities Exchange Act Release No. 60278 (July 10, 2009) 74 FR 34615 (July 16, 2009) (SR–NYSE–2009–67).

[8] 15 U.S.C. 78a.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

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–2009–78 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–2009–78. 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–2009–78 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19183 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60425; File No. SR–NYSEAMEX–2009–49]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending NYSE Amex Equities Rule 103B to Modify the Composition of the Exchange Selection Panel; and Prohibit any Ex Parte Communications During and Regarding the Selection Process between the DMM Units and the Individuals Serving on the Exchange Selection Panel

August 4, 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 July 27, 2009, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 Amex Equities Rule 103B (''Security Allocation and Reallocation'') to: (1) Modify the composition of the Exchange Selection Panel; and (2) prohibit any *ex parte* communications during and regarding the selection process between the DMM units and the individuals serving on the Exchange Selection Panel. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*.[4]

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Amex LLC (''NYSE Amex'' or ''Exchange''), formerly the American Stock Exchange LLC, proposes to amend NYSE Amex Equities Rule 103B (''Security Allocation and Reallocation'') to: (1) Modify the composition of the Exchange Selection Panel; and (2) Prohibit any *ex parte* communications during and regarding the selection process between the DMM units and the individuals serving on the Exchange Selection Panel.

The Exchange notes that parallel changes are proposed to be made to the rules of the New York Stock Exchange LLC (''NYSE'').[5]

Background

As described more fully in a related rule filing,[6] 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 Securities Exchange Act of 1934, as amended (the ''Act'').[7] 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 Amex Trading

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Commission notes that the Exchange inadvertently marked certain portions of the rule text incorrectly. Specifically, in paragraph (III)(B)(1) of Rule 103B the Exchange failed to indicate the deletion of a comma after ''his or her designee''and failed to mark ''; (b)'' as new text. In addition, the Exchange marked as new text one letter in a sentence being deleted from paragraph (III)(B)(1) of Rule 103B.

[5] *See* SR–NYSE–2009–74.

[6] *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).

[7] 15 U.S.C. 78f.

Systems'') are operated by the NYSE on behalf of the Exchange.[8]

As part of the Equities Relocation, NYSE Amex adopted NYSE Rules 1–1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Amex Equities Rules to govern trading on the NYSE Amex Trading Systems.[9] The NYSE Amex 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 Amex Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

NYSE Amex Equities Rule 103B—Allocation Process

Currently, pursuant to NYSE Amex Equities Rule 103B, an issuer may select the DMM unit that will be assigned its security or delegate the selection of the DMM unit to the Exchange. If the issuer authorizes the Exchange to select the DMM unit to trade its security, an Exchange Selection Panel (the ''ESP'' or the ''Panel'') is convened to select the DMM unit based on a review of all information that would be available to the issuer. The Panel is comprised of three members of the Exchange's Senior Management, as designated by the Chief Executive Officer (''CEO'') of the Exchange or his or her designee, one non-DMM Executive Floor Governor (''EFG'') and two non-DMM Floor Governors (''FGs''). The non-DMM EFG and non-DMM FGs are designated on a rotating basis. The Panel's decision is made by majority vote. In the event of a tie, the CEO of the Exchange or his/her designee makes the final decision. The Exchange then informs the issuer of the DMM unit selected by the Panel.

Proposed Amendments

The Exchange proposes to amend NYSE Amex Equities Rule 103B to modify the composition of the Panel in order to ensure consistent Floor participation in the selection process and minimize delays due to scheduling conflicts.

The current composition of the Panel has proven difficult when scheduling the required participants within five days of the issuer's request. The Exchange therefore seeks to amend NYSE Amex Equities Rule 103B to modify the representation on the Panel to include: (1) At least one member of the Exchange's Senior Management; (2) any combination of two Exchange Senior Management or Exchange Floor Operations Staff, to be designated by the Executive Vice-President of Exchange Floor Operations or his/her designee; and (3) any combination of three non-DMM EFGs or non-DMM FGs for a total of six members.

Finally, to reinforce the integrity and objectivity of the ESP selection process, the Exchange proposes to amend NYSE Amex Equities Rule 103B to explicitly prohibit any communications regarding the selection process between the Panelists and the DMM units. The Exchange proposes to have communication regarding the selection process cease from the time the issuer delegates the selection responsibility to the Exchange until the Panel selects the DMM unit to trade the issuer's security.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5),[10] which requires that an exchange have rules that are designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendments are consistent with these objectives. The amendments sought herein seek to streamline and facilitate the process of assigning securities to DMM units by allowing for more flexibility in composing the Panel which ultimately facilitates and expedites the allocation and ultimately the trading of securities on the Exchange. Furthermore, the proposed amendment to prohibit communications between the Panel and the DMM units preserves the integrity and impartiality of the allocation process and therefore protects the public interest.

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)[11] of the Act and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[14] 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, as specified in Rule 19b–4(f)(6)(iii),[15] which would make the rule change operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the Exchange to immediately streamline the process of allocating securities to

[8] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[9] *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, implementing 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).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 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 this requirement.

[13] *Id.*

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] *Id.*

DMM units. In addition, by prohibiting communications regarding the selection process between members of the Panel and DMM units, the Exchange will be able to immediately reinforce impartiality and fairness during the selection process.[16] Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

At any time within 60 days of the filing of such 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–NYSEAMEX–2009–49 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–NYSEAMEX–2009–49. 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 will also be available for inspection and copying at the principal office of the self-regulatory organization. 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–NYSEAMEX–2009–49 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19120 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[16] 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).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60428; File No. SR–NYSEAmex–2009–46]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Amex LLC Amending NYSE Amex Equities Rule 1000 To Allow Exchange Systems to Access CCS Interest to Partially Fill an Incoming Limit Order

August 4, 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 July 20, 2009, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') 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 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 amend NYSE Amex Equities Rule 1000 to allow Exchange systems to access CCS interest to partially fill an incoming limit order. 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 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 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

NYSE Amex LLC (''NYSE Amex'' or the ''Exchange''), formerly the American Stock Exchange LLC, proposes to amend NYSE Amex Equities Rule 1000 to allow Exchange systems to access CCS interest to partially fill an incoming limit order.

The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC.[4]

Background

NYSE Amex adopted sweeping changes to its market rules and execution technology designed to improve execution quality on the Exchange as a result of its merger with the New York Stock Exchange LLC.[5] Among the elements of the adopted enhanced Exchange market model, NYSE Amex eliminated the function of specialists on the Exchange creating a

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* SR–NYSE–2009–71.

[5] 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. 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). Subsequently NYSE Alternext US LLC was renamed NYSE Amex 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''). NYSE Alternext US LLC was subsequently renamed NYSE Amex LLC. *See* Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR–NYSEALTR–2009–24).

new category of market participant, the Designated Market Maker or DMM. The DMM, like specialists, have affirmative obligations to make an orderly market, including continuous quoting requirements and obligations to re-enter the market when reaching across to execute against trading interest. In view of the Exchange's electronic execution functionality, the DMM, unlike the specialist, would no longer be deemed the agent for every incoming order. The Exchange also responded to customer demand to create additional undisplayed reserve interest.

In another enhancement to the Exchange's market model, designed to encourage DMMs to add liquidity, the Exchange implemented a system change that allowed DMMs to create a schedule of additional non-displayed liquidity at various price points where the DMM is willing to interact with interest and provide price improvement to orders in the Exchange's system. This schedule is known as the DMM Capital Commitment Schedule (''CCS'').[6] CCS provides the Display Book®[7] with the amount of shares that the DMM is willing to trade at price points outside, at and inside the Exchange BBO. CCS interest is separate and distinct from other DMM interest in that it serves as the interest of last resort.

When an order is entered for an amount of shares that exceeds the liquidity available at the Exchange BBO, Exchange systems review all the liquidity available on the Display Book including CCS interest to determine the final price point at which the order can be fully executed (the ''completion price''). Exchange systems determine the completion price by calculating the unfilled volume of the incoming order (*i.e.*, the volume of the incoming order that exceeds the volume available to execute against it that is then present in the Exchange bid or offer) and reviewing the additional displayed and non-displayed interest available in the Display Book, which may be at more than one price point, including the CCS interest submitted by the DMM unit that is available at the completion price if the CCS interest were to participate at the completion price. Exchange systems also review any protected bids or offers on markets other than the Exchange (''away interest'') and determines the price at which the remaining volume of the contra side order can be executed in full.

Exchange systems then review the amount of liquidity offered by CCS to determine if the number of shares provided via the DMM's CCS at the completion price is less than the number of CCS shares provided at the next different price that has interest that is one minimum price variation (''MPV'') (as that term is defined in Exchange Rule 62[8]) or more higher (in the case of an order to sell) or at the next different price that has interest that is one MPV or more lower (in the case of an order to buy) (hereinafter collectively referred to as ''better price'').

Price of order or interest	Minimum price variation
Less Than $1.00	$.0001
$1.00 to 99,999.99	.01
$100,000 or greater	.10

If the volume of CCS interest that would be accessed is the same at the completion price and the better price, Exchange systems access CCS interest at the completion price with CCS interest yielding to any other interest in Exchange systems at the completion price.

If the number of shares that would be allocated to the CCS interest at the better price is more than the number of shares that would be allocated to the DMM's CCS interest at the completion price, then Exchange systems will access the CCS liquidity available at the better price with CCS interest yielding to any other interest in Exchange systems (both displayed and undisplayed reserve interest) at the better price. Any remaining balance of the incoming order is executed at the completion price against displayable and non-displayable interest pursuant to NYSE Amex Equities Rule 72 (''Priority of Bids and Offers and Allocation of Executions'').[9]

Exchange systems can access CCS interest only once to participate in the execution of an incoming order. As such, CCS interest that may exist at the completion price is inaccessible to Exchange systems to trade with any remaining balance of the incoming order if Exchange systems included the DMM's CCS interest in the execution of any portion of such order at the better price. Moreover, Exchange systems will only access CCS interest to participate in the execution of an incoming order where the incoming order will be executed in full.

Proposed Amendment to NYSE Amex Equities Rule 1000

The Exchange proposes to allow Exchange systems to access CCS interest to participate in executions where the incoming order will only be partially executed. The purpose of this change is to provide additional liquidity to the incoming order.

As illustrated in the example below, because Exchange systems are permitted to access CCS interest only where an incoming order would be executed in full, there are times when the incoming order exhausts the displayed and reserve interest on the Display Book at various price points and the remaining shares of the order are quoted. In these instances Exchange systems cannot access the CCS interest available at the price point where the remaining shares of the order will be quoted to partially fill the incoming limit order.

Example of Current CCS Operation

The Exchange Market is 200 shares bid at the price of $20.05 and 200 shares offered at a price of $20.10. At the price points of $20.04, $20.03, $20.02, $20.01 and $20.00 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at each of those price points as well. A customer sends the Exchange a sell order for 1200 shares with a limit price of $20.00. Given the current operation of CCS, the order will execute against the 200 shares at the Exchange bid price of $20.05 and all the shares indicated in *italic* typeface at each price point down to the orders limit price of $20.00 will be executed against the order for a total execution of 700 shares. The remaining 500 shares of the order will be filed in Display Book at its limit price of $20.00.

[6] The provisions of NYSE [sic] Rule 1000 relating to CCS are in effect pursuant to a pilot that commenced on October 2008 and is scheduled to end on October 1, 2009.

[7] The Display Book reg: system is an order management and execution facility. The Display Book system receives and displays orders to the DMMs, contains the order information, and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. The Display Book system is connected to a number of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems.

[8] *See* NYSE [sic] Rule 62, Supplementary Material .10, which provides that the minimum price variation (MPV) for quoting and entry of orders in equity securities admitted to dealings on the Exchange shall be as follows (see table above):

[9] Pursuant to NYSE Amex Equities Rule 72 round-lot executions on the Exchange are allocated on an equal basis, i.e. parity, among market participants at a price point unless one of the participants has established priority. Priority is established when the participant is the only interest displayed at the price point when such price is or becomes the best bid or offer published by the Exchange. A participant that establishes priority for the displayed portion of his or her order is allocated the first 15% of any execution (a minimum of one round lot). Any DMM non-CCS interest included in the displayed quantity and non-displayed quantity is also executed pursuant to NYSE [sic] Rule 72.

CCS interest	Shares bid	Bid price	Offer price	Shares offered	CCS interest
	.....	.....	$20.10	200	200
200	200	$20.05	.....	.....	.....
200	*100*	$20.04	.....	.....	.....
200	*100*	$20.03	.....	.....	.....
200	*100*	$20.02	.....	.....	.....
200	*100*	$20.01	.....	.....	.....
200	*100*	$20.00	.....	.....	.....

The Exchange proposes to modify the operation of CCS interest to allow Exchange systems to access and execute CCS interest designated to partially fill an incoming limit order. This will create an additional processing action for Exchange systems. Exchange systems will continue to review all the liquidity available on the Display Book and any away market centers; however, once it determines that the order cannot be executed in full, it will also review the DMM CCS interest file to determine if any of the liquidity is eligible to partially fill the incoming limit order at the price where any remaining shares of the order would be quoted.

In order for the DMM CCS interest to participate in a partial execution of an incoming limit order that exceeds the liquidity available at the Exchange BBO the DMM must designate interest available in the CCS interest file eligible for partial execution by including a ''PF'' indicator on the shares provided at the price point. All liquidity provided in the CCS interest file will continue to be eligible to participate in executions of incoming limit orders in full. Only DMM CCS interest containing the PF indicator will be available to participate in an execution to provide a partial execution of an incoming limit order that exceeds the liquidity available at the Exchange BBO. In this way incoming limit orders will have another opportunity to receive fuller executions prior to quoting.

Example of Proposed CCS Partial Fill at the Price the Remaining Shares Will be Quoted

The Exchange Market is 200 shares bid at the price of $20.05 and 200 shares offered at a price of $20.10. At the price points of $20.04, $20.03, $20.02, $20.01 and $20.00 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at each of those price points as well. The CCS interest at $20.00 is designated for partial fill. A customer sends the Exchange a sell order for 1200 shares with a limit price of $20.00. Enabling Exchange systems to access CCS interest to partially fill the order, the incoming limit order will execute against the 200 shares at the Exchange bid price of $20.05. The order would then execute against all the shares bid, indicated in *italic* typeface at each price point down to the orders limit price of $20.00, Exchange systems would execute an additional 200 shares of the order against the CCS interest at $20.00 designated for partial fill. The incoming limit order receives a total execution of 900 shares and the remaining 300 shares of the order will be filed in Display Book at its limit price of $20.00.

CCS interest	Shares bid	Bid price	Offer price	Shares offered	CCS interest
	.....	.....	$20.10	200	200
200	200	$20.05	.....	.....	.....
200	*100*	$20.04	.....	.....	.....
200	*100*	$20.03	.....	.....	.....
200	*100*	$20.02	.....	.....	.....
200	*100*	$20.01	.....	.....	.....
200 PF	*100*	$20.00	.....	.....	.....

When Exchange systems access the CCS interest in order to provide a partial execution of an incoming order, CCS interest will participate at the price point where the remaining shares will be quoted as illustrated in the example above. If, however, the incoming order reaches a Liquidity Replenishment Point (''LRP'') [10] prior to being executed in full, then Exchange systems will execute the CCS interest at the LRP price, as illustrated in the example below, and the remaining shares of the order will be quoted thereafter at its limit price. In the case of a market order it will be quoted at the LRP price.

Example of Proposed CCS Partial Fill at the LRP Price

CCS Partial Fill at the LRP #1

The Exchange Market is 200 shares bid at the price of $20.10 and 200 shares offered at a price of $20.15. The price point of $20.05 is a designated LRP. At the price points of $20.09 down to $20.05 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at the price points of $20.09 down to $20.05.[11] In addition, the CCS interest file indicates that the interest at the prices $20.08, $20.07 and $20.05 is available to provide a partial fill. A customer sends the Exchange a sell order for 1200 shares with a limit price of $20.00. Enabling Exchange systems to access CCS interest to partially fill the order, the incoming limit order would execute against the 200 shares at the Exchange bid price of $20.10. The order would then execute against all the shares bid (indicated in *italic* typeface) at each price point down to the LRP price of $20.05. Exchange systems

[10] LRPs are pre-determined price points that temporarily convert the automatic Exchange market to an auction market in order to dampen volatility when the market is experiencing a large price movement based on a security's typical trading characteristics or market conditions over short periods of time during the trading day. LRPs allow the DMM to solicit additional liquidity.

[11] A DMM cannot provide CCS interest past the LRPs because that interest will not be executed. Pursuant to current NYSE [sic] Rules, once an LRP is reached interest may not trade through the price point.

would execute an additional 200 shares of the order against the CCS interest at the LRP price of $20.05 for a total 900 shares of the incoming limit order executed. The original order will execute a total of 900 shares above its limit price before the remaining 300 shares of the order is posted on the Display Book at its limit price of $20.00.

CCS interest	Shares bid	Bid price	Offer price	Shares offered	CCS interest
	.....	.....	*$20.15*	*200*	200
200	*200*	*$20.10*	.....	.....	.....
200	*100*	$20.09	.....	.....	.....
200PF	*100*	$20.08	.....	.....	.....
200PF	*100*	$20.07	.....	.....	.....
200	*100*	$20.06	.....	.....	.....
200PF	*100*	$20.05 *LRP*	.....	.....	.....
0	0	$20.04	.....	.....	.....
0	0	$20.03	.....	.....	.....
0	0	$20.02	.....	.....	.....
0	0	$20.01	.....	.....	.....
0	0	$20.00	.....	.....	.....

CCS Partial Fill at the LRP # 2

The Exchange Market is 200 shares bid at the price of $20.10 and 200 shares offered at a price of $20.15. The price point of $20.05 is a designated LRP. At the price points of $20.09 and $20.08 there are 100 shares bid. The CCS interest file is willing to provide 200 shares of additional bid liquidity at the price points of $20.09 down to $20.05. In addition, the CCS interest file indicates that the interest at the prices $20.08, $20.07 and $20.05 is available to provide a partial fill. A customer sends the Exchange a sell order for 700 [12] shares with a limit price of $20.00. Enabling Exchange systems to access CCS interest to partially fill the order, the incoming limit order would execute against the 200 shares at the Exchange bid price of $20.10. The order would then execute 100 shares against the shares bid at $20.09 and $20.08. Exchange systems would execute an additional 200 shares of the order against the CCS interest at the LRP price of $20.05 for a total 600 shares of the incoming limit order executed. The remaining 100 shares of the order will be posted on the Display Book at its limit price of $20.00.

CCS interest	Shares bid	Bid price	Offer price	Shares offered	CCS interest
	.....	.....	$20.15	200	200
200	*200*	*$20.10*	.....	.....	.....
200	*100*	$20.09	.....	.....	.....
200 PF	*100*	$20.08	.....	.....	.....
200 PF	0	$20.07	.....	.....	.....
200	0	$20.06	.....	.....	.....
200 PF	0	$20.05 *LRP*	.....	.....	.....
0	0	$20.04	.....	.....	.....
0	0	$20.03	.....	.....	.....
0	0	$20.02	.....	.....	.....
0	0	$20.01	.....	.....	.....
0	0	$20.00	.....	.....	.....

When accessing CCS interest to partially execute an order, Exchange systems will not review the liquidity available at one minimum price variation better than the execution price to determine if the number of shares that CCS interest is willing to provide at the better price is greater than the number of shares at the price point where the order would execute and then post. The order will be executed against the CCS interest where the remaining shares of the order will ultimately be quoted or in the event an LRP is reached, at the LRP price.[13]

Whether the order is executed at the price where the remaining shares will be quoted or at the LRP price, Exchange systems will not access CCS interest designated PF until all other interest on the Display Book up to the price point is executed in full. CCS interest therefore, remains the interest of last resort because Exchange systems will access CCS interest to provide a partial execution to an incoming limit order only after all it has satisfied protected interest on away market centers and all other interest on the Display Book eligible to be executed against the order is executed in full. In all instances where Exchange systems access CCS to provide a partial execution of an order, the customer order is afforded the ability for price improvement within the parameters of the rule.

The Exchange therefore proposes to amend NYSE Amex Equities Rule 1000, to allow Exchange systems to access available CCS interest in order to provide an incoming order with a fuller execution. The Exchange proposes to amend NYSE Amex Equities Rule 1000(e)(iii)(A)(4) to include this provision and renumber former subparagraph (e)(iii)(A)(4) to (e)(iii)(A)(5).

[12] If the order were for 600 shares Exchange systems would have executed 200 shares at the bid price of $20.10, 100 shares at the price of $20.09. The Exchange will execute the remaining 300 shares at the price of $20.08 against the 100 shares of ''Shares Bid'' and CCS interest at the price point. However, because the 700 share order could not be completely filled at the price of $20.08 including CCS interest, it is executed based on the rules governing partial executions and will thus be executed as illustrated in the example.

[13] If the DMM did not designate the CCS interest eligible for partial fill, then the CCS interest would not participate in the execution and the remaining shares of the order would be quoted.

The Exchange believes that the instant proposal to maximize an order's partial execution by allowing Exchange systems to access CCS interest removes the current impediment from a limit order accessing all the liquidity available on the Display Book. The proposed modification increases the opportunities for executing a greater number of shares of the incoming order and exposes it to additional opportunity for price improvement. The Exchange believes that the proposal therefore contributes to perfect the mechanism of a free and open market and ultimately protects investors and the public interest.

Administrative Amendments to NYSE Amex Equities Rule 1000

The Exchange further proposes to include references to its Do Not Ship Order [14] in NYSE Amex Equities Rule 1000 subparagraphs (e)(ii), (e)(ii)(C) and (e)(iii)(A)(5) to illustrate the additional order type that requires the same execution handling as Reg. NMS-compliant IOC.

Finally, the Exchange proposes to delete the redundant text of NYSE Amex Equities Rule 1000 subparagraph (e)(ii)(D) because it restates the information contained in subparagraph (e)(ii) above it.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') [15] for these proposed rule changes is the requirement under Section 6(b)(5) [16] that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change supports these principles in that it seeks to protect the investor and the public interest by allowing an incoming limit order to execute against all the liquidity available on the Exchange.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. In addition, the Commission seeks comment on whether the proposed handling of incoming orders receiving partial fills that include CCS interest is consistent with the Act and, in particular, whether the proposed rule changes are designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

Specifically, in certain situations, the Exchange's proposal would allow the DMM's CCS interest to participate in partial fills at the best possible price (from the DMM's perspective), even when this price is inferior to all the non-CCS interest participating in the same execution. Currently, NYSE Amex's rules allow for CCS participation only when the incoming order will be completely filled, and the DMM's CCS interest may not participate in an execution at a price inferior to the completion price.

The Commission notes the fact pattern presented above under the heading ''CCS Partial Fill at the LRP #2'' where, under NYSE Amex's current rules, an incoming order of 600 shares would be completed at $20.08 (200, 100, and 100 shares of non-CCS interest at $20.10, $20.09, and $20.08 respectively, and 200 shares of CCS interest also at $20.08).[17] In contrast, under the proposal, an incoming order of 700 shares that outsizes the available non-CCS interest would be partially completed by CCS interest at the LRP price, and thus would receive an execution of 200 shares against CCS interest at $20.05, rather than $20.08, before the system quotes the residual 100 shares at $20.05, the LRP.[18]

Absent the proposed rule change, a 700-share incoming order would result in a partial fill without any CCS participation, with 300 shares unexecuted and quoting at the LRP. Thus, the Commission notes that the proposal may benefit the incoming order by immediately and automatically executing additional shares at the order's limit price or at the LRP price, as applicable. However, the Commission is interested in commenters' views on the proposed expansion of DMMs' CCS capabilities for partial fills and, in particular, on the proposed execution of CCS interest at the limit price of the order or the LRP price, as the case may be, even when no other interest resides at that price. To illustrate, in the ''CCS Partial Fill at the LRP #2'' example above, the proposal would result in a CCS interest execution at $20.05 (*i.e.,* the LRP price). Is another price more appropriate? For example, should such CCS interest be executed at $20.08 (the last price at which there is non-CCS interest)? Another price? Why or why not?

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–NYSEAmex-2009–46 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEAmex-2009–46. 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

[14] *See* NYSE Amex Equities Rule 13.

[15] 15 U.S.C. 78a.

[16] 15 U.S.C. 78f(b)(5).

[17] *See supra* note 12.

[18] *See supra* text accompanying note 12.

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 am and 3 pm. 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–NYSEAmex–2009–46 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19140 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60432; File No. SR–FINRA–2009–053]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Incorporated NYSE Rules 12 and 282 To Conform to Amendments Made by NYSE

August 4, 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 July 30, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Incorporated NYSE Rules 12 (''Business Day'') and 282 (Buy-in Procedures) [4] to conform to rule changes by the New York Stock Exchange LLC (''NYSE'') to its versions of Rules 12 and 282.[5]

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is proposing changes to Incorporated NYSE Rules 12 [6] and 282 [7] to conform these rules to amendments made by NYSE to allow customers to transmit orders for execution on the NYSE with the settlement instructions of ''cash'', ''next day'' and ''seller's option'' (collectively referred to herein as ''non-regular way settlement'') directly to a Floor broker for manual execution.

According to the NYSE filing,[8] after adopting amendments in March 2009 requiring that all orders submitted to the NYSE be submitted for regular way settlement (i.e., settlement on the third business day following trade date),[9] the NYSE recognized that there was a continuing need for the availability of orders with non-regular way settlement instructions. NYSE customers have expressed that certain trading strategies and/or expiration of certain trading instruments (e.g., rights and warrants) require the ability to submit orders to the NYSE that contain instructions for execution with non-regular way settlement. To accommodate the needs of its customers, the NYSE adopted NYSE Rule 14 (Non-Regular Way Settlement Instructions for Orders) to allow customers to directly transmit an order containing instructions for cash, next day and seller's option settlement to a Floor broker for representation in the trading crowd. In addition, the NYSE added Rule 14 references to several NYSE rules that relate in some way to these settlement instructions.

Under the NYSE filing, references to proposed NYSE Rule 14 (Non-Regular Way Settlement Instructions for Orders) and non-regular way settlement instructions were added to NYSE Rule 12 (''Business Day''), and specific provisions related to orders submitted with cash settlement instructions were added to NYSE Rule 282 (Buy-in Procedures).

FINRA is making conforming changes to Incorporated NYSE Rules 12 and 282 to ensure consistency with NYSE's versions of Rules 12 and 282.[10]

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see* FINRA *Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[5] *See* Securities Exchange Act Release No. 60216 (July 1, 2009), 74 FR 33283 (July 10, 2009) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2009–59).

[6] Incorporated NYSE Rule 12 defines the term ''business day.''

[7] Incorporated NYSE Rule 282 sets forth buy-in procedures.

[8] *See supra* note 5.

[9] *See* Securities Exchange Act Release No. 59446 (February 25, 2009), 74 FR 9323 (March 3, 2009) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2009–17).

[10] Pursuant to Rule 17d–2 under the Exchange Act, NASD, NYSE, and NYSE Regulation, Inc., entered into an agreement (''Agreement'') to reduce regulatory duplication for firms that are Dual Members by allocating certain regulatory responsibilities for selected NYSE rules from NYSE Regulation to FINRA. The Agreement includes a list of all those rules (''Common Rules'') for which FINRA has assumed examination, enforcement and surveillance responsibilities under the Agreement relating to compliance by Dual Members to the extent that such responsibilities involve member firm regulation. *See* Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (Notice of Filing and Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities). The Common Rules are the same NYSE rules that FINRA has incorporated into its rulebook. *See* Securities Exchange Act Release No. 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (Notice of Filing and Order Granting Accelerated Approval of

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is necessary and appropriate to restore the ability of NYSE market participants to enter orders with other than ''regular way'' settlement instructions and maintain consistency with the NYSE's amendments to its Rules 12 and 282.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest, (ii) impose any significant burden on competition, and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A)[12] of the Act and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative until 30 days after the date of filing.[14] However, Rule 19b–4(f)(6)(iii)[15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative immediately. Specifically, FINRA states that waiving the 30-day operative delay will allow FINRA's Incorporated NYSE Rules to maintain their status as Common Rules under the Agreement. Accordingly, the Commission believes that allowing the proposed rule change to become operative immediately is consistent with the protection of investors and the public interest, because it will enable FINRA to maintain consistency between its rules and NYSE's rules for purposes of the Agreement.[16]

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–FINRA–2009–053 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–FINRA–2009–053. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2009–053 and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19142 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

Proposed Rule Change to Incorporate Certain NYSE Rules Relating to Member Firm Conduct; File No. SR–NASD–2007–054).

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] *Id.*

[15] 17 CFR 240.19b–4(f)(6)(iii). 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. FINRA has satisfied this requirement.

[16] For purposes only of waiving the 30-day operative delay of the proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60430; File No. SR–NASDAQ–2009–072]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify Fee Schedule for Members Using the NASDAQ Market Center

August 4, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on July 24, 2009, The NASDAQ Stock Market LLC (''NASDAQ'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. Pursuant to Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(1) thereunder,[4] NASDAQ has designated this proposal as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule, which renders the proposed rule change effective upon filing.

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

NASDAQ proposes to streamline and clarify the fee schedule for members using the NASDAQ Market Center. No fee charged or credit offered is being modified. The text of the proposed rule change is attached as Exhibit 5 [sic] and also is available at *http://nasdaqomx.cchwallstreet.com/*, at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is making clerical changes to NASDAQ Rule 7018 to streamline and simplify its fee schedule. First, NASDAQ is moving all references to securities priced under $1 to a new subsection 7018(b) and renumbering the remaining subsections (c) through (j). Second, NASDAQ is combining Rule 7018(a)(2) and (a)(3), both of which govern trading of securities listed on the New York Stock Exchange, into a single paragraph and re-numbering current paragraph 7018(a)(4). Third, NASDAQ is eliminating multiple instances of redundant or superfluous text. None of the clerical changes will modify any fee assessed or credit earned for trading on the NASDAQ Market Center.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. NASDAQ is making clerical changes to enhance the clarity of its fee schedule without impacting any of the fees charged or credits offered to members.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [7] and subparagraph (f)(1) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2009–072 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–NASDAQ–2009–072. 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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2009–072, and should be submitted on or before September 1, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–19141 Filed 8–10–09; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(a)(ii).

[8] 17 CFR 240.19b–4(f)(1).

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Delegation of Authority No. 326]

Delegation by the Secretary of State as Chairperson of the Board of the Millennium Challenge Corporation to the Vice President for Compact Implementation

By virtue of the authority vested in me as Chairperson of the Board of Directors of the Millennium Challenge Corporation by Section 18 of Article I of the Bylaws and other relevant provisions of the bylaws and law, including Section 614(d) of the Millennium Challenge Act, 2003, and Section 1(a)(4) of the State Department Basic Authorities Act of 1956, I hereby delegate to Darius Mans, Vice President for Compact Implementation, to the extent authorized by law, the functions, duties and powers of the chief executive officer, to be exercised subject to my direction.

Any authorities covered by this delegation may also be exercised by me and may be redelegated to the extent authorized by law.

This delegation shall enter into effect on July 31, 2009 and shall expire upon the appointment and entry upon duty of a new Chief Executive Officer pursuant to Section 604(b) of the Millennium Challenge Act of 2003.

This delegation of authority shall be published in the **Federal Register.**

Dated: July 15, 2009/

Hillary Rodham Clinton,

Secretary of State, Department of State.

[FR Doc. E9–19218 Filed 8–10–09; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–570 (Sub–No. 3X)]

Palouse River & Coulee City Railroad, Inc.—Abandonment Exemption—in Latah County, ID

Palouse River & Coulee City Railroad, Inc. (PRCC) has filed a verified notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon 2.98 miles of rail line consisting of the following three segments between: (1) Milepost 84.0, at the Washington-Idaho State line, and milepost 85.91, in Moscow, ID; (2) milepost 86.11 and milepost 86.9, in Moscow; and (3) milepost 85.5 and the end of the line at the intersection of A Street and Almon Street, in Moscow, Latah County, ID.[1] The line traverses United States Postal Service Zip Code 83843.

PRCC has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on September 10, 2009, unless stayed pending reconsideration.[2] Petitions to stay that do not involve environmental issues,[3] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[4] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by August 21, 2009. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by August 31, 2009, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to PRCC's representative: Karl Morell, Ball Janik LLP, 1455 F Street, NW., Suite 225, Washington, DC 20005.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

PRCC has filed environmental and historic reports that address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by August 14, 2009. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), PRCC shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by PRCC's filing of a notice of consummation by August 11, 2010, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at http://*www.stb.dot.gov.*

Decided: August 6, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E9–19280 Filed 8–10–09; 8:45 am]

BILLING CODE 4915–01–P

[1] PRCC's segment located between milepost 85.91 and milepost 86.11 was authorized for abandonment in *Palouse River & Coulee City Railroad. Inc.—Abandonment Exemption—in Latah County, ID* (STB served August 17, 2007).

[2] Pursuant to 49 CFR 1152.50(d)(2), the railroad must file a verified notice with the Board at least 50 days before the abandonment or discontinuance is to be consummated. PRCC has indicated a proposed consummation date of September 9, 2009, but, because the verified notice was filed on July 22, 2009, consummation may not take place prior to September 10, 2009.

[3] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[4] Each OFA must be accompanied by the filing fee, which currently is set at $1,500. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA 2009–0040]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval to renew the following information collection: Tribal Transit Program (OMB Number: 2132–0567). The information to be collected for this program is to ensure FTA's compliance with applicable Federal laws and the Common Grant Rule. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on May 13, 2009.

DATES: Comments must be submitted before September 10, 2009. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Sylvia L. Marion, Office of Administration, Office of Management Planning, (202) 366–6680.

SUPPLEMENTARY INFORMATION:

Title: Tribal Transit Program.

Abstract: FTA's Tribal Transit Program provides financial assistance to federally recognized Indian tribes for public transportation services on and around Indian reservations located in rural areas. Eligibility is based on the statutory provisions of 49 U.S.C. 5311-Nonurbanized Area Formula Program. The provisions of the American Recovery and Reinvestment Act of 2009, Title 49 U.S.C. section 5311, 49 CFR part 18 Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (the Common Grant Rule), and prudent administration of Federal grant funds dictate that grantor agencies review applications for Federal assistance to assure eligibility and other criteria, as appropriate, and monitor approved projects to ensure timely expenditure of Federal funds by grant recipients. Information collected under this program is structured to comply with Federal mandates. The reporting requirements are submitted by recipients in two stages: the application stage and the project management stage.

The American Recovery Act of 2009 (ARRA) established funding for the Tribal Transit Program. This program is a $17,000,000 discretionary grant program to support capital investments for public transit services that serve Indian tribes and Alaska Native villages. To meet the requirements of the American Recovery Act, FTA requested an emergency approval from OMB for the Tribal Transit Program. OMB approved FTA's emergency request for approval on March 17, 2009. The OMB Control Number is 2132–0567. FTA published a **Federal Register** Notice on March 23, 2009, for Public Transportation on Indian Reservations Program: Tribal Transit Program under the American Recovery and Reinvestment Act of 2009.

Estimated Total Annual Burden: 3,195 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: FTA Desk Officer.

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.

Issued on: August 5, 2009.

Ann M. Linnertz,

Associate Administration for Administration.

[FR Doc. E9–19113 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier Federal Register publications, they are not repeated here. Requests for modification of special permits (e.g., to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix ''M'' denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before August 26, 2009.

Address Comments to: Record Center, Pipeline and Hazardous Materials, Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, Southeast, Washington, DC or at *http://regulations.gov.*

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on August 6, 2009.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
MODIFICATION SPECIAL PERMITS				
11458–M		Plaze Incorporated, St. Clair, MO.	49 CFR Part 107; 172.203(a); 173.150(b); 173.152(b); 173.154(b); 173.155(b); 173.306(a) and (h).	To modify the special permit to authorize another method of packaging the aerosol cans.
11489–M		TRW Washington, MI	49 CFR 172.320; 173.56(b).	To modify the special permit authorize an additional Division 1.4C explosives articles.
12046–M		University of Colorado, Denver (Former Grantee; UDC) Aurora, CO.	49 CFR 171 to 178	To modify the special permit to extend the authorization of transportation in commerce of various hazardous materials to locations out of the forty miles radius of UDC's Aurora Campus.
12629–M		TEA Technologies, Inc., Amarillo, TX.	49 CFR 180.205	To modify the special permit to authorize an additional cylinder.
13249–M		Creative Engineers, Inc. York, PA.	49 CFR 173.211; 180.205	To modify the special permit to authorize an additional cylinder.
14157–M		Worthington Cylinders of Canada Corporation, Tilbury, Ontario.	49 CFR 173.302a	To modify the special permit to change the type of steel specified; to change the impact test from each lot of 200 or less cylinders to each third lot of 200 or less third lot of 200 or less cylinders and to remove paragraph 178.37(j)(3).
14781–M		CCH Equipment Company, Dallas, TX.	49 CFR 173.302a and 173.314.	To reissue the special permit originally issued on an emergency basis to authorize the transportation in commerce of compressed hydrogen in manifolded and framed non-DOT specification seamless steel cylinders originally certified as Specification DOT–107A seamless steel tank car tanks.

[FR Doc. E9–19247 Filed 8–10–09; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before September 10, 2009.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, Southeast, Washington DC or at *http://fdms.gov.*

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on August 4, 2009.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
NEW SPECIAL PERMITS				
14887–N		S.C. Johnson & Sons, Sturtevant, WI.	49 CFR 173.306(a)(3)(v)	To authorize the transportation in commerce of certain aerosols containing a Division 2.2 compressed gas in certain non-refillable aerosol containers which are not subject to the hot water bath test. (mode 1)
14888–N		Boost Oxygen LLC, Bridgeport, CT.	49 CFR 173.306(a)(1)	To authorize the transportation in commerce of an 18 ounce capacity DOT 2Q container containing an oxygen mixture as Consumer commodity when transported by motor vehicle. (mode 1)

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
14889–N	.....	Albemarle Corporation, Baton Rouge.	49 CFR 180.605(d)	To authorize the transportation in commerce of certain UN portable tanks that are waived from the requirement to perform an internal examination as part of the intermediate 2.5 year periodic inspection when used exclusively for the transport of certain organometallic substances. (modes 1, 2, 3)
14890–N	.....	Liquid Transport Corp., Indianapolis, IN.	49 CFR 180.407(e) and (i)	To authorize the transportation in commerce of certain MC–307 and DOT–407 cargo tank motor vehicles containing certain Class 3 (flammable) materials that have not had internal visual inspections or thickness testing. (mode 1)
14892–N	.....	Norris Cylinder Company, Longview, TX.	49 CFR 173.301(a), 173.304a, 180.205(c), (f) and (g) and 180.215.	To authorize the manufacture, marking, sale and use of a non-DOT specification cylinder similar to a DOT 3AA which is authorized a 10 year retest period if qualified by ultrasonic examination. (modes 1, 2, 3, 4, 5)

[FR Doc. E9–19248 Filed 8–10–09; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–26367]

Motor Carrier Safety Advisory Committee Public Meeting

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Motor Carrier Safety Advisory Committee meeting.

SUMMARY: FMCSA announces that the Motor Carrier Safety Advisory Committee (MCSAC) will hold a committee meeting. The meeting is open to the public.

DATES: The meeting will be held on September 2, 2009, from 1 p.m. to 4 p.m. Eastern Daylight Time (EDT).

ADDRESSES: The meeting will be held at the U.S. Department of Transportation, Conference Center, Oklahoma Room, West Building, Ground Floor, located at 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Miller, Chief, Strategic Planning and Program Evaluation Division, Office of Policy Plans and Regulation, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–1258, *mcsac@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) required the Secretary of the U.S. Department of Transportation to establish a MCSAC in the FMCSA. The advisory committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and motor carrier safety regulations. The advisory committee operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App 2) and is comprised of 15 members appointed by the FMCSA Administrator.

II. Meeting Participation

The meeting is open to the public and FMCSA invites participation by all interested parties, including motor carriers, drivers, and representatives of motor carrier associations. Please note that attendees will need to be pre-cleared in advance of the meeting in order to expedite entry into the building. By August 26, 2009, please e-mail *mcsac@dot.gov* if you plan to attend the meeting to facilitate the pre-clearance security process. For information on facilities or services for individuals with disabilities or to request special assistance, please e-mail your request to *mcsac@dot.gov* by August 26, 2009. As a general matter, the advisory committee will make time available for public comments at the meeting at 3 p.m. EDT. The time available will be reasonably divided among those who have signed up to address the advisory committee; however, no one will have more than 15 minutes. Individuals wishing to address the advisory committee should send an e-mail to *mcsac@dot.gov* by close of business on August 28, 2009. Individuals with a desire to present written materials to the advisory committee should submit written comments identified by Federal Docket Management System (FDMC) Docket Number FMCSA–2006–26367 using any of the following methods:

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

Issued on: August 4, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–19237 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2009–35]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: This notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or

omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 31, 2009.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0709 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for 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).

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas (202) 267–7626 or Ralen Gao (202) 267–3168, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 5, 2009.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2009–0709.

Petitioner: Wings of Mercy, Inc.

Section of 14 CFR Affected: 14 CFR 61.113(c).

Description of Relief Sought: Wings of Mercy, Inc., seeks relief from § 61.113(c) to allow for reimbursement of volunteer pilots for fuel costs incurred in conducting charitable flights.

[FR Doc. E9–19111 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2009–34]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: This notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 31, 2009.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0702 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for 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).

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas (202) 267–7626 or Ralen Gao (202) 267–3168, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 5, 2009.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2009–0702.

Petitioner: Mercy Medical Airlift, Angel Flight Mid-Atlantic and Airlift Hope of America.

Section of 14 CFR Affected: 14 CFR 61.113(c).

Description of Relief Sought: Mercy Medical Airlift, Angel Flight Mid-Atlantic and Airlift Hope of America seek relief from § 61.113(c) to allow for reimbursement of volunteer pilots for fuel costs incurred in conducting charitable flights.

[FR Doc. E9–19112 Filed 8–10–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request—Fiduciary Powers of Savings Associations

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before October 13, 2009.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., and 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) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Judi McCormick. (202) 906–5636, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Fiduciary Powers of Savings Associations.

OMB Number: 1550–0037.

Form Numbers: 1240.

Regulation requirement: 12 CFR part 550.

Description: Under 12 U.S.C. 1464(n), the OTS regulates the fiduciary activities of Federal savings associations. Part 550 of 12 CFR contains the regulations that savings associations must follow when conducting fiduciary activities.

OTS will use the information in order to ensure that the proposed activities conform to applicable statutes and regulations and are properly organized and conducted.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 113.

Estimated Number of Responses: 113.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 3,051 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: August 6, 2009.

Deborah Dakin,

Acting Chief Counsel, Office of Thrift Supervision.

[FR Doc. E9–19217 Filed 8–10–09; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Peoples Community Bank, West Chester, OH; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision (OTS) has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for Peoples Community Bank, West Chester, Ohio (OTS No. 08097), on July 31, 2009.

Dated: August 4, 2009.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. E9–18968 Filed 8–10–09; 8:45 am]

BILLING CODE 6720–01–M

Federal Register

Tuesday,
August 11, 2009

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 483

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2010; Minimum Data Set, Version 3.0 for Skilled Nursing Facilities and Medicaid Nursing Facilities; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 483

[CMS–1410–F]

RIN 0938–AP46

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2010; Minimum Data Set, Version 3.0 for Skilled Nursing Facilities and Medicaid Nursing Facilities

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2010. In addition, it recalibrates the case-mix indexes so that they more accurately reflect parity in expenditures related to the implementation of case-mix refinements in January 2006. It also discusses the results of our ongoing analysis of nursing home staff time measurement data collected in the Staff Time and Resource Intensity Verification project, as well as a new Resource Utilization Groups, version 4 case-mix classification model for FY 2011 that will use the updated Minimum Data Set 3.0 resident assessment for case-mix classification. In addition, this final rule discusses the public comments that we have received on these and other issues, including a possible requirement for the quarterly reporting of nursing home staffing data, as well as on applying the quality monitoring mechanism in place for all other SNF PPS facilities to rural swing-bed hospitals. Finally, this final rule revises the regulations to incorporate certain technical corrections.

DATES: *Effective Date:* This final rule becomes effective on October 1, 2009.

FOR FURTHER INFORMATION CONTACT: Ellen Berry, (410) 786–4528 (for information related to clinical issues). Trish Brooks, (410) 786–4561 (for information related to Resident Assessment Protocols (RAPs) under the Minimum Data Set (MDS)). Jeanette Kranacs, (410) 786–9385 (for information related to the development of the payment rates and case-mix indexes). Abby Ryan, (410) 786–4343 (for information related to the STRIVE project). Jean Scott, (410) 786–6327 (for information related to the request for comment on the possible quarterly reporting of nursing home staffing data). Bill Ullman, (410) 786–5667 (for information related to level of care determinations, consolidated billing, and general information).

SUPPLEMENTARY INFORMATION: To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

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Abbreviations

In addition, because of the many terms to which we refer by abbreviation in this final rule, we are listing these abbreviations and their corresponding terms in alphabetical order below:

ADLs Activities of Daily Living
AIDS Acquired Immune Deficiency Syndrome
AOTA American Occupational Therapy Association
APTA American Physical Therapy Association
ARD Assessment Reference Date
ASHA American Speech-Language-Hearing Association
BBA Balanced Budget Act of 1997, Public Law 105–33
BBRA Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, Public Law 106–113
BIMS Brief Interview for Mental Status
BIPA Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Public Law 106–554
CAA Care Area Assessment
CAH Critical Access Hospital

CAM Confusion Assessment Method
CARE Continuity Assessment Record and Evaluation
CAT Care Area Trigger
CBSA Core-Based Statistical Area
CFR Code of Federal Regulations
CMI Case-Mix Index
CMS Centers for Medicare & Medicaid Services
CMSO Center for Medicaid and State Operations
DRA Deficit Reduction Act of 2005, Public Law 109–171
DSM–IV Diagnostic and Statistical Manual of Mental Disorders, 4th Revision
FQHC Federally Qualified Health Center
FR **Federal Register**
FY Fiscal Year
GAO Government Accountability Office
HCPCS Healthcare Common Procedure Coding System
HHA Home Health Agency
HIPPS Health Insurance Prospective Payment System
HIT Health Information Technology
HIV Human Immunodeficiency Virus
IFC Interim Final Rule with Comment Period
IPPS Hospital Inpatient Prospective Payment System
IRF Inpatient Rehabilitation Facility
LTCH Long-Term Care Hospital
MAC Medicare Administrative Contractor
MMACS Medicare/Medicaid Automated Certification System
MDS Minimum Data Set
MIPPA Medicare Improvements for Patients and Providers Act of 2008, Public Law 110–275
MMA Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108–173
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007, Public Law 110–173
MSA Metropolitan Statistical Area
MS–DRG Medicare Severity Diagnosis-Related Group
NCQA National Committee for Quality Assurance
NF Nursing Facility
NRST Non-Resident Specific Time
NTA Non-Therapy Ancillary
OIG Office of the Inspector General
OMB Office of Management and Budget
OMRA Other Medicare Required Assessment
OSCAR Online Survey Certification and Reporting System
PAC Post-Acute Care
PHQ–9 9-Item Patient Health Questionnaire
PPS Prospective Payment System
QM Quality Measure
RAI Resident Assessment Instrument
RAND RAND Corporation
RAP Resident Assessment Protocol
RAVEN Resident Assessment Validation Entry
RFA Regulatory Flexibility Act, Public Law 96–354
RHC Rural Health Clinic
RIA Regulatory Impact Analysis
RST Resident Specific Time
RUG–III Resource Utilization Groups, Version 3
RUG–IV Resource Utilization Groups, Version 4
RUG–53 Refined 53-Group RUG–III Case-Mix Classification System
SCHIP State Children's Health Insurance Program
SNF Skilled Nursing Facility
SOM State Operations Manual
STM Staff Time Measurement
STRIVE Staff Time and Resource Intensity Verification
TEP Technical Expert Panel
UMRA Unfunded Mandates Reform Act, Public Law 104–4

I. Background

On May 12, 2009, we published a proposed rule (74 FR 22208) in the **Federal Register** (hereafter referred to as the FY 2010 proposed rule), setting forth updates to the payment rates used under the prospective payment system (PPS) for skilled nursing facilities (SNFs), for fiscal year (FY) 2010. Annual updates to the PPS rates for SNFs are required by section 1888(e) of the Social Security Act (the Act), as added by section 4432 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted on August 5, 1997), and amended by the Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113, enacted on November 29, 1999), the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554, enacted on December 21, 2000), and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, enacted on December 8, 2003). Our most recent annual update occurred in a final rule (73 FR 46416, August 8, 2008) that set forth updates to the SNF PPS payment rates for FY 2009. We subsequently published a correction notice (73 FR 56998, October 1, 2008) with respect to those payment rate updates.

A. Current System for Payment of Skilled Nursing Facility Services Under Part A of the Medicare Program

Section 4432 of the BBA amended section 1888 of the Act to provide for the implementation of a per diem PPS for SNFs, covering all costs (routine, ancillary, and capital-related) of covered SNF services furnished to beneficiaries under Part A of the Medicare program, effective for cost reporting periods beginning on or after July 1, 1998. In this final rule, we are updating the per diem payment rates for SNFs for FY 2010. Major elements of the SNF PPS include:

- *Rates.* As discussed in section I.F.1 of this final rule, we established per diem Federal rates for urban and rural areas using allowable costs from FY 1995 cost reports. These rates also included a ''Part B add-on'' (an estimate of the cost of those services that, before July 1, 1998, were paid under Part B but furnished to Medicare beneficiaries in a SNF during a Part A covered stay). We adjust the rates annually using a SNF market basket index, and we adjust them by the hospital inpatient wage index to account for geographic variation in wages. We also apply a case-mix adjustment to account for the relative resource utilization of different patient types. This adjustment utilizes a refined, 53-group version of the Resource Utilization Groups, version 3 (RUG–III) case-mix classification system, based on information obtained from the required resident assessments using the Minimum Data Set (MDS) 2.0. Additionally, as noted in the final rule for FY 2006 (70 FR 45028, August 4, 2005), the payment rates at various times have also reflected specific legislative provisions, including section 101 of the BBRA, sections 311, 312, and 314 of the BIPA, and section 511 of the MMA.
- *Transition.* Under sections 1888(e)(1)(A) and (e)(11) of the Act, the SNF PPS included an initial, three-phase transition that blended a facility-specific rate (reflecting the individual facility's historical cost experience) with the Federal case-mix adjusted rate. The transition extended through the facility's first three cost reporting periods under the PPS, up to and including the one that began in FY 2001. Thus, the SNF PPS is no longer operating under the transition, as all facilities have been paid at the full Federal rate effective with cost reporting periods beginning in FY 2002. As we now base payments entirely on the adjusted Federal per diem rates, we no longer include adjustment factors related to facility-specific rates for the coming FY.
- *Coverage.* The establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage. However, because the RUG–III classification is based, in part, on the beneficiary's need for skilled nursing care and therapy, we have attempted, where possible, to coordinate claims review procedures with the existing resident assessment process and case-mix classification system. This approach includes an administrative presumption that utilizes a beneficiary's initial classification in one of the upper 35 RUGs of the refined 53-group system to assist in making certain SNF level of care determinations. In the July 30, 1999 final rule (64 FR 41670), we indicated that we would announce any changes to the guidelines for Medicare level of care determinations related to modifications

in the RUG–III classification structure (*see* section III.B.5 of this final rule for a discussion of the relationship between the current case-mix classification system and SNF level of care determinations, and section III.C.4 for a discussion of this process in the context of the upcoming conversion to version 4 of the RUGs (RUG–IV)).

• *Consolidated Billing.* The SNF PPS includes a consolidated billing provision that requires a SNF to submit consolidated Medicare bills to its fiscal intermediary or Medicare Administrative Contractor for almost all of the services that its residents receive during the course of a covered Part A stay. In addition, this provision places with the SNF the Medicare billing responsibility for physical, occupational, and speech-language therapy that the resident receives during a noncovered stay. The statute excludes a small list of services from the consolidated billing provision (primarily those of physicians and certain other types of practitioners), which remain separately billable under Part B when furnished to a SNF's Part A resident. A more detailed discussion of this provision appears in section III.G of this final rule.

• *Application of the SNF PPS to SNF services furnished by swing-bed hospitals.* Section 1883 of the Act permits certain small, rural hospitals to enter into a Medicare swing-bed agreement, under which the hospital can use its beds to provide either acute or SNF care, as needed. For critical access hospitals (CAHs), Part A pays on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, in accordance with section 1888(e)(7) of the Act, these services furnished by non-CAH rural hospitals are paid under the SNF PPS, effective with cost reporting periods beginning on or after July 1, 2002. A more detailed discussion of this provision appears in section III.H of this final rule.

B. Requirements of the Balanced Budget Act of 1997 (BBA) for Updating the Prospective Payment System for Skilled Nursing Facilities

Section 1888(e)(4)(H) of the Act requires that we provide for publication annually in the **Federal Register**:

1. The unadjusted Federal per diem rates to be applied to days of covered SNF services furnished during the upcoming FY.
2. The case-mix classification system to be applied with respect to these services during the upcoming FY.
3. The factors to be applied in making the area wage adjustment with respect to these services.

Along with other revisions discussed later in this preamble, this final rule provides these required annual updates to the Federal rates.

C. The Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA)

There were several provisions in the BBRA that resulted in adjustments to the SNF PPS. We described these provisions in detail in the SNF PPS final rule for FY 2001 (65 FR 46770, July 31, 2000). In particular, section 101(a) of the BBRA provided for a temporary 20 percent increase in the per diem adjusted payment rates for 15 specified RUG–III groups. In accordance with section 101(c)(2) of the BBRA, this temporary payment adjustment expired on January 1, 2006, upon the implementation of case-mix refinements (*see* section I.F.1. of this final rule). We included further information on BBRA provisions that affected the SNF PPS in Program Memorandums A–99–53 and A–99–61 (December 1999).

Also, section 103 of the BBRA designated certain additional services for exclusion from the consolidated billing requirement, as discussed in greater detail in section III.G of this final rule. Further, for swing-bed hospitals with more than 49 (but less than 100) beds, section 408 of the BBRA provided for the repeal of certain statutory restrictions on length of stay and aggregate payment for patient days, effective with the end of the SNF PPS transition period described in section 1888(e)(2)(E) of the Act. In the final rule for FY 2002 (66 FR 39562, July 31, 2001), we made conforming changes to the regulations at § 413.114(d), effective for services furnished in cost reporting periods beginning on or after July 1, 2002, to reflect section 408 of the BBRA.

D. The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA)

The BIPA also included several provisions that resulted in adjustments to the SNF PPS. We described these provisions in detail in the final rule for FY 2002 (66 FR 39562, July 31, 2001). In particular:

• Section 203 of the BIPA exempted CAH swing-beds from the SNF PPS. We included further information on this provision in Program Memorandum A–01–09 (Change Request #1509), issued January 16, 2001, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/a0109.pdf.*

• Section 311 of the BIPA revised the statutory update formula for the SNF market basket, and also directed us to conduct a study of alternative case-mix classification systems for the SNF PPS. In 2006, we submitted a report to the Congress on this study, which is available online at *http://www.cms.hhs.gov/SNFPPS/Downloads/RC_2006_PC-PPSSNF.pdf.*

• Section 312 of the BIPA provided for a temporary increase of 16.66 percent in the nursing component of the case-mix adjusted Federal rate for services furnished on or after April 1, 2001, and before October 1, 2002; accordingly, this add-on is no longer in effect. This section also directed the Government Accountability Office (GAO) to conduct an audit of SNF nursing staff ratios and submit a report to the Congress on whether the temporary increase in the nursing component should be continued. The report (GAO–03–176), which GAO issued in November 2002, is available online at *http://www.gao.gov/new.items/d03176.pdf.*

• Section 313 of the BIPA repealed the consolidated billing requirement for services (other than physical, occupational, and speech-language therapy) furnished to SNF residents during noncovered stays, effective January 1, 2001.

• Section 314 of the BIPA corrected an anomaly involving three of the RUGs that section 101(a) of the BBRA had designated to receive the temporary payment adjustment discussed above in section I.C. of this final rule. (As noted previously, in accordance with section 101(c)(2) of the BBRA, this temporary payment adjustment expired upon the implementation of case-mix refinements on January 1, 2006.)

• Section 315 of the BIPA authorized us to establish a geographic reclassification procedure that is specific to SNFs, but only after collecting the data necessary to establish a SNF wage index that is based on wage data from nursing homes. To date, this has proven to be infeasible due to the volatility of existing SNF wage data and the significant amount of resources that would be required to improve the quality of that data.

We included further information on several of the BIPA provisions in Program Memorandum A–01–08 (Change Request #1510), issued January 16, 2001, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/a0108.pdf.*

E. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)

The MMA included a provision that results in a further adjustment to the SNF PPS. Specifically, section 511 of the MMA amended section 1888(e)(12)

of the Act, to provide for a temporary increase of 128 percent in the PPS per diem payment for any SNF residents with Acquired Immune Deficiency Syndrome (AIDS), effective with services furnished on or after October 1, 2004. This special AIDS add-on was to remain in effect until ''* * * the Secretary certifies that there is an appropriate adjustment in the case mix * * * to compensate for the increased costs associated with [such] residents * * *.'' The AIDS add-on is also discussed in Program Transmittal #160 (Change Request #3291), issued on April 30, 2004, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/r160cp.pdf*. As discussed in the SNF PPS final rule for FY 2006 (70 FR 45028, August 4, 2005), we did not address the certification of the AIDS add-on in that final rule's implementation of the case-mix refinements, thus allowing the temporary add-on payment created by section 511 of the MMA to remain in effect.

For the limited number of SNF residents that qualify for the AIDS add-on, implementation of this provision results in a significant increase in payment. For example, using FY 2007 data, we identified slightly more than 2,700 SNF residents with a diagnosis code of 042 (Human Immunodeficiency Virus (HIV) Infection). For FY 2010, an urban facility with a resident with AIDS in RUG group ''SSA'' would have a case-mix adjusted payment of $252.95 (*see* Table 4) before the application of the MMA adjustment. After an increase of 128 percent, this urban facility would receive a case-mix adjusted payment of approximately $576.73. A further discussion of the AIDS add-on in the context of research conducted during the recent STRIVE study appears in section III.C.5 of this final rule.

In addition, section 410 of the MMA contained a provision that excluded from consolidated billing certain practitioner and other services furnished to SNF residents by rural health clinics (RHCs) and Federally Qualified Health Centers (FQHCs), as discussed in section III.G of this final rule.

F. Skilled Nursing Facility Prospective Payment—General Overview

We implemented the Medicare SNF PPS effective with cost reporting periods beginning on or after July 1, 1998. This PPS pays SNFs through prospective, case-mix adjusted per diem payment rates applicable to all covered SNF services. These payment rates cover all costs of furnishing covered SNF services (routine, ancillary, and capital-related costs) other than costs associated with approved educational activities. Covered SNF services include post-hospital services for which benefits are provided under Part A, as well as those items and services (other than physician and certain other services specifically excluded under the BBA) which, before July 1, 1998, had been paid under Part B but furnished to Medicare beneficiaries in a SNF during a covered Part A stay. A comprehensive discussion of these provisions appears in the May 12, 1998 interim final rule (63 FR 26252).

1. Payment Provisions—Federal Rate

The PPS uses per diem Federal payment rates based on mean SNF costs in a base year (FY 1995) updated for inflation to the first effective period of the PPS. We developed the Federal payment rates using allowable costs from hospital-based and freestanding SNF cost reports for reporting periods beginning in FY 1995. As discussed previously in section I.A of this final rule, the data used in developing the Federal rates also incorporated a ''Part B add-on,'' an estimate of the amounts that would be payable under Part B in the base year for covered SNF services furnished to individuals during the course of a covered Part A SNF stay.

In developing the rates for the initial period, we updated costs to the first effective year of the PPS (the 15-month period beginning July 1, 1998) using a SNF market basket index, and then standardized for the costs of facility differences in case-mix and for geographic variations in wages. In compiling the database used to compute the Federal payment rates, we excluded those providers that received new provider exemptions from the routine cost limits, as well as costs related to payments for exceptions to the routine cost limits. Using the formula that the BBA prescribed, we set the Federal rates at a level equal to the weighted mean of freestanding costs plus 50 percent of the difference between the freestanding mean and weighted mean of all SNF costs (hospital-based and freestanding) combined. We computed and applied separately the payment rates for facilities located in urban and rural areas. In addition, we adjusted the portion of the Federal rate attributable to wage-related costs by a wage index.

The Federal rate also incorporates adjustments to account for facility case-mix, using a classification system that accounts for the relative resource utilization of different patient types. The RUG–III classification system uses beneficiary assessment data from the Minimum Data Set (MDS) completed by SNFs to assign beneficiaries to one of 53 RUG–III groups. The original RUG–III case-mix classification system included 44 groups. However, under incremental refinements that became effective on January 1, 2006, we added nine new groups—comprising a new Rehabilitation plus Extensive Services category—at the top of the RUG hierarchy. The May 12, 1998 interim final rule (63 FR 26252) included a detailed description of the original 44-group RUG–III case-mix classification system. A comprehensive description of the refined 53-group RUG–III case-mix classification system (RUG–53) appeared in the proposed and final rules for FY 2006 (70 FR 29070, May 19, 2005, and 70 FR 45026, August 4, 2005).

Further, in accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, the Federal rates in this final rule reflect an update to the rates that we published in the final rule for FY 2009 (73 FR 46416, August 8, 2008) and the associated correction notice (73 FR 56998, October 1, 2008), equal to the full change in the SNF market basket index. A more detailed discussion of the SNF market basket index and related issues appears in sections I.F.2 and III.F of this final rule.

2. FY 2010 Rate Updates Using the Skilled Nursing Facility Market Basket Index

Section 1888(e)(5) of the Act requires us to establish a SNF market basket index that reflects changes over time in the prices of an appropriate mix of goods and services included in covered SNF services. We use the SNF market basket index to update the Federal rates on an annual basis. In the SNF PPS final rule for FY 2008 (72 FR 43425 through 43430, August 3, 2007), we revised and rebased the market basket, which included updating the base year from FY 1997 to FY 2004. The FY 2010 market basket increase is 2.2 percent, which is based on IHS Global Insight, Inc. second quarter 2009 forecast with historical data through the first quarter 2009.

In addition, as explained in the final rule for FY 2004 (66 FR 46058, August 4, 2003) and in section III.F.2 of this final rule, the annual update of the payment rates includes, as appropriate, an adjustment to account for market basket forecast error. As described in the final rule for FY 2008, the threshold percentage that serves to trigger an adjustment to account for market basket forecast error is 0.5 percentage point effective for FY 2008 and subsequent years. This adjustment takes into account the forecast error from the most recently available FY for which there is

final data, and applies whenever the difference between the forecasted and actual change in the market basket exceeds a 0.5 percentage point threshold. For FY 2008 (the most recently available FY for which there is final data), the estimated increase in the market basket index was 3.3 percentage points, while the actual increase was 3.6 percentage points, resulting in a difference of 0.3 percentage point. Accordingly, as the difference between the estimated and actual amount of change does not exceed the 0.5 percentage point threshold, the payment rates for FY 2010 do not include a forecast error adjustment. Table 1 shows the forecasted and actual market basket amounts for FY 2008.

TABLE 1—DIFFERENCE BETWEEN THE FORECASTED AND ACTUAL MARKET BASKET INCREASES FOR FY 2008

Index	Forecasted FY 2008 increase *	Actual FY 2008 increase **	FY 2008 difference ***
SNF	3.3	3.6	0.3

* Published in **Federal Register**; based on second quarter 2007 IHS Global Insight Inc. forecast (2004-based index).
** Based on the second quarter 2009 IHS Global Insight forecast (2004-based index).
*** The FY 2008 forecast error correction for the PPS Operating portion will be applied to the FY 2010 PPS update recommendations. Any forecast error less than 0.5 percentage points will not be reflected in the update recommendation.

II. Summary of the Provisions of the FY 2010 Proposed Rule

In the FY 2010 proposed rule (74 FR 22208), we proposed to update the payment rates used under the SNF PPS for FY 2010. We also proposed to recalibrate the case-mix indexes so that they more accurately reflect parity in expenditures related to the implementation of case-mix refinements in January 2006. We also discussed the results of our ongoing analysis of nursing home staff time measurement (STM) data collected in the Staff Time and Resource Intensity Verification (STRIVE) project, and proposed a new RUG–IV case-mix classification model that would use the updated Minimum Data Set (MDS) 3.0 resident assessment for case-mix classification effective FY 2011. In addition, we requested public comment on a possible requirement for the quarterly reporting of nursing home staffing data, and also on applying the quality monitoring mechanism in place for all other SNF PPS facilities to rural swing-bed hospitals. Finally, we proposed to revise the regulations to incorporate certain technical corrections.

III. Analysis and Response to Public Comments on the FY 2010 Proposed Rule

In response to the publication of the FY 2010 proposed rule, we received over 112 timely items of correspondence from the public. The comments originated primarily from various trade associations and major organizations, but also from individual providers, corporations, government agencies, and private citizens.

Brief summaries of each proposed provision, a summary of the public comments that we received, and our responses to the comments appear below.

A. General Comments on the FY 2010 Proposed Rule

In addition to the comments that we received on the proposed rule's discussion of specific aspects of the SNF PPS (which we address later in this final rule), commenters also submitted the following, more general observations on the payment system.

Comment: Some commenters noted that while the proposed rule's SNF PPS rate updates would be effective for FY 2010, its proposed conversion of the Resource Utilization Groups (RUGs) from version 3 (RUG–III) to version 4 (RUG–IV) would not take effect until FY 2011. The commenters argued that it is unprecedented to publish such a proposal so far in advance of its anticipated effective date, and that the 60-day public comment period would not afford sufficient time to analyze and comment meaningfully on it. The commenters then suggested that we withdraw the current RUG conversion proposal and reissue it at a later date with a ''more reasonable'' comment period.

Response: While it is true that the RUG conversion proposal would not become effective until FY 2011, our decision to include a discussion of it in the FY 2010 proposed rule and to propose to finalize it well in advance of its actual implementation date represents a response to specific requests from the nursing home industry for us to provide as much advance notification as possible of the nature of the proposed RUG–IV revisions, and to provide adequate time for system updates and training necessary to implement any proposed changes that are finalized. Thus, rather than arbitrarily deferring our discussion of this proposal until the FY 2011 rulemaking cycle (which, in any event, would have provided for exactly the same 60-day duration for the public comment period), we decided to include the discussion in the current proposed rule, in order to ensure that providers, States, and other stakeholders and interested parties would have the maximum time available to familiarize themselves with the broad outlines of the new model and to prepare for its implementation. Moreover, even after the close of the FY 2010 proposed rule's public comment period, we fully intend to continue our analysis of the proposed changes that are finalized in this rule, in order to consider the most current data as it becomes available. As an essential part of this ongoing analysis, we will, of course, also continue to welcome input from the various stakeholders and interested parties as we move closer to actual implementation.

Comment: We received comments similar to those discussed previously in the August 3, 2007 SNF PPS final rule for FY 2008 (72 FR 43415 through 43416) regarding the need to address certain perceived inadequacies in payment for non-therapy ancillary (NTA) services, including those services relating to the provision of ventilator care in SNFs. We also received comments recommending that we continue to monitor ongoing research, and that we consider alternative case-mix methodologies such as the recent MedPAC proposal that appears on the MedPAC Web site (*see http://www.MedPAC.gov*).

Response: As we noted in the proposed rule for FY 2010, we are conducting the analyses preparatory to developing a separate classification method for NTAs. For these analyses, we are using data developed through STRIVE, as well as alternative models such as the conceptual design released first by the Urban Institute and then by MedPAC. However, as noted in our December 2006 Report to Congress (available online at *http://*

www.cms.hhs.gov/SNFPPS/Downloads/RC_2006_PC-PPSSNF.pdf), our analysis of NTA utilization has been hindered by a lack of data. Almost all other Medicare institutional providers submit more detailed billing than SNFs on the ancillary services furnished during a Medicare-covered stay. SNFs may currently submit summary data that shows total dollar amounts for each ancillary service category, such as radiology and pharmacy, but are not required to submit more detailed data on drugs and biologicals, the most costly NTA expense category. As we examine the NTA analyses discussed in detail in the FY 2010 proposed rule, we will re-evaluate whether our current data requirements are sufficient to move forward with additional program enhancements. We will also consider whether collecting more detailed claims information on a regular basis will allow us to establish more accurate payment rates for NTA services.

We also believe it is important to monitor ongoing research activities, and work with all stakeholders, including MedPAC, to identify opportunities for future program enhancements. At the same time, we note that the SNF PPS reimbursement structure will be completely examined as part of the Post Acute Care Payment Reform Demonstration (PAC–PRD) project. Under this major CMS initiative, we intend to analyze the costs and outcomes across all post-acute care providers, and the data collected in this demonstration will enable us to evaluate the possibility of establishing an integrated payment model centered on beneficiary needs and service utilization (including the use of non-therapy ancillaries) across settings. In considering future changes to the SNF PPS, it will be important to evaluate how shorter term enhancements contribute to our integrated post acute care strategy.

A discussion of the public comments that we received on the STRIVE project itself appears in section III.C.1 of this final rule.

B. Annual Update of Payment Rates Under the Prospective Payment System for Skilled Nursing Facilities

1. Federal Prospective Payment System

This final rule sets forth a schedule of Federal prospective payment rates applicable to Medicare Part A SNF services beginning October 1, 2010. The schedule incorporates per diem Federal rates that provide Part A payment for almost all costs of services furnished to a beneficiary in a SNF during a Medicare-covered stay.

a. Costs and Services Covered by the Federal Rates

In accordance with section 1888(e)(2)(B) of the Act, the Federal rates apply to all costs (routine, ancillary, and capital-related) of covered SNF services other than costs associated with approved educational activities as defined in § 413.85. Under section 1888(e)(2)(A)(i) of the Act, covered SNF services include post-hospital SNF services for which benefits are provided under Part A (the hospital insurance program), as well as all items and services (other than those services excluded by statute) that, before July 1, 1998, were paid under Part B (the supplementary medical insurance program) but furnished to Medicare beneficiaries in a SNF during a Part A covered stay. (These excluded service categories are discussed in greater detail in section V.B.2 of the May 12, 1998 interim final rule (63 FR 26295 through 26297)).

b. Methodology Used for the Calculation of the Federal Rates

The FY 2010 rates reflect an update using the full amount of the latest market basket index. The FY 2010 market basket increase factor is 2.2 percent. A complete description of the multi-step process used to calculate Federal rates initially appeared in the May 12, 1998 interim final rule (63 FR 26252), as further revised in subsequent rules. We note that in accordance with section 101(c)(2) of the BBRA, the previous temporary increases in the per diem adjusted payment rates for certain designated RUGs, as specified in section 101(a) of the BBRA and section 314 of the BIPA, are no longer in effect due to the implementation of case-mix refinements as of January 1, 2006. However, the temporary increase of 128 percent in the per diem adjusted payment rates for SNF residents with AIDS, enacted by section 511 of the MMA (and discussed previously in section I.E of this final rule), remains in effect.

We used the SNF market basket to adjust each per diem component of the Federal rates forward to reflect cost increases occurring between the midpoint of the Federal FY beginning October 1, 2008, and ending September 30, 2009, and the midpoint of the Federal FY beginning October 1, 2009, and ending September 30, 2010, to which the payment rates apply. In accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, we would update the payment rates for FY 2010 by a factor equal to the full market basket index percentage increase. We further adjust the rates by a wage index budget neutrality factor, described later in this section. Tables 2 and 3 reflect the updated components of the unadjusted Federal rates for FY 2010.

TABLE 2—FY 2010 UNADJUSTED FEDERAL RATE PER DIEM URBAN

Rate Component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$155.23	$116.93	$15.40	$79.22

TABLE 3—FY 2010 UNADJUSTED FEDERAL RATE PER DIEM RURAL

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$148.31	$134.83	$16.45	$80.69

2. Case-Mix Adjustments

a. Background

Section 1888(e)(4)(G)(i) of the Act requires the Secretary to make an adjustment to account for case-mix. The statute specifies that the adjustment is to reflect both a resident classification system that the Secretary establishes to account for the relative resource use of different patient types, as well as resident assessment and other data that the Secretary considers appropriate. In first implementing the SNF PPS (63 FR 26252, May 12, 1998), we developed the

RUG–III case-mix classification system, which tied the amount of payment to resident resource use in combination with resident characteristic information. The STM studies conducted in 1990, 1995, and 1997 provided information on resource use (time spent by staff members on residents) and resident characteristics that enabled us not only to establish RUG–III, but also to create case-mix indexes.

Although the establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage, there is a correlation between level of care and provider payment. One of the elements affecting the SNF PPS per diem rates is the RUG–III case-mix adjustment classification system based on beneficiary assessments using the MDS 2.0. RUG–III classification is based, in part, on the beneficiary's need for skilled nursing care and therapy. As discussed previously in section I.F.1 of this final rule, the SNF PPS final rule for FY 2006 (70 FR 45026, August 4, 2005) refined the case-mix classification system effective January 1, 2006, by adding nine new Rehabilitation Plus Extensive Services RUGs at the top of the original, 44-group system, for a total of 53 groups. This nine-group addition was designed to better account for the higher costs of beneficiaries requiring both rehabilitation and certain high intensity medical services. When we developed the refined RUG–53 system, we constructed new case-mix indexes, using the STM study data that was collected during the 1990s and originally used in creating the SNF PPS case-mix classification system and case-mix indexes. In addition, the RUG–III system was standardized with the intent of ensuring parity in payments under the 44-group and 53-group models. In section III.B.2.b of this final rule, we discuss further adjustments to those new case-mix indexes.

The RUG–III case-mix classification system uses clinical data from the MDS 2.0, and wage-adjusted STM data, to assign a case-mix group to each patient record that is then used to calculate a per diem payment under the SNF PPS. The existing RUG–III grouper logic was based on clinical data collected in 1990, 1995, and 1997. As discussed in section III.C.1, we have recently completed a multi-year data collection and analysis under the STRIVE project to update the RUG–III case-mix classification system for FY 2011. As discussed later in this preamble, we are introducing a revised case-mix classification system, the RUG–IV, based on the data collected in 2006–2007 during the STRIVE project. At the same time, we plan to introduce an updated new resident assessment instrument, the MDS 3.0, to collect the clinical data that will be used for case-mix classification under RUG–IV. We believe that the coordinated introduction of the RUG–IV and MDS 3.0 reflects current medical practice and resource use in SNFs across the country, and will enhance the accuracy of the SNF PPS. Further, we plan to defer implementation of the RUG–IV and MDS 3.0 until October 1, 2010, to allow all stakeholders adequate time for the systems updates and staff training needed to assure a smooth transition. We discuss the RUG–IV methodology, the MDS 3.0, and the stakeholder comments in greater detail in sections III.C and III.D, respectively.

Under the BBA, each update of the SNF PPS payment rates must include the case-mix classification methodology applicable for the coming Federal FY. As indicated in section I.F.1 of this final rule, the FY 2010 payment rates set forth herein reflect the use of the refined RUG–53 system that we discussed in detail in the proposed and final rules for FY 2006.

b. Development of the Case-Mix Indexes

In the FY 2010 proposed rule (74 FR 22208, 22214, May 12, 2009), we discussed the incremental refinements to the case-mix classification system that we introduced effective January 1, 2006. We also discussed the accompanying adjustment that was intended to ensure that estimated total payments under the refined 53-group model would be equal to those payments that would have been made under the 44-group model that it replaced. We then explained that actual utilization patterns under the refined case-mix system differed significantly from the initial projections, and as a consequence, rather than simply achieving parity, this adjustment inadvertently triggered a significant increase in overall payment levels under the refined model, representing substantial overpayments to SNFs. Accordingly, the FY 2010 proposed rule included a proposal to recalibrate the parity adjustment in order to restore the intended parity to the 2006 case-mix refinements on a prospective basis. The comments that we received on this proposal, and our responses, appear below.

Comment: Most commenters opposed our proposal to recalibrate the case-mix weights put into place for the refined RUG–53 system. Some commenters expressed the belief that we have overstated the amount of the proposed parity adjustment, by incorrectly identifying increased payments related to treatment of higher case-mix patients with an overpayment related to the use of an incorrect budget neutrality adjustment factor applied in January 2006. They believed that the recalibration proposal should be either withdrawn or significantly reduced to eliminate the effect of real acuity changes. One commenter conducted a detailed analysis of MDS clinical data that included changes in reported activities of daily living (ADLs), infections, falls, medication use, and other clinical conditions to support their conclusions that patient acuity has increased since the start of the SNF PPS and that our recalibration proposal incorrectly ignored the impact of these changes. Another commenter believed that the proposed recalibration could be more accurately calculated using either 2005 data or a combination of 2005 and 2006 data.

Response: We agree that, on average, the case-mix indexes for current SNF patients are higher than they were in 2001. In fact, our primary reason for implementing the STRIVE project was to identify changes in patient characteristics, and to adjust the RUG case-mix classification system to reflect the staff time and resource costs needed to reimburse fairly for the type of patients currently being treated in nursing homes. Moreover, in the STRIVE study, we collected 2006–2007 patient and facility staff data in order to update the case-mix classification system. As indicated in detail in the proposed rule, STRIVE data also show significant changes in patient characteristics and facility practice patterns that need to be incorporated into the case-mix methodology to reimburse facilities more accurately.

However, we do not agree that changes in patient acuity levels skewed the results of our recalibration analysis. When we introduced nine new Rehabilitation Plus Extensive Care groups to create the RUG–53 model in January 2006, we made a small, focused adjustment to the case-mix classification of patients receiving both Extensive Care and Rehabilitation services. Under RUG–44, patients receiving both services would be classified into the highest paying group for which they qualified—either Extensive Care or Rehabilitation. Under RUG–53, we created a separate category for this subgroup of patients. As explained in the FY 2006 proposed rule (70 FR 29070, 29077, May 19, 2005), we took the nursing minutes used to create the original RUG–III system, and resorted the records to create three hierarchy categories (Rehabilitation, Extensive Care, and Rehabilitation Plus Extensive) from the two categories that were used

in the RUG–44 model. In making these changes, we did not change any other part of the case-mix classification model. Thus, patient clinical characteristics including ADL scores (used to assign a Rehabilitation RUG group) calculated under the RUG–53 model would be exactly the same as the patient characteristics, including ADL scores, calculated under the RUG–44 model. As we used the same 2006 data set to test for budget neutrality between the two models, ADLs and other components of the case-mix model reflected the same 2006 level of acuity.

In addition, we believe this concern may erroneously equate the introduction of a new classification model with the regular SNF PPS annual update process. Normally, changes in case mix are accommodated as the classification model identifies changes in case mix and assigns the appropriate RUG group. Actual payments will typically vary from projections since case-mix changes, which occur for a variety of reasons, cannot be anticipated in an impact analysis.

However, in January 2006, we did not just update the payment rates, but introduced a new classification model, the RUG–53 case-mix system. As discussed above, the purpose of this refined model was to redistribute payments across the 53 groups while maintaining the same total expenditure level that we would have incurred had we retained the original 44-group RUG model.

In testing the two models, we used 2001 data because it was the best data we had available, and found that using the raw weights calculated for the RUG–53 model, we could expect aggregate payments to decrease as a result of introducing the refinement. To prevent this expected reduction in overall Medicare expenditures, we applied an adjustment to the RUG–53 case-mix weights as described earlier in this section. Later analysis using actual 2006 data showed that, rather than achieving budget neutrality between the two models, expenditures under the RUG–53 model were significantly higher than intended. For FY 2010, we estimate expenditures to be $1.05 billion higher than intended.

As noted previously, we do not agree that updating our analysis using CY 2006 data captured payments related to increased case mix rather than establishing budget neutrality between the two models. First, by using 2006 data to estimate expenditures under both models, we incorporate the same case-mix changes into the estimated expenditure levels for RUG–44 as well as for RUG–53. Second, we believe it is appropriate to standardize the new model for the time period in which it is being introduced. The only reason we used 2001 data in the original calculation is that it was the best data available at the time. The CY 2006 data allowed us to calibrate the RUG–53 model more precisely for its first year of operation.

One commenter recommended using alternative time periods in calculating the budget neutrality adjustment. However, while it might be possible to use some or all of CY 2005 rather than CY 2006 data, using CY 2005 data still requires us to use a projection of the distributional shift to the nine new groups in the RUG–53 group model. We believe that using actual instead of projected data is the most appropriate approach. We also looked at a second recommended alternative, which involved averaging data periods directly before and after implementation of the RUG–53 model; 2005 for the RUG–44 model and 2006 for the RUG–53 model. Again, we believe that using actual utilization data for CY 2006 is more accurate, as actual case mix during the calibration year is the basis for computing the case-mix adjustment. We have determined that using the 2006 data instead of the suggested alternatives is the most appropriate data to adopt.

Comment: A few commenters stated that CMS failed to make public all information needed to provide sufficient explanation of the basis for the recalibration. The commenters indicated that the negative $1.05 billion impact of the recalibration should be similar to that proposed in the 2009 proposed rule, and questioned the reasons for the change. Further, the commenters suggested that CMS has failed to provide the public with the aggregate baseline spending values that CMS used in making the initial FY 2006 ''parity'' adjustment and the one that is currently being used in the FY 2010 proposed rule.

Response: In the FY 2009 rule, actual data were used to compare payments in 2006 under RUG–44 and RUG–53. At that time it was decided that an adjustment was necessary to recalibrate the CMIs because the adjustments in place since FY 2006, which were supposed to be budget neutral, actually resulted in a 3.3 percent overpayment to SNFs. It was also determined that the adjustment necessary to attain the appropriate 3.3 percent reduction in payments was a 9.68 percent increase to the unadjusted RUG–53 case-mix indexes (73 FR 46422, August 8, 2008), to replace the 17.90 percent adjustment that was in place since 2006. To determine the dollar impact ($780 million) for the FY 2009 rule, the 3.3 percent was applied to the estimated Medicare reimbursement to SNFs in FY 2008, which is net of beneficiary cost-sharing. For the FY 2010 rule, the same data and methodology were used as in the FY 2009 rule, which determined that an overpayment of 3.3 percent has been in place since 2006, requiring an adjustment to the nursing case-mix indexes of 9.68 percent (74 FR 22214, May 12, 2009) to replace the 17.90 percent adjustment. However, we believe that the presentation of the dollar impact would be more accurately reflected by applying the overpayment percentage to total SNF payments, including beneficiary cost-sharing amounts. The reason for using these higher payments to determine the dollar impact is because this is how the impact will play out in actual practice. Specifically, the revised 9.68 percent adjustment to the nursing CMIs is used to calculate total payments to SNFs, which reflect a combination of reimbursement from Medicare along with beneficiary cost-sharing. However, as the daily coinsurance amount for days 21–100 in the SNF is set by law (in section 1813(a)(3) of the Act) at one-eighth of the current calendar year's inpatient hospital deductible amount, the beneficiary cost-sharing is unaffected by the change in payments resulting from the recalibration. This point is best illustrated by way of an example: Total payments to SNFs in FY 2009 are estimated at approximately $31.3 billion, consisting of $25.9 billion in Medicare reimbursement and $5.4 billion in beneficiary cost-sharing.

The impact of the recalibration lowers total payments to SNFs by approximately $1 billion (or 3.3 percent), to about $30.3 billion. Of this $30.3 billion, beneficiary cost-sharing (as determined by the statutory formula) remains unchanged at $5.4 billion, while Medicare reimbursement is reduced to $24.8 billion. Thus, although the determination of the total dollar impact changed, the methodology used to determine the need to recalibrate the CMIs did not change from FY 2009 to FY 2010. The total payments to SNFs that are used to determine the dollar impacts are not explicitly published anywhere, but can be easily estimated by dividing the dollar impacts by the percentage impact. These results can be confirmed by contacting the CMS Office of the Actuary.

Comment: Some commenters believed that CMS failed to provide sufficient information for a third party to reproduce CMS's conclusions with regard to the recalibrated parity

adjustment, noting the following specific elements: The baseline used for FY 2010, the CY 2006 days of service for both the RUG–44 and RUG–53 systems, and the separate values for the recalibrated parity adjustment factor and the NTA cost adjustment factor for FY 2010.

Response: We do not agree with the commenters' assertion. The methodology used to establish the case-mix adjustments is the same as that described in detail in the FY 2006 SNF PPS proposed rule (70 FR 29077 through 29079, May 19, 2005), the FY 2009 SNF PPS proposed rule (73 FR 25923, May 7, 2008) and the FY 2009 SNF PPS final rule (73 FR 46421–22, August 8, 2008). In addition, the data used to calculate the adjustments are publicly available on the CMS Web site, as explained below. We used the CY 2006 days of service (available in the Downloads section of our Web site at *http://www.cms.hhs.gov/SNFPPS/02_Spotlight.asp*) for both the RUG–44 and RUG–53 systems. We multiplied the CY 2006 days of service by the FY 2008 unadjusted Federal per diem payment rate components (72 FR 43416, August 3, 2007) multiplied by the unadjusted case-mix indexes (available in the Downloads section of our Web site at *http://www.cms.hhs.gov/SNFPPS/09_RUGRefinement.asp*) to establish expenditures under the RUG–44 and RUG–53 systems. The budget neutrality adjustment was determined as the percentage increase necessary for the nursing CMIs to generate estimated expenditure levels under the RUG–53 system that were equal to estimated expenditure levels under the RUG–44 system. We then calculated a second adjustment factor to increase the baseline by an amount that served to offset the variability in NTA utilization.

The separate recalibrated parity adjustment factor and the NTA cost adjustment factor were considered in the calculation of the combined parity adjustment factor of 9.68 in the FY 2009 SNF PPS proposed rule (73 FR 25923, May 7, 2008), the FY 2009 SNF PPS final rule (73 FR 46421–22, August 8, 2008), and the FY 2010 SNF PPS proposed rule (74 FR 22214, May 12, 2009). We presented the total adjustment to the nursing case-mix indexes of 9.68 percent because this reflects all changes to the payment system with respect to the recalibration. The percentage adjustment to the nursing CMIs to maintain parity between the 44-group and 53-group models is a 2.43 percent increase. The adjustment to account for the variability in the non-therapy ancillary utilization is a 7.08 percent increase. The separate adjustments represent interim steps in the calculations, and the final result of 9.68 percent represents the complete change to aggregate payments.

Although the SNF baseline is not explicitly published, the baseline used can be determined by dividing the dollar impacts by the percentage impact. Many commenters used this approach to conduct their own analyses. Some of the commenters contacted CMS to confirm the baseline in use, and this information was provided or verified.

Comment: A few commenters believe that CMS failed to explain fully the evaluation done since the FY 2009 final rule to support the decision to proceed with the recalibration for FY 2010.

Response: The analytic methodology and calculations were explained in detail in the FY 2009 proposed and final rules. In the final rule, we explained that we were deferring rather than withdrawing the recalibration proposal. After the publication of the FY 2009 final rule, we worked with CMS staff and contractors, and reviewed the entire methodology with our actuaries. We reviewed the recalibration approach with the CMS actuaries, asked for an independent review by one of our contractors, and met with an industry representative to discuss the methodology. The calculations were determined to be mathematically correct. The approach was reconsidered along with alternative approaches that we presented in our FY 2009 final rule (73 FR 46423, 46439–40) and those offered by industry. Based on our results from these steps, we determined that our methodology was appropriate and reissued the proposal for FY 2010. In addition, we further considered the effects of the recalibration on beneficiaries, SNF clinical staff, and quality of care, and as explained in the FY 2010 proposed rule (74 FR 22214), we determined that it is appropriate to proceed with the recalibration in FY 2010. As we explained in the FY 2010 proposed rule (74 FR 22214), by recalibrating the CMIs under the 53-group model, we expect to restore SNF payments to their appropriate level by correcting an inadvertent increase in overall payments. Because the recalibration would simply remove an unintended overpayment rather than decrease an otherwise appropriate payment amount, we do not believe that the recalibration should negatively affect beneficiaries, clinical staff, or quality of care, or create an undue hardship on providers. The purpose of the FY 2006 refinements was to reallocate payments so that they more accurately reflect resources used, not to increase or decrease overall expenditures. Thus, we believe that it is appropriate to proceed with the recalibration in order to ensure that we correctly accomplish the purpose of the FY 2006 case-mix refinements and restore payments to their appropriate level.

Comment: Several commenters stated that the need for the recalibration arose because CMS initial projections of utilization under the refined case-mix system proved to be inaccurate once actual utilization data became available. They then asserted that in view of this, the proposed recalibration represents a ''forecast error adjustment'' that is not covered under the statutory authority to provide for an appropriate adjustment to account for case mix (section 1888(e)(4)(G)(i) of the Act).

Response: It would be incorrect to characterize the proposed recalibration as a ''forecast error adjustment,'' as that term refers solely to an adjustment that compensates for an inaccurate forecast of the annual inflation factor in the SNF market basket, as described in section III.F.2 of this final rule (*see* 42 CFR 413.337(d)(2)). By contrast, the proposed recalibration would serve to ensure that the 2006 case-mix refinements are implemented as intended. As such, it would be integral to the process of providing ''* * * for an appropriate adjustment to account for case mix'' that is based upon appropriate data in accordance with section 1888(e)(4)(G)(i) of the Act.

Comment: A number of comments included references to the discussion of the 2006 case-mix refinements in the SNF PPS proposed rule for FY 2006 (70 FR 29079, May 19, 2005), in which we explained that we were ''* * * advancing these proposed changes under our authority in section 101(a) of the BBRA to establish case-mix refinements, and that the changes we are hereby proposing will represent the final adjustments made under this authority'' (emphasis added). The commenters stated that this earlier description of the 2006 case-mix refinements as ''final'' effectively precludes CMS from proceeding with a recalibration, which they characterized as representing a further refinement. Similarly, several commenters also questioned our authority to recalibrate the case-mix system prior to the completion of the STRIVE STM project. In addition, several commenters questioned whether CMS has the authority to impose a budget neutrality requirement on the introduction of a new classification model.

Response: We wish to clarify that the actual ''refinement'' that we proposed and implemented in the FY 2006

rulemaking cycle consisted of our introduction of the 9 new Rehabilitation plus Extensive Services groups at the top of the previous, 44-group RUG hierarchy, along with the adjustment recognizing the variability of NTA use, which together fulfilled the provisions of section 101(a) of the BBRA. The accompanying adjustment to the case-mix indexes (CMIs) was merely a vehicle through which we implemented that refinement. Rather than representing a new or further ''refinement'' in itself, the proposed recalibration merely serves to ensure that we correctly accomplish a revision to the CMIs that accompanied the FY 2006 case-mix refinements.

In the FY 2006 final rule (70 FR 45033, August 4, 2005), we addressed the introduction of the refinements within the broader context of ensuring payment accuracy and beneficiary access to care. We pointed out that

> * * * this incremental change is part of this ongoing process that will also include update activities such as the upcoming STM study and investigation of potential alternatives to the RUG system itself. However, the commitment to long term analysis and refinement should not preclude the introduction of more immediate methodological and policy updates.

Finally, the budget neutrality factor was applied to the unadjusted RUG–53 case-mix weights that were introduced in January 2006. As stated above, our initial analyses indicated that payments would be lower under the RUG–53 model. As the purpose of the refinement was to reallocate payments, and not to reduce expenditures, we believe that increasing the case-mix weights to equalize payments under the two models is an appropriate exercise of our broad authority to establish an appropriate case-mix system. We further note that the FY 2006 refinement to the case-mix classification system using adjusted CMIs was implemented through the rulemaking process, and we received no comments on the use of a budget neutrality adjustment at that time.

Comment: Some commenters argued against implementing the proposed recalibration by asserting that it is important to maintain Medicare SNF payments at their current levels in order to cross-subsidize what they characterized as inadequate payment rates for nursing facilities under the Medicaid program. Other commenters urged CMS to reconsider the recalibration in light of the potential national impact in a weak economy. A few commenters asserted that the recalibration would have the same impact as the original implementation of the SNF PPS, which they asserted had pushed providers into bankruptcy.

Response: We wish to clarify that it is not the appropriate role of the Medicare SNF benefit to cross-subsidize nursing home payments made under the Medicaid program. We note that MedPAC has indicated that it is inappropriate for the Medicare program's SNF payments to cross-subsidize Medicaid nursing facility rates in this manner. Specifically, on page 152 of its March 2008 Report to the Congress on Medicare Payment Policy (which is available online at *http://medpac.gov/documents/Mar08_EntireReport.pdf*), MedPAC stated:

> There are several reasons why Medicare cross-subsidization is not advisable policy for the Medicare program. On average, Medicare payments accounted for 21 percent of revenues to freestanding SNFs in 2006. As a result, the policy would use a minority of Medicare payments to subsidize a majority of Medicaid payments. If Medicare were to pay still higher rates, facilities with high shares of Medicare payments—presumably the facilities that need revenues the least—would receive the most in subsidies from the higher Medicare payments. In other words, the subsidy would be poorly targeted. Given the variation among States in the level and method of nursing home payments, the impact of the subsidy would be highly variable; in States where Medicaid payments were adequate, it would have no positive impact. In addition, increasing Medicare's payment rates could encourage States to reduce Medicaid payments further and, in turn, result in pressure to again raise Medicare rates. It could also encourage providers to select patients based on payer source or to rehospitalize dual-eligible patients so that they qualified for a Medicare-covered, and higher payment, stay.

We agree with MedPAC and, therefore, do not agree with the commenters that cited cross-subsidizing Medicaid as a justification for maintaining Medicare SNF payments at any specific level.

We are also aware of the concerns that reductions in payment levels can have a negative impact on SNFs and the quality of care furnished to nursing home patients across the country. However, in this particular case, we have proposed to correct, on a prospective basis, an overpayment situation that has been in effect since January 2006. To avoid possible negative consequences, we have decided not to go back and recoup the excess expenditures made to SNFs ever since January 2006. Instead, we are limiting the scope of the recalibration to restoring the intended SNF PPS payment levels on a prospective basis only, effective October 1, 2010.

We have also considered the concerns raised by industry representatives that restoring the intended payment levels will result in job losses and add significant burden to health care workers and State governments. CMS cost report and Online Survey Certification and Reporting System (OSCAR) data show that, for the majority of SNFs that operate as freestanding facilities or as parts of chains, there has been little change in staffing or in facility costs since 2006. Therefore, as data do not indicate that the overpayment was used to increase staffing during this time, we do not believe that restoring payments to their intended and appropriate levels should necessarily result in job losses or add significant burden to health care workers and State governments. Further, in its March 2009 Report to the Congress (available online at *http://www.medpac.gov/documents/Mar09_EntireReport.pdf*), MedPAC reports that average Medicare margins have increased for freestanding SNFs since 2005. In 2007, the aggregate Medicare margin for freestanding SNFs was 14.5 percent, up from 13.3 percent in 2006.

A few commenters expressed concern that the recalibration would have the same impact as the original implementation of the SNF PPS in the late 1990s, which they asserted had pushed providers into bankruptcy. However, studies have indicated multiple factors for those nursing home closures. Castle *et al* studied the rate of nursing home closures for 7 years (1999–2005).[1] Those reasons for bankruptcy included internal factors such as quality, organizational factors such as chain membership, and external factors such as competition. Nursing homes most likely to close included those with higher rates of deficiency citations, hospital-based facilities, chain members, small bed size, and facilities located in markets with high levels of competition. A recent study examined nursing homes terminated from the Medicare and Medicaid programs.[2] The study found that the introduction of the prospective case-mix system was not the sole cause of the fiscal instabilities that led these providers to terminate their participation in Medicare. The authors state that some of the fiscal instability was self-inflicted, due to investment

[1] Castle NG, Engberg J, Lave J, Fisher A. *Factors Associated with Increasing Nursing Home Closures*, Health Services Research 44: (3) June 2009, pp. 1088–1109.

[2] Zinn J, Mor V, Feng Z, Intrator O. *Determinants of performance failure in the nursing home industry*, Social Science & Medicine 68: (5), March, 2009, pp. 933–940.

decisions made in an uncertain market and misreading the changing reimbursement environment.

A similar finding had been reported in the March 2002 MedPAC report.[3] MedPAC noted that the ability to service debt was the same under PPS as under cost-based payments. Finally, a 2000 GAO report stated that the bankruptcies resulted from heavy business investments in ancillary service lines and high capital-related costs such as depreciation, interest, and rent.[4]

Research fails to indicate that case-mix reimbursement is a significant contributor to nursing home bankruptcy. Thus, we do not agree with the commenters who asserted that the recalibration of Medicare CMIs to restore budget neutrality on a prospective basis will force providers into bankruptcy, or create the type of fiscal pressure that would negatively affect facility staffing or the quality of care furnished to Medicare beneficiaries. As regards the comment that CMS should reconsider the recalibration in light of the potential impact on a weak economy, we do not believe that a weak economy justifies perpetuating an overpayment.

Comment: Several commenters asserted that a shift in patients from Inpatient Rehabilitation Facilities (IRFs) to SNFs results in savings to the Medicare Trust Fund and that the current SNF spending levels are needed to treat higher acuity patients that are now being treated in SNFs rather than IRFs. They asserted that the recalibration adjustment should not be made because SNFs used the money to expand their infrastructures to handle more seriously ill patients who were previously treated in IRFs, and that their actions actually saved Medicare dollars. Specifically, these commenters asserted that a shift of patients from IRFs to SNFs resulted in savings to the Medicare Trust Fund, and that SNFs need to maintain current SNF spending levels to treat this new type of patients. Underlying these comments is the assumption that SNFs are providing care for the same type of patients who would otherwise qualify for the higher IRF payments.

Response: We note that a basic principle of the SNF PPS is to pay appropriately for the services provided. CMS data are consistent with the commenters' assertions that many patients formerly being treated in IRFs are now being treated in SNFs or Home Health Agencies (HHAs). In fact, our data show that a portion of patients needing rehabilitation have always been treated at SNFs and HHAs. The CY 2006 distribution used to recalibrate the case-mix adjustments reflects an increase in rehabilitation patients, and probably includes patients who might have been admitted to the higher-paying IRFs prior to CMS enforcement of IRF facility compliance criteria and more intensive medical review of IRF claims. However, we do not agree that these patients represent a higher level of acuity than the type of patients historically treated in SNFs. In fact, the decrease in the number of patients admitted to IRFs reflects that subset of the rehabilitation population that was not appropriate for IRF care. As such, CMS may have overpaid IRFs for more routine orthopedic cases, such as single joint knee replacements. For those former IRF patients who are appropriate for SNF care, we must pay the appropriate rate for the SNF services provided, and cannot use a reduction in IRF overpayments as a reason to increase payments under the SNF PPS. In discussing the proposed recalibration, it is important to bear in mind that recalibrating CMIs would not change the relative nature of higher payments for patients using more staff resources and services.

Accordingly, for the reasons specified in the FY 2010 proposed rule (74 FR 22214–22215), we are finalizing the recalibration of the parity adjustment to the RUG–53 case-mix indexes in order to restore the intended parity in overall payments between the RUG–44 model and the RUG–53 model, and the factor used to recognize variability in NTA utilization, using the methodology described in the FY 2009 proposed and final rules (73 FR 25923, 73 FR 46421–24). Thus, for FY 2010, the aggregate impact of this recalibration would be the difference between payments calculated using the original FY 2006 total CMI increase of 17.9 percent and payments calculated using the recalibrated total CMI increase of 9.68 percent. The total difference is a decrease in payments of $1.05 billion (on an incurred basis) in payments for FY 2010. We also note that the negative $1.05 billion would be partly offset by the FY 2010 market basket adjustment factor of 2.2 percent, or $690 million, with a net result of a negative 1.1 percent update of $360 million for FY 2010. Again, we want to emphasize that we are implementing the recalibration on a prospective basis, which is the strategy that we believe best mitigates the potential impact on providers. By using CY 2006 claims data (which represent actual RUG–53 utilization), rather than FY 2001 claims data, we believe the SNF PPS will better reflect resources used, resulting in more accurate payment.

We list the case-mix adjusted payment rates separately for urban and rural SNFs in Tables 4 and 5, with the corresponding case-mix values. These tables do not reflect the AIDS add-on enacted by section 511 of the MMA, which we apply only after making all other adjustments (wage and case-mix).

TABLE 4—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES, URBAN

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp.	Non-case mix component	Total rate
RUX	1.77	2.25	274.76	263.09		79.22	617.07
RUL	1.31	2.25	203.35	263.09		79.22	545.66
RVX	1.44	1.41	223.53	164.87		79.22	467.62
RVL	1.24	1.41	192.49	164.87		79.22	436.58
RHX	1.33	0.94	206.46	109.91		79.22	395.59
RHL	1.27	0.94	197.14	109.91		79.22	386.27
RMX	1.80	0.77	279.41	90.04		79.22	448.67
RML	1.57	0.77	243.71	90.04		79.22	412.97
RLX	1.22	0.43	189.38	50.28		79.22	318.88
RUC	1.20	2.25	186.28	263.09		79.22	528.59
RUB	0.92	2.25	142.81	263.09		79.22	485.12

[3] Report to the Congress: Medicare Payment Policy, ''Section 2D: Skilled nursing facility,'' March 2002, pp. 85–90.

[4] General Accounting Office. Nursing homes: aggregate Medicare payments are adequate despite bankruptcies. No T–HEHS–00–192. Washington (DC), GAO. September 2000.

TABLE 4—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES, URBAN—Continued

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp.	Non-case mix component	Total rate
RUA	0.78	2.25	121.08	263.09		79.22	463.39
RVC	1.14	1.41	176.96	164.87		79.22	421.05
RVB	1.01	1.41	156.78	164.87		79.22	400.87
RVA	0.77	1.41	119.53	164.87		79.22	363.62
RHC	1.13	0.94	175.41	109.91		79.22	364.54
RHB	1.03	0.94	159.89	109.91		79.22	349.02
RHA	0.88	0.94	136.60	109.91		79.22	325.73
RMC	1.07	0.77	166.10	90.04		79.22	335.36
RMB	1.01	0.77	156.78	90.04		79.22	326.04
RMA	0.97	0.77	150.57	90.04		79.22	319.83
RLB	1.06	0.43	164.54	50.28		79.22	294.04
RLA	0.79	0.43	122.63	50.28		79.22	252.13
SE3	1.72		267.00		15.40	79.22	361.62
SE2	1.38		214.22		15.40	79.22	308.84
SE1	1.17		181.62		15.40	79.22	276.24
SSC	1.14		176.96		15.40	79.22	271.58
SSB	1.05		162.99		15.40	79.22	257.61
SSA	1.02		158.33		15.40	79.22	252.95
CC2	1.13		175.41		15.40	79.22	270.03
CC1	0.99		153.68		15.40	79.22	248.30
CB2	0.91		141.26		15.40	79.22	235.88
CB1	0.84		130.39		15.40	79.22	225.01
CA2	0.83		128.84		15.40	79.22	223.46
CA1	0.75		116.42		15.40	79.22	211.04
IB2	0.69		107.11		15.40	79.22	201.73
IB1	0.67		104.00		15.40	79.22	198.62
IA2	0.57		88.48		15.40	79.22	183.10
IA1	0.53		82.27		15.40	79.22	176.89
BB2	0.68		105.56		15.40	79.22	200.18
BB1	0.65		100.90		15.40	79.22	195.52
BA2	0.56		86.93		15.40	79.22	181.55
BA1	0.48		74.51		15.40	79.22	169.13
PE2	0.79		122.63		15.40	79.22	217.25
PE1	0.77		119.53		15.40	79.22	214.15
PD2	0.72		111.77		15.40	79.22	206.39
PD1	0.70		108.66		15.40	79.22	203.28
PC2	0.66		102.45		15.40	79.22	197.07
PC1	0.65		100.90		15.40	79.22	195.52
PB2	0.52		80.72		15.40	79.22	175.34
PB1	0.50		77.62		15.40	79.22	172.24
PA2	0.49		76.06		15.40	79.22	170.68
PA1	0.46		71.41		15.40	79.22	166.03

TABLE 5—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES, RURAL

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp.	Non-case mix component	Total rate
RUX	1.77	2.25	262.51	303.37		80.69	646.57
RUL	1.31	2.25	194.29	303.37		80.69	578.35
RVX	1.44	1.41	213.57	190.11		80.69	484.37
RVL	1.24	1.41	183.90	190.11		80.69	454.70
RHX	1.33	0.94	197.25	126.74		80.69	404.68
RHL	1.27	0.94	188.35	126.74		80.69	395.78
RMX	1.80	0.77	266.96	103.82		80.69	451.47
RML	1.57	0.77	232.85	103.82		80.69	417.36
RLX	1.22	0.43	180.94	57.98		80.69	319.61
RUC	1.20	2.25	177.97	303.37		80.69	562.03
RUB	0.92	2.25	136.45	303.37		80.69	520.51
RUA	0.78	2.25	115.68	303.37		80.69	499.74
RVC	1.14	1.41	169.07	190.11		80.69	439.87
RVB	1.01	1.41	149.79	190.11		80.69	420.59
RVA	0.77	1.41	114.20	190.11		80.69	385.00
RHC	1.13	0.94	167.59	126.74		80.69	375.02
RHB	1.03	0.94	152.76	126.74		80.69	360.19
RHA	0.88	0.94	130.51	126.74		80.69	337.94
RMC	1.07	0.77	158.69	103.82		80.69	343.20
RMB	1.01	0.77	149.79	103.82		80.69	334.30
RMA	0.97	0.77	143.86	103.82		80.69	328.37
RLB	1.06	0.43	157.21	57.98		80.69	295.88

TABLE 5—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES, RURAL—Continued

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp.	Non-case mix component	Total rate
RLA	0.79	0.43	117.16	57.98		80.69	255.83
SE3	1.72		255.09		16.45	80.69	352.23
SE2	1.38		204.67		16.45	80.69	301.81
SE1	1.17		173.52		16.45	80.69	270.66
SSC	1.14		169.07		16.45	80.69	266.21
SSB	1.05		155.73		16.45	80.69	252.87
SSA	1.02		151.28		16.45	80.69	248.42
CC2	1.13		167.59		16.45	80.69	264.73
CC1	0.99		146.83		16.45	80.69	243.97
CB2	0.91		134.96		16.45	80.69	232.10
CB1	0.84		124.58		16.45	80.69	221.72
CA2	0.83		123.10		16.45	80.69	220.24
CA1	0.75		111.23		16.45	80.69	208.37
IB2	0.69		102.33		16.45	80.69	199.47
IB1	0.67		99.37		16.45	80.69	196.51
IA2	0.57		84.54		16.45	80.69	181.68
IA1	0.53		78.60		16.45	80.69	175.74
BB2	0.68		100.85		16.45	80.69	197.99
BB1	0.65		96.40		16.45	80.69	193.54
BA2	0.56		83.05		16.45	80.69	180.19
BA1	0.48		71.19		16.45	80.69	168.33
PE2	0.79		117.16		16.45	80.69	214.30
PE1	0.77		114.20		16.45	80.69	211.34
PD2	0.72		106.78		16.45	80.69	203.92
PD1	0.70		103.82		16.45	80.69	200.96
PC2	0.66		97.88		16.45	80.69	195.02
PC1	0.65		96.40		16.45	80.69	193.54
PB2	0.52		77.12		16.45	80.69	174.26
PB1	0.50		74.16		16.45	80.69	171.30
PA2	0.49		72.67		16.45	80.69	169.81
PA1	0.46		68.22		16.45	80.69	165.36

3. Wage Index Adjustment to Federal Rates

Section 1888(e)(4)(G)(ii) of the Act requires that we adjust the Federal rates to account for differences in area wage levels, using a wage index that we find appropriate. Since the inception of a PPS for SNFs, we have used hospital wage data in developing a wage index to be applied to SNFs.

In the FY 2010 proposed rule, we proposed to continue that practice, as we continue to believe that in the absence of SNF-specific wage data, using the hospital inpatient wage index is appropriate and reasonable for the SNF PPS. As explained in the update notice for FY 2005 (69 FR 45786, July 30, 2004), the SNF PPS does not use the hospital area wage index's occupational mix adjustment, as this adjustment serves specifically to define the occupational categories more clearly in a hospital setting; moreover, the collection of the occupational wage data also excludes any wage data related to SNFs. Therefore, we believe that using the updated wage data exclusive of the occupational mix adjustment continues to be appropriate for SNF payments.

In the FY 2010 proposed rule, we also proposed to continue using the same methodology discussed in the SNF PPS final rule for FY 2008 (72 FR 43423) to address those geographic areas in which there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the FY 2010 SNF PPS wage index. For rural geographic areas that do not have hospitals and, therefore, lack hospital wage data on which to base an area wage adjustment, we proposed to use the average wage index from all contiguous CBSAs as a reasonable proxy. This methodology is used to construct the wage index for rural Massachusetts. However, we indicated that we would not apply this methodology to rural Puerto Rico due to the distinct economic circumstances that exist there, but instead would continue using the most recent wage index previously available for that area. For urban areas without specific hospital wage index data, we proposed to use the average wage indexes of all of the urban areas within the State to serve as a reasonable proxy for the wage index of that urban CBSA. The only urban area without wage index data available is CBSA (25980) Hinesville-Fort Stewart, GA.

The comments that we received on the wage index adjustment to the Federal rates, and our responses to those comments, appear below.

Comment: A commenter requested that CMS develop a method of gathering wage data information that would directly reflect the wages earned in both rural and urban SNF settings.

Response: As described above, hospital wage data are used in developing a wage index to be applied to SNFs. All hospitals, both rural and urban, are used to establish the hospital wage data used to construct the SNF PPS wage index. Therefore, we believe that the SNF PPS wage index adequately captures earned wages across both urban and rural settings. Further, as discussed in greater detail below, we have been unable to develop a SNF-specific wage index due to ''* * * the volatility of existing SNF wage data and the significant amount of resources that would be required to improve the quality of that data'' (73 FR 46426, August 8, 2008).

Comment: Several commenters asked CMS to consider adopting certain wage index policies in use under the acute IPPS, such as reclassification, because SNFs compete in a similar labor pool as acute care hospitals. In addition, a few commenters recommended that CMS develop a SNF-specific wage index. One commenter requested that we revisit the use of CBSA labor market areas and

develop an alternative that better captures Statewide labor market trends.

Response: The regulations that govern the SNF PPS currently do not provide a mechanism for allowing providers to seek geographic reclassification. Moreover, as we have explained in the past (most recently, in the SNF PPS final rule for FY 2009 (73 FR 46416, 46426, August 8, 2008), while section 315 of the Benefits Improvement and Protection Act of 2000 (BIPA, Pub. L. 106–554) does authorize us to establish such a reclassification methodology under the SNF PPS, it additionally stipulates that such reclassification cannot be implemented until we have collected the data necessary to establish a SNF-specific wage index. This, in turn, has proven to be infeasible due to ''* * * the volatility of existing SNF wage data and the significant amount of resources that would be required to improve the quality of that data'' (73 FR 46426, August 8, 2008). We continue to believe that these factors make it unlikely for such an approach to yield meaningful improvements in our ability to determine facility payments, or to justify the significant increase in administrative resources as well as burden on providers what this type of data collection would involve.

In addition, we reviewed the Medicare Payment Advisory Commission's (MedPAC) wage index recommendations as discussed in MedPAC's June 2007 report entitled, ''Report to Congress: Promoting Greater Efficiency in Medicare.'' Although some commenters recommend that we adopt the IPPS wage index policies such as reclassification and floor policies, we note that MedPAC's June 2007 report to Congress recommends that Congress ''repeal the existing hospital wage index statute, including reclassification and exceptions, and give the Secretary authority to establish new wage index systems.'' We believe that adopting the IPPS wage index policies (such as reclassification or floor) would not be prudent at this time, because MedPAC suggests that the reclassification and exception policies in the IPPS wage index alters the wage index values for one-third of IPPS hospitals. In addition, MedPAC found that the exceptions may lead to anomalies in the wage index. By adopting the IPPS reclassification and exceptions at this time, the SNF PPS wage index could become vulnerable to problems similar to those that MedPAC identified in their June 2007 Report to Congress. However, we will continue to review and consider MedPAC's recommendations on a refined or alternative wage index methodology for the SNF PPS in future years.

We also note that section 106(b)(2) of the Medicare Improvements and Extension Act (MIEA) of 2006 (which is Division B of the Tax Relief and Health Care Act (TRHCA) of 2006, Public Law 109–432, collectively referred to as ''MIEA–TRHCA'') required the Secretary of Health and Human Services, taking into account MedPAC's recommendations on the Medicare wage index classification system, to include in the FY 2009 IPPS proposed rule one or more proposals to revise the wage index adjustment applied under section 1886(d)(3)(E) of the Act for purposes of the IPPS. To assist CMS in meeting the requirements of section 106(b)(2) of MIEA–TRHCA, in February 2008, CMS awarded a Task Order under its Expedited Research and Demonstration Contract, to Acumen, LLC. Acumen, LLC conducted a study of both the current methodology used to construct the Medicare wage index and the recommendations reported to Congress by MedPAC. Part One of Acumen's final report, which analyzes the strengths and weaknesses of the data sources used to construct the CMS and MedPAC indexes, is available online at *http://www.acumenllc.com/reports/cms*. MedPAC's recommendations are presented in the FY 2009 IPPS final rule (*http://edocket.access.gpo.gov/2008/pdf/E8-17914.pdf*). We plan to continue monitoring wage index research efforts and the impact or influence they may have for the SNF PPS wage index.

Moreover, in light of all of the pending research and review of wage index issues in general, we believe that it would be premature at this time to initiate revisiting the use of CBSA labor market areas and review of a SNF-specific wage index.

Therefore, in this final rule, we will continue to use hospital wage data exclusive of the occupational mix adjustment to calculate the SNF PPS wage index adjustment, and we are finalizing the wage index and associated policies as proposed in the SNF PPS proposed rule for FY 2010 (74 FR 22217–22219, May 12, 2009).

To calculate the SNF PPS wage index adjustment, we apply the wage index adjustment to the labor-related portion of the Federal rate, which is 69.840 percent of the total rate. This percentage reflects the labor-related relative importance for FY 2010, using the revised and rebased FY 2004-based market basket. The labor-related relative importance for FY 2009 was 69.783, as shown in Table 16. We calculate the labor-related relative importance from the SNF market basket, and it approximates the labor-related portion of the total costs after taking into account historical and projected price changes between the base year and FY 2010. The price proxies that move the different cost categories in the market basket do not necessarily change at the same rate, and the relative importance captures these changes. Accordingly, the relative importance figure more closely reflects the cost share weights for FY 2010 than the base year weights from the SNF market basket.

We calculate the labor-related relative importance for FY 2010 in four steps. First, we compute the FY 2010 price index level for the total market basket and each cost category of the market basket. Second, we calculate a ratio for each cost category by dividing the FY 2010 price index level for that cost category by the total market basket price index level. Third, we determine the FY 2010 relative importance for each cost category by multiplying this ratio by the base year (FY 2004) weight. Finally, we add the FY 2010 relative importance for each of the labor-related cost categories (wages and salaries, employee benefits, non-medical professional fees, labor-intensive services, and a portion of capital-related expenses) to produce the FY 2010 labor-related relative importance. Tables 6 and 7 show the Federal rates by labor-related and non-labor-related components.

TABLE 6—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT

RUG–III category	Total rate	Labor portion	Non-labor portion
RUX	617.07	430.96	186.11
RUL	545.66	381.09	164.57
RVX	467.62	326.59	141.03
RVL	436.58	304.91	131.67
RHX	395.59	276.28	119.31
RHL	386.27	269.77	116.50

TABLE 6—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG–III category	Total rate	Labor portion	Non-labor portion
RMX	448.67	313.35	135.32
RML	412.97	288.42	124.55
RLX	318.88	222.71	96.17
RUC	528.59	369.17	159.42
RUB	485.12	338.81	146.31
RUA	463.39	323.63	139.76
RVC	421.05	294.06	126.99
RVB	400.87	279.97	120.90
RVA	363.62	253.95	109.67
RHC	364.54	254.59	109.95
RHB	349.02	243.76	105.26
RHA	325.73	227.49	98.24
RMC	335.36	234.22	101.14
RMB	326.04	227.71	98.33
RMA	319.83	223.37	96.46
RLB	294.04	205.36	88.68
RLA	252.13	176.09	76.04
SE3	361.62	252.56	109.06
SE2	308.84	215.69	93.15
SE1	276.24	192.93	83.31
SSC	271.58	189.67	81.91
SSB	257.61	179.91	77.70
SSA	252.95	176.66	76.29
CC2	270.03	188.59	81.44
CC1	248.30	173.41	74.89
CB2	235.88	164.74	71.14
CB1	225.01	157.15	67.86
CA2	223.46	156.06	67.40
CA1	211.04	147.39	63.65
IB2	201.73	140.89	60.84
IB1	198.62	138.72	59.90
IA2	183.10	127.88	55.22
IA1	176.89	123.54	53.35
BB2	200.18	139.81	60.37
BB1	195.52	136.55	58.97
BA2	181.55	126.79	54.76
BA1	169.13	118.12	51.01
PE2	217.25	151.73	65.52
PE1	214.15	149.56	64.59
PD2	206.39	144.14	62.25
PD1	203.28	141.97	61.31
PC2	197.07	137.63	59.44
PC1	195.52	136.55	58.97
PB2	175.34	122.46	52.88
PB1	172.24	120.29	51.95
PA2	170.68	119.20	51.48
PA1	166.03	115.96	50.07

TABLE 7—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT

RUG–III category	Total rate	Labor portion	Non-labor portion
RUX	646.57	451.56	195.01
RUL	578.35	403.92	174.43
RVX	484.37	338.28	146.09
RVL	454.70	317.56	137.14
RHX	404.68	282.63	122.05
RHL	395.78	276.41	119.37
RMX	451.47	315.31	136.16
RML	417.36	291.48	125.88
RLX	319.61	223.22	96.39
RUC	562.03	392.52	169.51
RUB	520.51	363.52	156.99
RUA	499.74	349.02	150.72
RVC	439.87	307.21	132.66
RVB	420.59	293.74	126.85
RVA	385.00	268.88	116.12
RHC	375.02	261.91	113.11

TABLE 7—RUG–53—CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG–III category	Total rate	Labor portion	Non-labor portion
RHB	360.19	251.56	108.63
RHA	337.94	236.02	101.92
RMC	343.20	239.69	103.51
RMB	334.30	233.48	100.82
RMA	328.37	229.33	99.04
RLB	295.88	206.64	89.24
RLA	255.83	178.67	77.16
SE3	352.23	246.00	106.23
SE2	301.81	210.78	91.03
SE1	270.66	189.03	81.63
SSC	266.21	185.92	80.29
SSB	252.87	176.60	76.27
SSA	248.42	173.50	74.92
CC2	264.73	184.89	79.84
CC1	243.97	170.39	73.58
CB2	232.10	162.10	70.00
CB1	221.72	154.85	66.87
CA2	220.24	153.82	66.42
CA1	208.37	145.53	62.84
IB2	199.47	139.31	60.16
IB1	196.51	137.24	59.27
IA2	181.68	126.89	54.79
IA1	175.74	122.74	53.00
BB2	197.99	138.28	59.71
BB1	193.54	135.17	58.37
BA2	180.19	125.84	54.35
BA1	168.33	117.56	50.77
PE2	214.30	149.67	64.63
PE1	211.34	147.60	63.74
PD2	203.92	142.42	61.50
PD1	200.96	140.35	60.61
PC2	195.02	136.20	58.82
PC1	193.54	135.17	58.37
PB2	174.26	121.70	52.56
PB1	171.30	119.64	51.66
PA2	169.81	118.60	51.21
PA1	165.36	115.49	49.87

Section 1888(e)(4)(G)(ii) of the Act also requires that we apply this wage index in a manner that does not result in aggregate payments that are greater or less than would otherwise be made in the absence of the wage adjustment. For FY 2010 (Federal rates effective October 1, 2009), we apply an adjustment to fulfill the budget neutrality requirement. We meet this requirement by multiplying each of the components of the unadjusted Federal rates by a budget neutrality factor equal to the ratio of the weighted average wage adjustment factor for FY 2009 to the weighted average wage adjustment factor for FY 2010. For this calculation, we use the same 2007 claims utilization data for both the numerator and denominator of this ratio. We define the wage adjustment factor used in this calculation as the labor share of the rate component multiplied by the wage index plus the non-labor share of the rate component. The budget neutrality factor for this year is 1.0010. The wage index applicable to FY 2010 is set forth in Tables A and B, which appear in the Addendum of this final rule.

Comment: One commenter estimated SNF reimbursements using both the FY 2010 SNF wage index in the proposed rule and in the absence of a wage index using simulation. The commenter found that SNF reimbursement was about $400 million lower with the wage index adjustment than without it. The commenter believes that CMS is incorrectly adjusting for the wage index and that payments during the 2002–2009 timeframe are more than $2 billion too low.

Response: The intent of the wage index budget neutrality factor is to make sure that aggregate payments using the updated wage index are not greater or less than aggregate payments would be using the previous year's wage index. Because the wage index is based on the pre-floor, pre-reclassified, no occupational mix hospital wage index, the weighted average wage index would be equal to 1.0000 for hospitals. However, there are often multiple SNFs within a wage area with varying utilization levels. The weighted average wage index across all SNF providers may not be equal to 1.0000 for any given fiscal year, so payments could go up or down as a result of their application. Estimation of payments relies on the combination of the geographic wage index value for providers along with their distribution of service days. The change in the wage index values along with the utilization within each urban or rural area determines the change in aggregate payments related to the previous year and, therefore, the budget neutrality factor. The application of the budget neutrality factor ensures that aggregate payments will not increase or decrease due to the year-to-year change in the wage index. Therefore, we do not accept the methodology applied by the commenter, and believe that the 1.0010 budget neutrality factor will ensure equal payments after updating to the FY 2010 SNF PPS wage index, prior to any other policy changes.

In the SNF PPS final rule for FY 2006 (70 FR 45026, August 4, 2005), we adopted the changes discussed in the Office of Management and Budget (OMB) Bulletin No. 03–04 (June 6, 2003), available online at *http://www.whitehouse.gov/omb/bulletins/b03-04.html*, which announced revised definitions for Metropolitan Statistical Areas (MSAs), and the creation of Micropolitan Statistical Areas and Combined Statistical Areas. In addition, OMB published subsequent bulletins regarding CBSA changes, including changes in CBSA numbers and titles. As indicated in the FY 2008 SNF PPS final rule (72 FR 43423, August 3, 2007), this and all subsequent SNF PPS rules and notices are considered to incorporate the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current SNF PPS wage index. The OMB bulletins may be accessed online at *http://www.whitehouse.gov/omb/bulletins/index.html*.

In adopting the OMB Core-Based Statistical Area (CBSA) geographic designations, we provided for a 1-year transition with a blended wage index for all providers. For FY 2006, the wage index for each provider consisted of a blend of 50 percent of the FY 2006 MSA-based wage index and 50 percent of the FY 2006 CBSA-based wage index (both using FY 2002 hospital data). We referred to the blended wage index as the FY 2006 SNF PPS transition wage index. As discussed in the SNF PPS final rule for FY 2006 (70 FR 45041), subsequent to the expiration of this 1-year transition on September 30, 2006, we used the full CBSA-based wage index values, as now presented in Tables A and B in the Addendum of this final rule.

4. Updates to the Federal Rates

In accordance with section 1888(e)(4)(E) of the Act, as amended by section 311 of the BIPA, the payment rates in this final rule reflect an update equal to the full SNF market basket, estimated at 2.2 percentage points. We continue to disseminate the rates, wage index, and case-mix classification methodology through the **Federal Register** before the August 1 that precedes the start of each succeeding FY.

5. Relationship of RUG–III Classification System to Existing Skilled Nursing Facility Level-of-Care Criteria

As discussed in § 413.345, we include in each update of the Federal payment rates in the **Federal Register** the designation of those specific RUGs under the classification system that represent the required SNF level of care, as provided in § 409.30. This designation reflects an administrative presumption under the refined RUG–53 system that beneficiaries who are correctly assigned to one of the upper 35 of the RUG–53 groups on the initial 5-day, Medicare-required assessment are automatically classified as meeting the SNF level of care definition up to and including the assessment reference date on the 5-day Medicare required assessment.

A beneficiary assigned to any of the lower 18 groups is not automatically classified as either meeting or not meeting the definition, but instead receives an individual level of care determination using the existing administrative criteria. This presumption recognizes the strong likelihood that beneficiaries assigned to one of the upper 35 groups during the immediate post-hospital period require a covered level of care, which would be less likely for those beneficiaries assigned to one of the lower 18 groups.

In this final rule, we are continuing the designation of the upper 35 groups for purposes of this administrative presumption, consisting of all groups encompassed by the following RUG–53 categories:

- Rehabilitation plus Extensive Services;
- Ultra High Rehabilitation;
- Very High Rehabilitation;
- High Rehabilitation;
- Medium Rehabilitation;
- Low Rehabilitation;
- Extensive Services;
- Special Care; and,
- Clinically Complex.

A discussion of the relationship of the proposed RUG–IV classification system to existing SNF level of care criteria appears in section III.C.4 of this final rule.

6. Example of Computation of Adjusted PPS Rates and SNF Payment

Using the hypothetical SNF XYZ described in Table 8, the following shows the adjustments made to the Federal per diem rate to compute the provider's actual per diem PPS payment. SNF XYZ's 12-month cost reporting period begins October 1, 2009. SNF XYZ's total PPS payment would equal $30,635. We derive the Labor and Non-labor columns from Table 6 of this final rule.

TABLE 8—RUG–53—SNF XYZ: LOCATED IN CEDAR RAPIDS, IA (URBAN CBSA 16300); WAGE INDEX: 0.8984

RUG group	Labor	Wage index	Adj. labor	Non-labor	Adj. rate	Percent adj.	Medicare days	Payment
RVX	$326.59	0.8984	$293.41	$141.03	$434.44	$434.44	14	$6,082.00
RLX	222.71	0.8984	200.08	96.17	296.25	296.25	30	8,888.00
RHA	227.49	0.8984	204.38	98.24	302.62	302.62	16	4,842.00
CC2	188.59	0.8984	169.43	81.44	250.87	*571.98	10	5,720.00
IA2	127.88	0.8984	114.89	55.22	170.11	170.11	30	5,103.00
Total							100	30,635.00

* Reflects a 128 percent adjustment from section 511 of the MMA.

C. Resource Utilization Groups, Version 4 (RUG–IV)

1. Staff Time and Resource Intensity Verification (STRIVE) Project

In the FY 2010 proposed rule (74 FR 22208, 22220, May 12, 2009), we noted that the SNF PPS uses the Resource Utilization Group (RUG) to which a resident is assigned to make a case-mix adjustment to that resident's payment amount, in order to reflect the relative resource intensity that would typically be associated with the resident's clinical condition. In this context, we discussed our STRIVE project, which we conducted to help ensure that the SNF PPS payment rates reflect current practices and resource needs. The following sections discuss the comments that we received on this issue and related topics, along with our responses.

a. Data Collection

To help ensure that the SNF PPS payment rates reflect current practices

and resource needs, CMS sponsored a national nursing home time study, STRIVE, which began in the Fall of 2005. Information collected in STRIVE includes the amount of time that staff members spend on residents and information on residents' physical and clinical status derived from MDS assessment data. As noted in the FY 2010 proposed rule (74 FR 22208, 22221, May 12, 2009), identifying the level of staff resources needed to provide quality care to nursing home patients was a primary objective. For this reason, nursing homes with poor survey histories or pending enforcement actions were excluded from the sample. In addition, nursing homes with poor quality indicator (QI) or quality measure (QM) scores were also excluded, as were nursing homes with low occupancy rates, large proportions of private pay or pediatric patients, and nursing homes that were undergoing hardships (such as fires or floods) that would prevent participation in the study. The comments that we received on this issue, and our responses, appear below.

Sampling Methodology

A number of commenters addressed issues regarding the sampling methodology of the STRIVE project. These comments fell into several major categories:

- Sample size and margin of error.
- Random nature of the sample.
- Representativeness of the sample and data collection process.

Sample Size and Margin of Error

Comment: Several commenters recognized CMS's efforts in collecting significantly more data than that gathered in the 1990 sample used initially to develop RUG–III, and the 1995/1997 sample used to revise RUG–III and establish the current CMIs that are the basis for current Medicare rates. However, a number of comments asserted that the precision was too low (that is, the margin of error too high) to make reliable estimates for use in setting payment rates. More specifically, these commenters stated that the overall margins of error for the sample that were presented at several TEP meetings appeared unrealistically low. These commenters recommended that CMS should abandon the time study methodology, which relies on a sample-based special study, and develop a methodology that uses population-based administrative data.

Response: At several TEP meetings, estimates of the overall margin of error for Medicare and non-Medicare cases were presented. It is worth noting that these analyses were interim work products and were developed during the course of our analyses to give stakeholders the most current information available as early as possible to help them evaluate the RUG–IV model. To the comment that asserted these estimates were unrealistically low and that we must have failed to consider correctly the sample design when they were calculated, we note that these estimates actually did account for the sample design (both stratification and clustering), but were adjusted in two ways: (a) We developed procedures to remove variance associated with case mix, and (b) we presented a weighted variance estimate that was based upon all of the individual RUG groups and which weighted more prevalent groups more heavily than less prevalent groups (since these would be more often used in making payments). Basically, we attempted to compute the margin of error for the ''typical'' or ''average'' RUG group after removing the effect of case mix.

Upon further review, as noted by a few commenters, we found minor flaws in the methodology, and have updated our analysis. As shown below, we believe that the simplest and most informative overall measure of the precision of the sample is the margin of error associated with the nursing and therapy overall means. Table 9 below presents relevant values from the STRIVE study and from the prior 1995/97 time study.

TABLE 9

Parameter	STRIVE	1995/97 time study	Percent improvement
Nursing Time:			
Number of cases (weighted)	9,766	3,933	
Mean wage-weighted time	135.2	228.3	
Standard error of mean	3.1	7.2	
Coefficient of variation of mean	2.3%	3.2%	26.7
Margin of error (percent of mean)	±4.6%	±6.2%	26.8
Therapy Time:			
Number of cases (weighted)	1,510	1,133	
Mean wage-weighted time	144.0	86.0	
Standard error of mean	5.5	3.5	
Coefficient of variation of mean	3.8%	4.0%	4.6
Margin of error (percent of mean)	±7.6%	±8.0%	4.7

Note: Coefficient of variation of the mean = (std error of mean)/(mean) * 100.

For each of these studies, the table above presents statistics for mean nursing time (based upon all residents in the sample) and for therapy time (based upon all residents who received any therapy time). For each of these datasets, the table presents the number of cases (raw, unweighted counts), the mean of the wage-weighted minutes, the standard error of the mean, the margin of error associated with the mean, and the margin of error expressed as a percentage of the mean.

We note that for both nursing and therapy time, the methodology used to wage-weight time differed between the two studies. (A detailed discussion of the wage-weighting protocols is presented below.) Therefore, the means, standard errors, and margins of error cannot be directly compared between the two studies. We have, therefore, computed the margin of error as a percentage of the mean to allow such comparison.

It can be seen that in the STRIVE sample, the margin of error for the nursing time is about ±4.6 percent of mean nursing time, compared with ±6.2 percent in the earlier study. This represents a 26.8 percent improvement in precision over the earlier study. For therapy time, the STRIVE margin of error is ±7.6 percent, a 4.7 percent improvement over the earlier study. With regard to therapy time, the

improvement is modest because of the relatively large number of cases in the 1995/97 time study that had therapy time. We believe this is because the sample that was used for the earlier study was largely aimed at identifying and enlisting nursing homes that had Medicare residents and provided therapy.

Thus, the STRIVE sample is larger and has considerably more precision for nursing time than the earlier time study. The results of the earlier study have served as the basis for Medicare and Medicaid rate setting since 1998 and the new results should, if anything, lead to more accuracy than the data collected more than 10 years ago. We believe that the ability to distinguish more precisely and accurately between patient characteristics and varying degrees of acuity with the time study methodology outweighs the issues of ease of collection and analysis of population-based administrative data.

Comment: Some commenters said the sample sizes for some individual RUG groups were very low. Several commenters focused on sampling error due either to bias or to small sample sizes that they believed weakened the STRIVE study. One respondent questioned the small sample size, and claimed that an overall sample size of 500,000 (compared with STRIVE's sample of under 10,000) would be necessary to ensure reasonable precision in all RUG groups. While they also stated that the margins of error associated with overall mean nursing and therapy times provide a useful metric for comparing the STRIVE study with the 1995/97 time study, several comments expressed concerns about the precision of individual RUG group means as opposed to the means for the entire sample. They observed that the margin of error for such small RUG groups was so large as to make the mean staff time estimates unusable for those groups.

Response: While a sample size of 500,000 might be appropriate for a large-scale academic research project or medical trial, the STRIVE project was specifically designed to update the RUG case-mix classification system to reflect current resource utilization in nursing homes across the country. As many commenters pointed out, patient characteristics have changed and patient acuity levels have increased since the introduction of the SNF PPS in 1998. For STRIVE, as for many other CMS analytic projects, there is a tradeoff between timeliness of results, cost, and small cell size. In fact, using the sample size guideline recommended by the commenter, it is unlikely that many if not most of the programmatic changes incorporated into the Medicare program since its inception in 1966 could have been successfully introduced.

It is true that the sample sizes for some RUG groups are small and that the margins of errors for these RUG groups means are large. However, there are several reasons why we believe that the precision is sufficient for rate setting:

- Some comments appeared to suggest that only Medicare cases were used to produce the group means and CMIs that were used for rate setting. Because Medicare residents comprised only about 14 percent of the total weighted STRIVE sample, this would have exacerbated problems with small sample sizes. In fact, however, we used the entire sample of valid cases (that is, all cases that passed our accuracy edits), not just Medicare cases, to produce these group means and CMIs. Thus, the RUG group sample sizes were considerably larger than some comments suggested.
- Therapy CMIs are based upon mean therapy times for the therapy categories, not the means for individual therapy groups. That is, mean therapy times are calculated for the RU, RV, RH, RM, and RL categories and therapy CMIs are computed based upon these category means. The therapy CMI for a category is then used to calculate the therapy payment rate applied to all of that category's subgroups. For example, the RU therapy CMI and corresponding rate are applied across the RUX, RUL, RUC, RUB, and RUA groups. Because the therapy CMIs and therapy rate components are computed at the category level, the sample sizes are considerably larger than some comments suggest.
- We recognized that the nursing time sample sizes were quite small for some individual RUG groups, especially those with tertiary splits (based on nursing rehabilitation and depression) and for the ''Rehabilitation plus Extensive'' groups. To address this problem, we used regression-based estimation procedures to develop group means and CMIs for these groups. For example, the individual combined Rehabilitation-Extensive Services RUG–IV groups (for example, RUX) had very small sample sizes, with weighted sample sizes varying from less than 1 to 12 cases. Clearly, this was an insufficient number of cases in these individual groups to obtain reliable individual group means or reliable CMIs based on individual group means. Therefore, we developed a regression model to estimate the overall average increase in nursing time for providing extensive services to residents receiving rehabilitation, controlling for level of therapy and ADL dependence. The estimated average increase due to extensive services was based on comparison of all Rehabilitation-Extensive Services residents (49 sample weighted cases) versus all Rehabilitation-only residents (1,261 sample weighted cases). The nursing time estimate for each Rehabilitation-Extensive Services group was then calculated as the nursing time mean for Rehabilitation-only residents with the same level of rehabilitation and ADL dependence plus the estimated average increase due to extensive services. For example, the nursing time estimate for RUX was calculated as the mean for RUC plus the average extensive services increase. This estimate is based on much larger sample sizes and is, therefore, much more reliable than individual Rehabilitation-Extensive Services group means. Similar models and adjustments were made for the depression and restorative therapy splits.
- The RUG–IV model, like previous RUG models, is structured and contains implicit assumptions about the ordering of group means. One assumption is that within a category, payment rates will increase as the ADL score (and ADL dependence) increases. A second assumption is that within a corridor of ADL scores, payment rates will decrease as one moves down the hierarchy. Exceptions to these constraints are called rate inversions and are to be avoided because of the perverse incentives they can create (for example, when a resident qualifies for more than one group and would produce a higher payment in a lower group with fewer services being provided). A considerable effort was made to examine the individual group means, CMIs, and rates for possible inversions, and to make adjustments where necessary to fix these inversions. Inversions were fixed employing the regression models described above and by smoothing techniques (for example, computing the weighted mean of two groups that had a small inversion and using that weighted mean as the basis for computing the rate for those two groups). Some of the observed inversions were in groups with small sample sizes and may have been the result of imprecise estimates of the group means. The smoothing and estimation procedures described above produced payment rates that, with a few exceptions, conformed with the RUG model's hierarchical constraints. Most exceptions where rate inversions remained involved the following rare groups (with sample weighted number

of cases in parenthesis): RHL (8 cases), RML (10 cases), RLX (0 cases), RLB (21 cases), and RLA (24 cases)). The only inversions involving larger groups were LD1 and CD1 versus PD2. Because the means, CMIs, and rates were constrained as discussed above, and were adjusted where necessary to conform with these constraints, the impact of any statistical imprecision due to small sample sizes was mitigated.

• Finally, regarding those comments which stated that the lack of sampling precision associated with some RUG groups meant that the STRIVE results were too imprecise to be used with confidence for rate setting, we note that the logic of PPS models is that they successfully predict cost, and that payment rates that are based on those models will be accurately aligned with actual cost. The net result will be that providers will be paid in proportion to the cost of providing care to their residents. Nevertheless, PPS models do not perfectly predict cost, and there is error inherent in using such PPS models. This is true of the diagnosis-related group (DRG) model used for acute hospitals, the case-mix group (CMG) model used for inpatient rehabilitation hospitals, and the home health resource group (HHRG) model used for home health care. It has been recognized since the late 1980s that these models are not perfect predictors of cost. In fact, in 2002, a Report to Congress (''Prospective Payment System for Inpatient Services in Psychiatric Hospitals and Exempt Units,'' available online at *http://www.cms.hhs.gov/InpatientPsychFacilPPS/downloads/rptcongress.pdf)* discussed the historical limitations of PPS systems generally in terms of predicting resource use, and a June, 2008 MedPAC report (available online at *http://www.medpac.gov/documents/Jun08_EntireReport.pdf*) noted that PPS models do not perfectly predict cost. Thus, all of the Medicare PPS models account for only a portion of the variance associated with cost. Our analysis shows that, with sampling weights applied and using the full sample, the RUG–IV model accounts for 41.5 percent of the variance in nursing time. This statement does not mean that the RUG–IV model should not be used for rate setting. In fact, using the STRIVE sample, the RUG–IV variance explanation is higher than the 29.1 percent variance calculated for RUG–III.

As discussed above, there will always be a certain amount of error associated with payment rates. For the SNF PPS, much of this inaccuracy is ''averaged out'' when payment is made to a facility for a large number of days and for multiple residents. That small sample sizes and some degree of sampling error may contribute to this overall estimation error does not mean that rate setting cannot be performed with an acceptable level of accuracy.

Random Nature of the STRIVE Sample

Comment: Several commenters argued that the STRIVE sample is not random, making it unreliable for projecting patient acuity in the development of the new RUG–IV system. One commenter suggested that, while there is insufficient information to make a conclusive finding on this point, the potential exists that the STRIVE sample is fatally flawed due to the presence of bias.

A few commenters noted that at the last stage of the design, facilities had to be sub-sampled if the facilities were too large to be observed in their entirety. Due to a lack of PDAs and data monitors, data collection was limited to a portion of the facility, be it one or more floors, or one or more units. The subsample was selected by the project staff in consultation with facility management. The commenters stated that the subsampling was not conducted using any randomization method, and may have introduced bias to the sample and data collection.

Generally, several commenters argued that because the STRIVE sampling plan relied upon voluntary participation, sample selection was not random and may have introduced sampling biases.

Response: Selection of the STRIVE sample involved a number of steps, and we have acknowledged in public documentation and at several TEP meetings that non-random selection was used, by necessity, at several steps in this process. Specifically, States volunteered for selection and were not selected randomly. Nursing homes volunteered to participate and were, therefore, not selected randomly. Finally, in larger facilities where the entire nursing home could not be studied, nursing units within the nursing home were selected based upon a pre-determined protocol, rather than using a random procedure.

While we sought to utilize random processes where possible (for example, the list of facilities that were invited to participate in the study in each State was generated using a random procedure), the nature of this study precluded the use of strictly random selection. Because CMS did not have the authority to compel any State or nursing home to participate in the study, it was impossible to use a strictly random procedure for selecting States or nursing homes. Further, in larger nursing homes where all nursing units could not be included in the study, it was not possible to select nursing units randomly for inclusion in the study, because this could have introduced difficult logistical problems for data monitors if the selected nursing units were located on different floors of a building or different buildings on a campus.

It was, therefore, apparent from the outset of the study that the sampling design would have to accommodate non-random selection procedures. Potential problems that could be introduced by the use of non-random selection were addressed in several ways.

First, random procedures were used whenever possible, such as for generating lists of facilities that were invited to participate in the study. Second, where random processes were not feasible, we developed protocols that described exactly how selection was to occur. For example, we used a detailed decision tree to select nursing units in larger facilities. This protocol was uniform across nursing homes and applied by the project staff who managed the study. Use of these protocols eliminated important types of bias (for example, selecting a nursing unit because it was deemed more efficient or of better quality). Third, we directly assessed the study's sampling error and quantified its precision statistically. Fourth, we developed sampling weights based on the sample design that adjust the sample for over- or under-sampling and produced sample estimates that were not biased by the design itself. A number of analyses were performed comparing the STRIVE sample with national OSCAR and MDS databases to determine the degree to which the sample was representative (that is, the degree to which the sample resembled the population on important variables). The results of these analyses are described later in this final rule.

Sample Representativeness

Comment: Some commenters questioned the overall representativeness of the STRIVE sample, stating it was biased due to a number of factors. Commenters stated that CMS had not made sufficient information available to show that the sample can be relied upon to generalize nationally. Commenters also questioned whether the actual sample being smaller than the original project goal affected the sample representativeness, and questioned whether the sample methodology had taken these differences from the planned design into account. In addition, a commenter

asserted that CMS has not presented any evaluation or validation of the study in the publicly available documents.

Another bias factor mentioned by commenters was geographic location. Specifically, the commenters indicated that the STRIVE sample size was too small to be nationally representative, that important States were omitted from the sample, and that the 15 States that were included in the sample were not representative of the nation. It was also noted that in four States, we drew facilities from only a portion of the State and that this could have introduced additional geographic bias. In order to demonstrate the potential biases introduced by these geographic selections, several comments included analyses showing statistically significant differences in claims, OSCAR, and MDS data between the 15 States that were included in the sample and the remaining States in the nation. Commenters were concerned that no data were collected from the Mid-Atlantic or New England regions, California and Oregon, or in the area the commenter characterized as the ''entire mid-section'' of the country. One commenter noted that the initial STRIVE collection methodology was tested in one center in Maryland and that none of the preliminary data from that center were considered.

Some commenters argued that there is greater relative resource use with significantly higher costs in those missing States than in the STRIVE States, as well as the nation overall. The commenters indicated that the operating characteristics of the facilities in the STRIVE States do not appear to be representative of the characteristics of the facilities in the other States.

Another commenter questioned CMS's reference to Canadian data, given the significant differences in the health systems between the two countries. The commenter asked CMS to explain how and why Canadian data were used, and how such data can be considered representative of New England States, the Mid-Atlantic States, the Southeastern States, and California.

One commenter asserted that the participating States were not representative of SNFs nationwide, and that the STRIVE sample likely may be weighted in a manner that reflects care patterns in rural areas and facilities more than in urban facilities. The commenter argued that the STRIVE sample only included 2 of the 7 States with a high urban ratio (the District of Columbia, and 4 Florida facilities) where more than 90 percent of facilities are in an urban region. The commenter believed that selecting the majority of the participating States from the remaining 44 States (where the urban-to-rural ratio is about 70 percent to 30 percent) biased the sample.

One commenter submitted a regression analysis suggesting that the RUG costs, both overall and by RUG–53 category, are different in STRIVE States when compared to non-STRIVE States, indicating that the STRIVE relative weight structure could be non-representative. The commenter believed that the perceived lack of representativeness calls into question the validity and appropriateness of the updated weights and the re-categorization of residents who were key to the STRIVE project and critical to the design of RUG–IV. In addition, several commenters asserted patients evaluated in the STRIVE sample may not be representative of the actual acuity of most SNF residents nationwide.

Finally, a commenter claimed that CMS failed to make publicly available sufficient information to allow for an external evaluation of the impact. As a result, the commenter concluded that it is not known how much bias might have been added to the estimators of the mean staff time due to these nonsampling errors. The commenter recommended performing further analysis of the current sample before implementing the RUG–IV model, in order to determine whether and to what extent the sample might have been affected by these potential biases.

Response: In response to these comments, we note first that it would have been best to base the sample on either a random selection of States or on all States in the nation. However, as noted above, this was not possible given the study's resources and the voluntary nature of the study. We note also that the sample included both populous and small States, predominantly urban and predominantly rural States, and States that were spread geographically across the country. Thus, we disagree with commenters that believe the study's sample size and geographic scope were insufficient or led to undue bias.

Of course, in any sample that includes less than all of the States (or indeed, less than all facilities throughout the country), it is always possible to question whether the sample is sufficiently representative of the nation as a whole. While some commenters suggested that selecting facilities in only 2 of the 7 States with the highest urban-to-rural ratios might have understated STRIVE acuity levels, it is equally possible that oversampling the States with atypical population distributions could have resulted in the opposite effect. However, whether the STRIVE sample is representative can be and was tested by comparing data from STRIVE with national data to determine the degree to which the sample statistics match with national statistics. Some commenters noted that the data and analyses that were previously presented were insufficient to judge the degree of sampling bias that was present. We have, therefore, performed supplemental analysis which will be presented later in this section.

It is true, as some commenters noted, that our actual sample size of 205 nursing homes was smaller than the goal of 238 nursing homes that was set at the beginning of the study. While it is always preferable to have a larger sample size, we were unable, given available time and resources, to achieve the initial goal. During the planning phase of the study, we projected the expected margins of error using various sample sizes, including the size that was actually achieved. All things being equal, precision is always better when the sample size is larger, but we determined that the incremental precision that would have been achieved with 238 facilities was small and that the sample size that was actually achieved was sufficient to meet the analytic goals of the study.

Regarding the comment that questioned CMS's reference to Canadian data, we note that in fact, the Canadian data were not merged with the STRIVE sample at all. Instead, we worked with Canadian officials who were developing their own STM study based on our efforts: CAN–STRIVE. We have shared data and discussed findings as a way of testing the accuracy of our own findings. For example, patients with similar characteristics and care needs required similar staff resources for treatment. In addition, the CAN–STRIVE project reports that applying our RUG–IV model to their data results in a variance explanation of weighted nursing time of 35.4 percent. This represents an independent and highly successful validation of the RUG–IV model. Far from being an inappropriate misuse of data, we believe that this inter-governmental collaboration actually serves to further the interests of both Canada and the United States. Similarly, data from 2 facilities, including 1 in Maryland, that were used to pilot test the data collection process, were used to determine facility training needs and to finalize data collection procedures. These pilot facilities were crucial in testing protocols and, as a result of honest and open staff feedback, in modifying some of our original data collection methods. Since the data collection process was still under

development, we did not include the staff time data in the STRIVE data.

Finally, in response to the commenters' concerns about our evaluation and validation of the study, a validation methodology was built into the STRIVE study. With the large sample size obtained, we reserved one third (3,253 observations) for validation: We did not use these reserved observations at all in the derivation of the RUG–IV classification. After the RUG–IV system was fully developed, we then tested it on the validation sample. Such a cross-validation procedure is standard statistical practice to ensure that a statistical model is not ''over-fitted,'' meaning that some of the relationships that appear to be statistically significant are merely noise. Cross-validation allows us to verify that the model will perform well in practice, will replicate well, and will have reasonably accurate predictive ability. The results showed that the derived system described in the proposed rule was robust. For example, the variance explanation of nursing time (sample weighted) of the RUG–IV system fitted to the derivation sample was 41.8 percent, while in the validation sample, the same statistic was 41.4 percent. Because the results have been cross-validated within the original STRIVE sample, we do not consider a separate validation study to be necessary, nor was a separate study part of the original STRIVE design. Further, the results of the CAN–STRIVE project, reported above, serve as a second type of model validation.

Comment: Some commenters asserted the sample was biased due to voluntary self-selection of nursing homes that agreed or refused to participate in the study. Commenters questioned the selection of facilities based on the number of facilities the data monitors were able to visit, indicating the sample size within the State was driven by resource constraints on how many facilities could be visited, which could introduce bias.

Another voluntary sampling issue raised by the commenters was the selection of facilities until enough facilities agreed to participate. Bias could be introduced here when such factors as resources or staff availability could influence the decision of a facility to agree or not agree to participate.

A few commenters questioned the high non-response rate. The commenters noted that of the 837 sampled facilities, 100 were dropped by State agencies or CMS regional offices. Of the 737 eligible facilities, 523 were invited to participate, 214 (about 40 percent) agreed to participate, and 205 (about 39 percent) actually participated in the study. The STRIVE sample survey literature indicates that voluntary response samples are biased, as people with strong opinions or atypical institutions tend to respond.

Response: As with geographic selection, we would have preferred a design where self-selection was not a factor. However, as noted above, CMS did not have the authority to require participation in the study if a facility was randomly selected for inclusion. As discussed in published documentation, only 40.9 percent of the facilities invited to participate in STRIVE agreed to be part of the study. This acceptance rate is not surprising considering participation required a fairly large commitment of time and resources on the part of the nursing home. Like those who commented on this issue, we were concerned that this self-selection might have introduced biases. In particular, we were concerned that only those facilities with better staffing levels might agree to participate because of the time involved in being part of the study.

We tested this possibility using OSCAR staffing data. Staffing data were cleaned using standard CMS algorithms to remove erroneous data, and were matched to the STRIVE data. For each nursing home in the database, both STRIVE and non-STRIVE, we computed the number of staff minutes per resident day for RNs, LVNs, and aides separately. Table 10 shows the mean minutes per resident day by staff type for the following groups of STRIVE nursing homes in the first 3 rows: (1) STRIVE nursing homes that were eliminated from consideration by State and Regional staff, (2) STRIVE nursing homes that were invited but declined to participate, and (3) STRIVE nursing homes that participated in the study. We also show three national groups of nursing homes: (4) All nursing homes nationally that passed the QI/QM and survey deficiency quality data screens, (5) all nursing homes nationally that failed the quality data screens, and (6) all nursing homes nationally. Note that the number of facilities shown in Rows 1, 2, and 3 of the table are slightly lower than those in previously published documentation, because not all STRIVE facilities could be matched to OSCAR data.

TABLE 10

Row	Group	Mean minutes per resident day				
		Nursing homes	RNs	LVNs	Aides	Total
	STRIVE Nursing Homes					
1	Eliminated by States and regions	90	32.2	49.3	144.9	226.4
2	Declined to participate	287	37.4	46.8	*136.5	*220.7
3	Participated	[1] 198	34.4	54.7	146.7	235.9
	National Nursing Homes					
4	Passed quality data screens	13,419	38.2	47.4	141.3	226.9
5	Excluded by quality data screens	1,149	38.1	51.8	138.6	228.6
6	All facilities	14,636	38.2	47.8	141.1	227.1

Notes:
[1] There were 205 nursing homes that participated in the STRIVE study, but only 198 could be matched to OSCAR data.
*Asterisks indicate statistically significant differences between the values in Rows 1, 2, or 3 compared with corresponding values in Row 4.

The proper basis for comparison between the STRIVE sample groups and the nation is Row 4: Facilities that passed the quality data screens. As part of the design, we excluded about 8 percent of all nursing homes nationally from the sampling frame that had very poor QI, QM, or survey deficiency histories (Row 5). Since these nursing

homes were not in the sampling frame, we would not necessarily expect the staffing levels of STRIVE nursing homes to match their staffing levels. Therefore, statistical comparisons were made between corresponding values in Rows 1, 2, and 3 and the values in Row 4. Asterisks indicate values that are significantly different ($p < 0.05$) from the values in Row 4.

The three groups of STRIVE nursing homes matched the national statistics in Row 4 fairly well. Nursing homes that declined to participate (Row 2) had significantly lower aide and total time, but the staff times for nursing homes that completed the study were not significantly different from the nation. Therefore, we conclude that the factors related to self-selection did not create a sample that was biased (upwards) in staff time.

We do not agree with the comment that resource constraints on the number of facilities that data monitors could visit may have introduced another source of bias. When a State agreed to participate in the study, an evaluation was made of the number of facilities that the data monitors would be able to visit. The sample size for the State was agreed upon before the sample was drawn. These resource constraints, therefore, could not have produced a sample bias.

Comment: A few commenters expressed concern that the STRIVE project did not specifically address short-stay patients. They were concerned that, when collecting data, we excluded short-stay patients from the study and only used data for patients with lengths of stay of 7 or more days. They indicated that short-stay patients, especially those with hospital readmission, tend to be unstable and have higher acuity and resource utilization.

Response: The purpose of the STRIVE project was to update the existing RUG–III case-mix classification system that was introduced on July 1, 1998. While the RUG–III model does not include a separate classification structure for short-stay patients, short-stay patients were included in the original study. Similarly, when collecting the STRIVE data, we included a variety of patients from new admissions to longer-term or chronic patients. For each unit in the test sample, we included patients who were admitted prior to or on the study start date, and who remained in the facility for the two days on which we collected nursing staff time data. The nursing staff time for these patients was included in the STRIVE data. The confusion may have arisen because we limited the collection of therapy data to patients who were nursing home patients for the entire 7 days when therapy data were collected.

During the past few years, we have been conducting analyses on episodes of care (that are separate from STRIVE) and are concerned that episodes of care increasingly show repeated transfers between acute and post acute care. We agree with the commenters that these short-stay admissions appear to be more costly, but we have not yet determined the reasons for these transfers. It is not clear whether the primary reasons for frequent readmission to an acute care setting reflect hospital discharge patterns, SNF care practices, or a combination of both. Until more research is available, we do not believe it would be appropriate to establish a separate payment structure for short-term patients. In the future, we hope to include an analysis of short-stay patients as part of other post-acute health care reform initiatives. In this way, we can make appropriate adjustments as we develop the next generation of post acute care payment systems.

Comment: A few other commenters who questioned the omission of short-stay patients suggested that the omission of this sizable and expensive population would likely skew both nursing time and the nursing index, while raising questions about the appropriateness of the reclassification of SNF residents within the RUG hierarchy. These commenters submitted data that they believed showed the following:

- This short-stay SNF resident population has substantially higher acuity and substantially higher resource utilization.
- Very short stay SNF residents account for over 21.0 percent of SNF stays.
- The omission of this critical population may well have underestimated and skewed the reclassification of SNF residents and the nursing and therapy weights that underlie the proposed RUG–IV system.
- Given that these very short stay, higher acuity residents generally would not be captured in the STRIVE data, the conclusion of the STRIVE project concerning resource utilization of SNF residents who received extensive services in the hospital may be wrong.

Response: It is true that some patients with very short stays (discharge within two days of admission) were not included in the final STRIVE results. This occurred because residents were excluded unless complete nursing time was available for both days of the nursing time study in a facility. If a resident was admitted or discharged on a nursing time study day, then only incomplete nursing time data were available for that day, and inclusion of the resident would have resulted in an underestimation of nursing time. This led to exclusion of residents with a length of stay of 2 days or less (as well as any other residents seen in the first or last 2 days of their longer stay).

However, we do not believe that excluding patients with stays of 2 days or less skewed the nursing time and nursing case-mix weights. The STRIVE methodology only excluded nursing facility stays with lengths of stay of 1 or 2 days. Other short SNF stays (for example, length of stay of 3 days) were included in all analyses.

We note that the results submitted by one commenter indicating that short-stay SNF residents have higher acuity were based on the MS–DRG CMIs for the cost of hospital care preceding the SNF stay rather than on the cost of the SNF stay itself, and that using the hospital cost as a proxy for the SNF cost might not be accurate. Further, the hospital CMIs do not show ''substantially higher resource utilization'' for short stays excluded by STRIVE (1 to 2 days) versus short stays included by STRIVE (for example, 3 to 7 days). The MS–DRG CMI decrease for 3- to 7-day stays versus 1- to 2-day stays is 2.9 percent for short-stay SNF patients readmitted to the hospital, 4.1 percent for short-stay SNF patients who die in the SNF after a short stay, and 3.0 percent for short-stay SNF patients who are discharged to another setting. While the hospital acuity for the very short 1- to 2-day stays is somewhat higher than 3- to 7-day stays, it certainly is not ''substantially higher.''

Again, we were very concerned by the assertion that very short stays involving 21 percent of all SNF stays were excluded, and after reviewing the data carefully, we found the claim to be at least partially inaccurate. The 21 percent of stays refers to stays involving 1 to 7 days. STRIVE only excluded 1- to 2-day stays, and this comprises only 5.4 percent of all SNF stays. Even this 5.4 percent of stays greatly overestimates the actual impact of the excluded stays. The excluded very short stays of 1 to 2 days represent only 0.2 percent of all SNF paid days of service for a year. We do not believe that excluding these stays has much impact at all on (a) patterns of resident classification, (b) the nursing and therapy weights underlying RUG–IV, or (c) the resulting payments to providers. However, we do believe that additional research is needed to determine the reasons for the high

volume of discharges within the first 7 days of SNF admission.

Finally, exclusion of very short 1- to 2-day stays does not invalidate STRIVE project results concerning resource utilization of SNF residents who received extensive services in the hospital. Pre-admission hospital services were captured for residents who were admitted 1 to 6 days before the nursing staff time study, as long as they were not discharged during that 2-day study. The STRIVE results included over 500 residents who were assessed for extensive services received in the hospital within 7 days prior to SNF admission. Thus, the exclusion of very short 1- to 2-day stays did not preclude valid analysis of pre-admission extensive services.

Comment: A few commenters stated that we should have stratified by the type of assessment for each resident (5-, 14-, 30-, 60-, 90-day, quarterly, annual, *etc.*), and indicated that not doing so could have introduced biases. One commenter referenced MedPAC's analysis that resource use and case-mix can frequently vary by provider type, noting that in California, hospital-based SNFs tend to provide more medically-intensive services to a more acutely ill and injured patient population than do freestanding SNFs. The commenter indicated that in the proposed rule, it is unclear that CMS measured STRIVE data differences between hospital-based and freestanding SNFs, and argued that if these differences remain unmeasured and unaccounted for, they will ultimately lead to less accurate payment under RUG–IV and perpetuate the persistent decline of hospital-based SNFs.

Response: We note that it would not have been possible to perform such stratification given our study design. Once a nursing home and its nursing units were selected for inclusion in the study, all residents within those nursing units were included in the study regardless of any other characteristic, including the type of assessment that was due next. Because the sample-weighted STRIVE sample represents a cross-section of nursing home residents nationally, we believe that the sample should approximate the national distribution with regard to the type of assessment that is due next for each resident.

Moreover, while we recognize that hospital-based, proprietary, and nonprofit SNFs have some different facility characteristics, CMS does not have the authority to create separate classification models by provider type. During the STRIVE project, we did collect data on all 3 provider types for future analysis. In this way, we can continue to monitor the accuracy of our payment system and adjust for changes in patient acuity and staff resource needs.

Comment: Some commenters alleged that the sample under-represented Medicare residents, specifically those in a Medicare Part A stay. They asserted that the number of weighted Medicare cases in the STRIVE sample represented only 14.1 percent of the sample, while Medicare cases comprise 35 percent of national MDS data.

Response: This statistic apparently was derived from an analysis of the national MDS database in which each assessment was classified as PPS or non-PPS and in which the percent of assessments that were PPS was considered to be identical to the percent of residents who are Medicare residents. However, we believe this 35 percent figure is misleading for two reasons. First, we have performed work where we have matched Medicare Part A claims with MDS data, and have observed that a fairly large proportion of assessments that have a PPS reason for assessment are not actually linked with a SNF stay. Thus, depending upon MDS PPS assessments to identify Medicare residents leads to an overestimate of the number of those residents. Second, if the comment was based upon an analysis of a longitudinal data set, for example, a year's worth of MDS data, rather than a cross-section, the Medicare percentage will be further inflated. One reason for this is that Medicare residents have shorter lengths of stay and higher turnover than non-Medicare residents and, therefore, are over-represented when data are analyzed longitudinally. In addition, Medicare residents have more assessments per resident than non-Medicare residents, because PPS assessments must be completed more frequently than OBRA assessments. Therefore, the longitudinal approach will over-represent the number of Medicare residents present on any given day.

In order to produce counts that can be validly compared with the STRIVE data, an MDS snapshot must be produced that represents the latest assessment for each resident who is active on a given day. As part of our sampling process, we built a snapshot file for March 1, 2006 and matched Part A claims with this file. Based upon this analysis, we estimated that about 13.5 percent of nursing home residents are in SNF stays, which closely matches the national estimate from the STRIVE sample (14.1 percent).

Comment: One commenter presented a series of tables that compared STRIVE statistics on a number of MDS variables with corresponding statistics from the MDS national database. These tables broke down both the STRIVE sample and the national statistics by Medicare versus non-Medicare, and purported to show not only that Medicare distributions were different from non-Medicare distributions, but that the STRIVE distributions were different from the national distributions, thereby demonstrating significant bias in the STRIVE sample.

The commenter stated that unlike the change from RUG–44 to RUG–53, the estimate of distribution of days under the proposed RUG–IV is not directly calculated based on a linked MDS/claims data file, but rather, inferred using the STRIVE data to estimate the distribution of paid days in each of the RUG–66 groups. The commenter questioned the accuracy of the payment impact analysis based on these estimated distributions.

Response: For the reasons described previously, we believe that the commenter's analyses are flawed in how they classified the national data as Medicare/non-Medicare. While we acknowledge that there are clinical differences between Medicare and non-Medicare residents, these analyses appeared to reflect the premise that all STRIVE analyses were based upon Medicare residents only and that the results are, therefore, misleading when applied to the nation, stating, ''STRIVE uses the Medicare portion of the sample to refine the existing Resource Utilization Group (RUG) classification system.'' However, this statement is incorrect. STRIVE RUG development used both Medicare and non-Medicare cases, relying upon a ⅔ development sample and a ⅓ validation sample that included both types of cases. Furthermore, the calculation of mean nursing and therapy times that served as the basis for CMI calculation was based upon all valid cases. The only time that we limited analysis to Medicare cases was in producing the transition matrix used in estimating RUG–IV Medicare days of service from actual RUG–III paid days of service. All other development and rate setting analyses used both Medicare and non-Medicare cases.

It is true, as noted in the comments, that the fiscal estimates hinge upon the Medicare transition matrix. Ideally, fiscal estimates would be based upon an existing national assessment database. However, RUG–IV classifications cannot be performed on existing MDS 2.0 data, and MDS 3.0 will not be implemented for over a year, so the only way to make financial projections based on currently

available data is with the transition matrix.

We do not agree, however, that this is a critically flawed methodology. While there may be instances in which estimates for individual RUG–IV groups are not precisely accurate, any estimation errors should be random, with estimates for some groups being too high and others being too low compared with actual values. When estimates are made across all groups, however, these random estimation errors will tend to offset each other, and the overall estimates will have much greater precision.

Further, the fiscal impact estimates have other sources of error (for example, changes in provider behavior, changes in the cost of specific services, *etc.*) that cannot be remedied even if a national MDS 3.0 database were available. Estimation error due to the STRIVE transition matrix is likely to be a relatively small portion of the total error. Therefore, we believe that the overall fiscal estimates are as precise as possible, given the uncertainties associated with implementing a new payment model.

Finally, we recognize the difficulty of implementing changes to a payment system that cannot be verified by a review of historical data. In this case, we estimated changes to the distribution of paid days across the RUG–IV model, because the RUG–IV grouper utilizes clinical data that will not be collected until we introduce the MDS 3.0. In adopting this methodology, we recognize that there is a tradeoff between timely updating of the case-mix system to ensure more accurate distribution of SNF PPS payments and the potential weakness of using estimated data. For this reason, we have committed to post-implementation monitoring of the accuracy of the system calibration. We will, if needed, recalibrate the CMIs in the RUG–IV model using actual data if our analyses indicate that an adjustment is needed.

Comment: A number of commenters expressed concern about overall sample bias, specifically questioning how accurately the STRIVE sample represents residents nationally. One commenter stated the patient mix in the STRIVE sample is not representative of the national SNF Medicare cases, and thus, is not reliable in developing the RUG–IV system. The commenter asserted that based on the information available, it is readily apparent that the STRIVE sample is not representative and cannot be used as a basis for redefining the RUG system. The commenter argued that comparisons of behavioral and activity-level responses between STRIVE Medicare cases and Minimum Data Set 2.0 (''MDS'') Medicare cases reveal a significant disparity, and offered the following as examples:

- The activities of daily living (''ADL'') Index component for Self-Performance item G1aa (Bed Mobility Self-Performance) reveals a significant difference between the STRIVE Medicare cases and MDS Medicare cases for the Extensive Assistance category.
- Similarly, the ADL Index component for Self-Performance item G1ba (Transfer Self-Performance) shows a significant difference between the STRIVE Medicare cases and MDS Medicare cases for the Extensive Assistance categories.
- The ADL Index component for Self-Performance item G1ha (Eating Self-Performance) shows a significant difference between the STRIVE Medicare cases and MDS Medicare cases for the Extensive Assistance category.
- Finally, the ADL Index component for Self-Performance item G1ia (Toilet Use Self-Performance) shows a significant difference between the STRIVE Medicare cases and MDS Medicare cases for the Extensive Assistance category.

Thus, the commenter stated that the comparison of behavioral and activity-level responses between STRIVE Medicare cases and MDS Medicare cases provides additional support for the commenter's conclusion that there are serious issues with the representativeness of the STRIVE sample.

Response: As discussed above, we acknowledge that there were factors in the sampling procedures which, though unavoidable, may have introduced sampling bias. To test this, we assembled a snapshot database of MDS data and compared the results with the STRIVE sample on selected variables.

Table 11 compares STRIVE statistics for the entire sample with national MDS statistics. For these comparisons, a cross-section of MDS data was selected, which contained the latest assessment for every resident who was active in a nursing home on a given date. March 1, 2006 was selected for this analysis, so that the data would be as contemporaneous as possible with the STRIVE data. Variables important to case-mix determination were selected for analysis. Chi-square tests were performed to determine whether the distribution of scores on each variable deviated significantly from the national distribution. The columns in Table 11 show the MDS variable, the number and percent of cases for each value of the variable for the nation and for STRIVE, and an indicator of whether or not the chi-square test showed the STRIVE distribution to be significantly different from the national distribution.

TABLE 11

MDS variable	Value	MDS national snapshot		STRIVE: sample weighted		Signif diff ($p < 0.05$)
		Freq	Pcnt	Freq	Pcnt	
G1AA (bed mobility self-performance)	0. Independent	393,296	28.4%	2,724	27.9%	Yes.
	1. Supervision	86,778	6.3	612	6.3	
	2. Limited assist	241,342	17.4	1,638	16.8	
	3. Extens assist	438,795	31.7	2,871	29.4	
	4. Total depend	224,203	16.2	1,918	19.6	
	8. Did not occur	634	0.0	2	0.0	
	Total	1,385,048	100.0	9,766	100.0	
G1BA (transferring self-performance)	0. Independent	271,891	19.6	1,600	16.4	Yes.
	1. Supervision	96,985	7.0	602	6.2	
	2. Limited assist	258,049	18.6	1,946	19.9	
	3. Extens assist	432,545	31.2	3,115	31.9	
	4. Total depend	313,808	22.7	2,410	24.7	
	8. Did not occur	11,817	0.9	93	0.9	

TABLE 11—Continued

MDS variable	Value	MDS national snapshot		STRIVE: sample weighted		Signif diff (p < 0.05)
		Freq	Pcnt	Freq	Pcnt	
	Total	1,385,095	100.0	9,766	100.0	
G1HA (eating self-performance)	0. Independent	599,025	43.2	3,556	36.4	Yes.
	1. Supervision	327,129	23.6	2,448	25.1	
	2. Limited assist	128,760	9.3	1,046	10.7	
	3. Extens assist	123,645	8.9	1,019	10.4	
	4. Total depend	206,050	14.9	1,696	17.4	
	8. Did not occur	478	0.0	1	0.0	
	Total	1,385,087	100.0	9,766	100.0	
G1IA (toileting self-performance)	0. Independent	206,103	14.9	1,048	10.7	Yes.
	1. Supervision	79,396	5.7	450	4.6	
	2. Limited assist	215,647	15.6	1,548	15.9	
	3. Extens assist	451,917	32.6	3,338	34.2	
	4. Total depend	427,881	30.9	3,181	32.6	
	8. Did not occur	4,154	0.3	200	2.1	
	Total	1,385,098	100.0	9,766	100.0	
Verbal/physical abuse	No	1,373,940	99.2	9,737	99.3	No.
	Yes	11,173	0.8	66	0.7	
	Total	1,385,113	100.0	9,802	100.0	
K5A (perenteral/IV)	No	1,343,588	98.3	9,634	98.3	No.
	Yes	22,972	1.7	163	1.7	
	Total	1,366,560	100.0	9,798	100.0	
K5B (feeding tube)	No	1,295,170	93.7	9,036	92.2	Yes.
	Yes	87,738	6.3	762	7.8	
	Total	1,382,908	100.0	9,798	100.0	
P1AC (IV medication)	No	1,255,886	91.7	9,138	93.3	Yes.
	Yes	113,052	8.3	661	6.7	
	Total	1,368,938	100.0	9,799	100.0	
P1AG (oxygen therapy)	No	1,198,577	87.6	8,656	88.3	Yes.
	Yes	170,392	12.4	1,143	11.7	
	Total	1,368,969	100.0	9,799	100.0	
P1AI (suctioning)	No	1,354,628	99.0	9,595	97.9	Yes.
	Yes	14,356	1.0	203	2.1	
	Total	1,368,984	100.0	9,799	100.0	
P1AJ (tracheostomy care)	No	1,355,834	99.0	9,618	98.2	Yes.
	Yes	13,150	1.0	181	1.8	
	Total	1,368,984	100.0	9,799	100.0	
I1A (diabetes mellitus)	No	971,074	71.0	6,824	69.6	Yes.
	Yes	397,044	29.0	2,975	30.4	
	Total	1,368,118	100.0	9,799	100.0	
I1V (hemiplegia/hemiparesis)	No	1,231,378	90.0	8,807	89.9	No.
	Yes	137,410	10.0	993	10.1	
	Total	1,368,788	100.0	9,799	100.0	
I1Z (quadriplegia)	No	1,358,262	99.2	9,722	99.2	No.
	Yes	10,531	0.8	77	0.8	
	Total	1,368,793	100.0	9,799	100.0	
M2A (stage 3 or 4 pressure ulcer)	No	1,346,209	97.2	9,419	96.4	Yes.

TABLE 11—Continued

MDS variable	Value	MDS national snapshot		STRIVE: sample weighted		Signif diff (p < 0.05)
		Freq	Pcnt	Freq	Pcnt	
	Yes	38,827	2.8	348	3.6	
	Total	1,385,036	100.0	9,767	100.0	

While several of the variables that were analyzed showed no significant difference, there were significant differences between the sample and the nation on a number of other variables. On the ADLs, for example, there was a consistent trend for residents in the sample to show slightly more dependence than residents nationally. On each of the ADLs, the percent of STRIVE cases in the ''total dependence'' category exceeded the national percentage by between 1.7 and 3.4 percentage points. Conversely, the percent of residents in the ''independent'' category was lower for the STRIVE sample by between 0.5 and 6.8 percentage points. The picture was mixed on the services items that displayed significant differences. Among these items, the STRIVE residents were slightly more likely to receive feeding tubes, suctioning, and tracheostomy care, but less likely to receive IV medications or oxygen therapy. Slightly more STRIVE residents had diabetes mellitus and Stage 3 or 4 pressure ulcers than was seen nationally.

The overall picture from these comparisons is that the STRIVE sample has somewhat higher acuity than the nation. This could have been due to the last stage in the sample selection process, where nursing units within larger nursing homes were selected for inclusion in the study. In selecting units for inclusion, the protocol used by data monitors tended to favor SNF units and other specialty units that likely had higher acuity. Because of a lack of data that would have allowed for correction of this bias, it is possible that a greater proportion of higher-acuity residents were included in the sample, and that the sample weights did not correct for this.

However, the impact of this bias should be small. First, while those differences displayed above were statistically significant due to the large sample sizes involved, they were not substantial. Second, the RUG–III and RUG–IV classification models are designed specifically to classify residents into groups with similar acuity levels; for example, ADL scores are used explicitly to subdivide residents falling into each of the major hierarchical groups. While the impact of this bias might have been to place slightly more residents into heavier care nursing groups, this bias should have been corrected when using national days of service (from claims data) to standardize the RUG–IV distribution.

We note that even if the STRIVE sample's RUG distribution exactly matched the national cross-sectional distribution, this cross-sectional distribution must be standardized against the national days of service distribution, which accumulates paid days over an entire year. To the extent that the distribution of residents, even if perfectly representative of the nation, does not match the distribution of paid days, this standardization step is necessary. Thus, standardizing the RUG distribution to paid days should remove the relatively small amount of bias that was observed above.

Data Collection Process

Comment: Some commenters noted the process for collecting therapy data from the participating sites resulted in several problems, highlighting inconsistencies in training, data-collection methods, and oversight for the therapists submitting data that they asserted affected the accuracy of the study. Commenters were concerned that the assessment instrument and accompanying ''instruction manual'' used in STRIVE was changed during the study. The implication was that any changes that were made could have weakened or invalidated the study.

Response: The STRIVE data collection effort spanned approximately 18 months. During that period, we updated our training materials based on feedback from participating facility staff. Updating and fine tuning the training materials and project protocols is a standard method used to ensure the collection of the most accurate data possible. We do not believe these changes weakened the effectiveness of the study. In fact, we would be more concerned about the reliability of any study where the project staff made no effort to enhance their training efforts over such a long collection period.

As stated in our discussion of the collection and adjustment of therapy minutes, our analysis indicated that therapy minutes were underreported. When the therapists reported staff time data, we found it to be reasonably accurate. The problem was that therapists did not consistently report the services that they provided to patients. The omissions in the data collection process do not appear to be related to changes in the training process. We provided training and technical assistance to all therapists who participated in the study. STRIVE staff were available either onsite or by phone during the entire study, and the facility staff received copies of the training materials. While direct oversight of therapists' data collection for the entire 7-day time study period was not feasible, ample training and resource materials were available to guide them. However, some therapists simply did not submit data for the entire 7-day time study period. Again, we do not believe the underreporting can be associated with changes in the training manuals or in the data collection procedures.

Comment: One commenter noticed that the proposed rule does not list physical therapist assistants as a SNF staff participant in the STRIVE project. The commenter asked us for clarification in the final rule confirming the inclusion of physical therapist assistants in the STRIVE project.

Response: In the proposed rule, we inadvertently neglected to list physical therapy assistants and occupational therapy assistants as participating in the STRIVE study. We noted this error on our Web site at *http://www.cms.hhs.gov/SNFPPS/02_Spotlight.asp.* Physical therapy assistants and occupational therapy assistants did, in fact, participate in the STRIVE study, which included their resource times.

MDS 3.0 Data

Comment: A few commenters questioned our ability to assess the impact of the proposed RUG–IV model, as national claims data are not available for either the RUG–IV grouper or the MDS 3.0. Similarly, they were concerned that stakeholders could not

fully assess the impact of the proposed changes. These commenters recommended delaying the implementation of RUG–IV for 2 years, allowing for the collection of actual MDS 3.0 data to undertake a detailed impact analysis, and appropriately adjust the SNF PPS so that the transition from RUG–III to RUG–IV is budget neutral.

Response: We recognize the difficulty of precisely calibrating a new case-mix model using estimated data. However, by waiting for actual data to become available, we risk perpetuating systems that become progressively less able to target payments accurately to acuity levels.

In this instance, we worked closely with our MDS development team to integrate payment needs into the structure of the MDS 3.0 assessment. We also made available a RUG–IV grouper and our estimates on the distribution of patient days to allow stakeholders to assess the impact of the new case-mix model.

Finally, we have made provision for correcting discrepancies in the estimates used to introduce the RUG–IV model. In this final rule, we have committed to monitoring the accuracy of our projections and, when actual data becomes available, to recalibrate the system to ensure that the conversion to RUG–IV was budget neutral. This recalibration would be data driven, and could result in either payment increases or decreases. Therefore, we do not agree that the introduction of the RUG–IV case-mix system should be delayed beyond October 1, 2010.

b. Developing the Analytical Database

In the FY 2010 proposed rule (74 FR 22208, 22221, May 12, 2009), we noted that information acquired through the STRIVE research pointed to the need for modifications to the RUG–IV model in a number of specific areas, which we discuss in the following sections.

i. Concurrent Therapy

Concurrent therapy is the practice of one professional therapist treating multiple patients at the same time while the patients are performing different activities. In the SNF Part A setting, concurrent therapy is distinct from group therapy, where one therapist provides the same services to everyone in the group. In a concurrent model, the therapist works with multiple patients at the same time, each of whom can be receiving different therapy treatments. For concurrent therapy, there are currently no MDS coding restrictions regarding either the number of patients that may be treated concurrently, or the amount or percentage of concurrent therapy time that can be included on the MDS, whereas with group therapy there are limitations, as discussed in the July 30, 1999 SNF PPS final rule (64 FR 41662).

In the FY 2010 proposed rule (74 FR 22208, 22222, May 12, 2009), we noted a significant shift in the provision of therapy from individual one-on-one treatment to a concurrent basis. We stated that given that Medicare and Medicaid patients are among the frailest and most vulnerable populations in nursing homes, we believed that the most appropriate mode of providing therapy would usually be individual, and not concurrent therapy. We indicated that concurrent therapy should never be the sole mode of delivering therapy to a SNF patient; rather, it should be used as an adjunct to individual therapy when clinically appropriate. Further, we expressed concern that the current method for reporting concurrent therapy on the MDS creates an inappropriate payment incentive to perform concurrent therapy in place of individual therapy, because the current method permits concurrent therapy time provided to a patient to be counted in the same manner as individual therapy time. Accordingly, we proposed that, effective with the introduction of RUG–IV, concurrent therapy time provided in a Part A SNF setting would no longer be counted as individual therapy time for each of the patients involved; rather, for each discipline, we would require allocating concurrent therapy minutes among the individual patients receiving it before reporting total therapy minutes on the MDS 3.0. The comments that we received on this issue, and our responses, appear below.

Comment: Several commenters stated that the data reported in the proposed rule showing concurrent therapy as representing a majority of the delivery of all therapy services are inconsistent with industry data. Some stated they were not able to replicate the STRIVE findings that two-thirds of therapy provided is concurrent. A few reported that when they ''polled'' their rehabilitation staff, the estimates they received were that approximately 33 percent of therapy is delivered concurrently.

Response: In order to determine whether the STRIVE results may have overstated the amount of concurrent therapy, we re-examined the raw data and methodology we used to distinguish between individual and concurrent therapy. We determined that the amount of concurrent therapy that we reported in the March 2009 TEP and later cited in the proposed rule was overstated, and that the amount of concurrent therapy based on the ''time-slice'' method discussed later in this section of the final rule is actually 28.26 percent. Nevertheless, we continue to believe that concurrent therapy should be allocated when assigning a RUG–IV classification. The SNF PPS is based on resource utilization and costs. When a therapist treats two patients concurrently for an hour, it does not cost the SNF twice the amount (or 2 hours of the therapist's salary) to provide those services. The therapist would appropriately receive one hour's salary for the hour of therapy provided, regardless of whether the therapist treated one patient individually or two patients concurrently for that hour. Therefore, as proposed, we will utilize allocated concurrent therapy minutes to establish the RUG–IV group to which patients are assigned. In addition, we will require the therapist to track and report the three different delivery modes of therapy (individual, concurrent, and group) on the MDS 3.0, as explained later in this section.

Comment: Most commenters agreed with CMS that concurrent therapy is a legitimate mode of delivering therapy services, based on individual care needs as determined by the therapist's professional judgment. Many commenters stated that when used appropriately, concurrent therapy produces positive patient outcomes and does not result in poor quality of care, while others reported there are no studies to support that concurrent therapy is inferior to individual. Several commenters stated that the patients are fully engaged throughout the entire concurrent therapy session with the therapist directly supervising both patients, and some reported that rest periods are a necessary part of treatment and concurrent therapy allows the therapist to be more efficient. However, there were others who reported that the therapist is not always directly supervising with the patient in line-of-sight, and in fact, some commenters reported that therapists would leave the treatment area to conduct other tasks or treatments and that patients are not always engaged.

Response: We did not propose to eliminate concurrent therapy. We agree that the there are times when patients may interact with one another during a concurrent session, and that these interactions may be beneficial. However, as noted by some commenters, this may not always be the case. We are concerned that some commenters reported that therapists do not always have the patient in line-of-

sight (and may actually leave the treatment area). In fact, some commenters reported that the patient is not always engaged during the entire concurrent time, and that there are potentially instances when treatment decisions are influenced by facility or provider productivity requirements. We agree that the delivery of therapy services should be based on the therapist's professional and clinical judgment solely according to the individual needs of each patient. Considering the potential for inappropriate care, and that in some cases, patients may not be fully interacting with each other or the therapist throughout the concurrent therapy session, we believe that allocating concurrent therapy minutes is appropriate.

Comment: Several commenters stated that CMS does not have the authority to dictate the practice of therapy and, therefore, cannot instruct therapists to allocate concurrent therapy.

Response: We agree that CMS does not have the authority to dictate clinical practice. However, we do have the authority and the responsibility to determine coverage and payment policy, that is, the scope of services that will be paid for by the Medicare program under the SNF PPS and the manner in which those services will be reported and paid. We again acknowledge that concurrent therapy may be an appropriate mode to provide therapy services under certain circumstances, but we also note that the SNF PPS is based on resource utilization and costs. When a therapist treats two patients concurrently for an hour, it does not cost the SNF twice the amount (or 2 hours of the therapist's salary) to provide those services. The therapist would appropriately receive one hour's salary for the hour of therapy provided, regardless of whether the therapist treated one patient individually or two patients concurrently for that hour. Therefore, as proposed, we will use allocated concurrent therapy minutes to establish the RUG–IV group to which the patient is assigned. In addition, we will require the therapist to report concurrent therapy minutes on the MDS 3.0, as discussed later in this section.

Comment: We received a large number of comments on the potential effects of the proposed allocation of concurrent therapy. Many of the commenters agreed that therapy time should be allocated, and offered a variety of justifications, such as: Abuse of therapy being reported; therapists being coerced to maximize minutes (and, therefore, reimbursement); lack of existing research to support the efficacy of concurrent therapy; and, the need to use Medicare funds appropriately and as intended. In fact, one commenter requested that allocation of concurrent therapy begin in FY 2010, prior to implementation of RUG–IV. Another commenter believed that an increased use of individual therapy would have a positive impact on their SNFs by raising the SNF case mix and, therefore, attracting patients with more advanced therapy needs to their facilities. Many commenters believed that concurrent therapy, when provided appropriately, is a valid method for providing therapy that has many benefits (for example, psychosocial and educational), and that patients motivate and learn from each other. Additionally, many commenters agreed that concurrent therapy should be an adjunct to individual therapy.

Many other commenters opposed any allocation whatsoever for concurrent therapy. Some of those commenters argued that allocation would, in effect, reduce the therapy provided to patients. Others expressed concern that some patients would not receive therapy at all in parts of the country (particularly rural areas) where therapists are scarce. Some believed that by allocating therapy, CMS would actually incur a greater cost to the Medicare program, as there would be a greater rate of re-hospitalizations. Others stated that allocating concurrent therapy would increase labor costs to SNFs and, thus, would ''force'' contract therapy providers to increase their charges to SNFs.

Response: As stated in the proposed rule, we believe that concurrent therapy can represent a legitimate mode of delivering therapy services when used properly based on individual care needs as determined by the therapist's professional judgment; should be an adjunct to individual therapy, not the primary mode of delivering care; and should represent an exception rather than the standard of care. As noted previously, we did not propose to eliminate concurrent therapy altogether. Rather, we proposed to allocate the minutes of the therapist's time when providing concurrent therapy among the patients to accurately reflect the therapist's time treating patients.

We do not agree that allocating concurrent therapy minutes means that patients will not receive needed therapy. Assuming that concurrent therapy is being used appropriately, the allocation requirements do not change the actual provision of services. The only change is in the way the therapist records the time he or she spends with each patient. In fact, we believe therapists will continue to provide therapy services in a combination of individual, concurrent, and group as appropriate based on the therapist's professional judgment of the individual's needs and in accordance with Medicare coverage requirements. Similarly, the requirement to track concurrent therapy does not, in and of itself, increase labor costs to SNFs. We are aware, however, that by allocating concurrent therapy minutes to assign the RUG–IV category, the total number of therapist staff minutes may not be sufficient to keep a patient in the same therapy group for payment purposes. For example, under RUG–III, a patient receiving a combination of 325 individual and (unallocated) concurrent therapy minutes would be assigned to a RUG–III High Rehabilitation group. Under RUG–IV, the patient might be classified into a lower-paying therapy group if the adjusted therapist time falls below the 325-minute threshold needed to qualify for High Rehabilitation. We regard it as likely that providers will ask therapists to modify their treatment plans to make sure that patients qualify for the higher therapy groups. However, this type of behavioral adjustment, even if it increases labor cost, may not be reflective of actual patient need. We also see no imperative in this reporting change that would ''force'' contract therapy providers to increase their charges to SNFs. However, the specific details of contractual arrangements between SNFs and therapy contractors are essentially private business arrangements that are outside the scope of this rule. Finally, we are extremely concerned that some commenters believe that allocating therapy minutes will result in poor patient outcomes, such as underutilization and rehospitalizations. While we believe these negative outcomes are unlikely, we intend to alert our Survey and Quality Monitoring staff to the possibility so that we can monitor facility practices to ensure quality care for all SNF residents.

Comment: A few commenters requested CMS to provide specific guidelines on when concurrent therapy may occur, such as limiting the number of patients that can be seen concurrently. Of those commenters that favored setting a numerical limit, a majority recommended allowing the therapist to treat no more than two patients concurrently. A few suggested a maximum of three or four patients for concurrent therapy, while others stated that treating three or four patients at the same time should instead constitute group therapy. Some suggested that we apply a cap similar to the one that

already exists for group therapy (in which we limit the number of individuals and the amount to be coded on the MDS). One commenter stated that if the requirements set forth in the Medicare Benefit Policy Manual (Pub. L. 100–2), chapter 8, section 30.4.1.1 are met, then the therapy services are skilled and the mode of therapy delivered does not matter (individual, concurrent, or group). On the other hand, some requested that CMS work with the professional and industry associations and stakeholders to develop criteria and guidelines. One commenter stated that concurrent therapy is neither individual nor group therapy and, therefore, should not be allowed.

Response: As we explained in the proposed rule (74 FR 22222), concurrent therapy can represent a legitimate mode of delivering therapy services when used properly based on individual care needs as determined by the therapist's professional judgment; should be an adjunct to individual therapy, not the primary mode of delivering care; and should represent an exception rather than the standard of care.

We agreed with those commenters who supported placing some limits on concurrent therapy. Commenters who supported concurrent therapy almost unanimously stated that when concurrent therapy is properly delivered, patients are fully engaged during the entire treatment time and that the therapist is able to direct the entire treatment session for each participant. We believe that in order for the therapist to be able to direct the entire treatment session and ensure that the patients are fully engaged, the number of participants should be limited to two. We agree with the commenters who pointed out that, once a clinician has to divide his/her time between three or more patients, the therapist's ability to direct the entire treatment session for each individual and ensure that the patients are fully engaged can become problematic. In addition, in order for a therapist to direct the entire treatment session of both participants and ensure that they are fully engaged, the therapist must have line-of-sight of both patients. Both the American Physical Therapy Association (APTA) and the American Occupational Therapy Association (AOTA) recommended limiting concurrent therapy to two patients. In fact, the AOTA reports in their comment on the FY 2010 SNF PPS proposed rule, and on their Web site at *http://www.aota.org/Practitioners/Reimb/Pay/Medicare/FactSheets/37784.aspx*, that they have been advising their members to limit the provision of concurrent therapy in this manner for some time: ''For a number of years, AOTA has been informally advising members that the number of patients should be limited to 2 as a best practice standard.'' We believe the clinical knowledge and expertise of the therapy associations is a proper benchmark for determining the allowable number of patients during a concurrent session, and we agree that a therapist (or assistant) should treat no more than two patients concurrently. At this time, we do not agree that CMS should impose a specific cap, similar to the one for group therapy, on the amount of concurrent therapy to be coded on the MDS. However, we are revising the MDS, as noted later in this section, to capture therapy data by mode of therapy. We will then be able to analyze the data on therapy, including the delivery mode, and will be able to better understand the rates of provision and develop other requirements as deemed appropriate, including but not limited to a cap on concurrent therapy. Therefore, under RUG–IV, in order to code minutes on the MDS, the following criteria must be met:

- Individual therapy; or
- Concurrent therapy consisting of no more than 2 patients (regardless of payer source), both of whom must be in line-of-sight of the treating therapist (or assistant); or
- Group therapy consisting of 2 to 4 patients (regardless of payer source), who are performing similar activities, and are supervised by a therapist (or assistant) who is not supervising any other individuals.

In instances that involve a therapist treating 3 or more patients that do not meet the definition of group therapy, that is, similar activities are not being performed by the participants, then for purposes of MDS reporting, the definition of concurrent therapy is not met and, thus, those therapy minutes may not be coded.

We agree that requirements set forth in the Medicare Benefit Policy Manual (Pub. L. 100–2), chapter 8, section 30.4.1.1 should be met for medical review purposes. However, as stated previously, from a payment perspective, the SNF PPS is based on resource utilization and costs. When a therapist treats two patients concurrently for an hour, it does not cost the SNF twice the amount (or 2 hours of the therapist's salary) to provide those services. The therapist would appropriately receive one hour's salary for the hour of therapy provided, regardless of whether the therapist treated one patient individually or two patients concurrently for that hour. Therefore, Medicare should pay for the one hour of the therapist's time.

Furthermore, the criteria set forth in section 30 for skilled nursing facility level of care must be met in order for a beneficiary to meet the requirements for a SNF Part A stay. These requirements are:

- The patient requires skilled nursing services or skilled rehabilitation services, that is, services that must be performed by or under the supervision of professional or technical personnel (*see* §§ 30.2–30.4); are ordered by a physician and the services are rendered for a condition for which the patient received inpatient hospital services or for a condition that arose while receiving care in a SNF for a condition for which he received inpatient hospital services;
- The patient requires these skilled services on a daily basis (*see* § 30.6);
- As a practical matter, considering economy and efficiency, the daily skilled services can be provided only on an inpatient basis in a SNF (*see* § 30.7.); and
- The services must be reasonable and necessary for the treatment of a patient's illness or injury, that is, be consistent with the nature and severity of the individual's illness or injury, the individual's particular medical needs, and accepted standards of medical practice. The services must also be reasonable in terms of duration and quantity.

We also believe that, when appropriate, therapy services should be treated uniformly across the PAC settings and under Parts A and B. We intend to work with the professional organizations and within the various CMS components to analyze and explore the various issues that affect therapy services in the various provider types and payment systems.

We realize that establishing guidelines, requirements, and criteria for therapy services is a complex matter regardless of setting. For instance, we must be cognizant of multiple issues that may affect the delivery of therapy services to patients, such as:

- Patient rights (patient preference for a particular treatment method (for example, individually and not with others, either concurrently or in a group setting), and whether this preference is honored);
- Infection precautions (whether therapists follow standard infection control practices when treating more than one patient at time);
- Facility layout (logistical feasibility of treating multiple patients and maintaining proper and adequate supervision).

Comment: A few commenters stated that when the RUG–III model was developed, all modes of therapy were being provided, and the minutes and staff time were weighted to reflect concurrent therapy. Some commenters reported that concurrent therapy became the norm after the inception of the SNF PPS, and that individual therapy was previously the primary mode of therapy being delivered.

Response: We do not disagree that the different modes of therapy were being provided prior to SNF PPS. For the purpose of this final rule, we are considering how the current distribution of therapy time affects the accuracy of the payments that will be made under the RUG–IV model. For RUG–IV, we are using the therapist's time (individual minutes, concurrent therapy minutes allocated, and the group therapy minutes unallocated with 25 percent cap) to establish the minimum therapy minutes for each of the rehabilitation categories. We do not believe that Medicare payments should exceed the cost of the services rendered. As stated previously, when a therapist provides concurrent therapy services for an hour, no matter how many patients he or she treats, the therapist is only providing and being paid for an hour of time. Payments made to the SNF under the SNF PPS should reflect that same principle. As we did not propose to change the method in which group therapy minutes are used in RUG–IV classification and the amount of group therapy being provided is low, therapists will still be allowed to count the entire group session for each patient (as long as they maintain the patient limitation and supervision requirements) in accordance with the 25 percent cap. However, we will monitor therapy provided in the group setting, analyze data associated with group therapy, and, if needed, address any issues at a later time.

Comment: Some commenters suggested updating the MDS 3.0 in order to record the three modes of therapy: individual, concurrent, and group. Some believed that this would allow a method to track and analyze the amount of concurrent therapy being provided. One commenter suggested developing a ''take back'' if concurrent therapy exceeded 50 percent of the therapy time. One commenter urged CMS to consider a documentation method that would not be burdensome. Another commenter stated that tracking concurrent therapy would be tedious. Another commenter stated that providers would be vulnerable to post-payment audits and denials if CMS did not develop documentation instructions. Lastly, one commenter stated that reporting the therapist time and not the resident time would alter the ''patient-centric'' intent of the MDS.

Response: Under Medicare Part B therapy services, CMS has issued documentation requirements. When these requirements were developed, CMS worked closely with the Medicare contractors, professional therapy associations, and multiple components within CMS. We intend to address therapy documentation issues for SNF PPS in a similar fashion to determine the most appropriate documentation requirements. We will update the MDS 3.0 so that the assessor codes the actual total patient minutes associated with the three modes of delivering therapy services (individual, concurrent, and group) and, thereby, reports them separately (thus keeping the MDS patient-centric). We believe that requiring providers to report total therapy time by mode of therapy on the MDS 3.0 will not pose a significant burden for providers, as providers will not be required to allocate concurrent therapy minutes before recording them on the MDS, but instead will only be required to identify those minutes as concurrent. This method of reporting will allow us to track and analyze the amount of each type of therapy being provided and determine appropriate reimbursement. Under RUG–IV, the recording of therapy minutes on the MDS will be as follows:

- *Individual*—Report entire amount of individual therapy.
- *Concurrent*—Report the entire unallocated minutes of concurrent therapy.
- *Group*—Report the entire unallocated minutes of group therapy (as long as the patient limitation is not exceeded and the supervision requirement is maintained).

This method for recording therapy minutes will reflect the resident's entire time receiving therapy. However, as stated earlier, we will assign the RUG–IV category based on allocated concurrent therapy minutes and maintain the 25 percent cap on group therapy. The RUG–IV data specifications will account for these requirements.

We do not agree with the suggestion to implement a ''take back'' policy at this time. However, as the MDS 3.0 will require the therapist to code the minutes for each mode of therapy being delivered, we will be able to analyze the data and, if need be, address any issues in the future. Thus, we will update our policy based on data, not on a pre-defined limit. In addition, we will need to conduct further analysis to determine an appropriate amount of allowed concurrent therapy, as well as the appropriate fiscal penalty if we were to implement a ''take back'' policy.

Comment: Several commenters argued that allocating concurrent minutes to the RUG–IV model and then also applying CMIs represents a ''double hit.'' Others characterized concurrent therapy allocation as a method of cost control.

Response: As stated in the proposed rule (74 FR 22222–23), and as discussed above, allocating concurrent therapy time reflects resource use more accurately for this type of therapy. Patients are classified into RUGs based on average resource use, and allocating therapy minutes allows for better measurement of resource use, more accurate RUG classification, and application of more appropriate CMIs. For example, when a therapist treats 2 patients concurrently for an hour, a full hour of therapy time is counted for each of the 2 patients under existing procedures. However, the therapist is not actually providing 2 hours of his/her time to treat the patients; rather, the therapist is providing a total 1 hour of therapy time. Thus, rather than representing a ''double hit'' or a method of cost control, allocating concurrent therapy minutes to the RUG–IV model results in more accurate payment under the SNF PPS, and allows for a more appropriate reflection of resources used. Further, as stated in the proposed rule, we maintained budget neutrality with the implementation of RUG–IV, which also serves to refute the characterization of allocating concurrent therapy as a cost control method.

Comment: One commenter agreed that the role of therapy aides is to provide support services to the therapists and, thus, disagreed with our concern that placing limits on concurrent therapy could result in an inappropriate substitution of therapy aides for therapists and assistants and that the RAI manual should be updated. In addition, a commenter requested that we maintain the policy that therapy provided by therapy students should continue to be counted on the MDS.

Response: We would also like to reiterate that therapy aides are expected to provide support services to the therapists and cannot be used to provide skilled therapy services. As we stated in the proposed rule, based on the STRIVE data, it appears therapy aides are being used appropriately. However, as we stated, we intend to monitor the use of therapy aides, and if necessary, propose changes to MDS reporting requirements in the future. Further, we agree that, as set forth previously in the correction

notice for the FY 2000 SNF PPS final rule (64 FR 60122, November 4, 1999), providers should record minutes of skilled therapy provided by a therapy student on the MDS when the student is in the therapist's line-of-sight.

Therefore, as we proposed in the FY 2010 proposed rule, effective with RUG–IV, we will use allocated concurrent therapy minutes to establish the RUG–IV group to which the patient is assigned. In addition, as discussed above, a therapist (or assistant) will be permitted to treat no more than two patients concurrently. In addition, we will require the therapist to report the three different delivery modes of therapy (individual, concurrent, and group) on the MDS 3.0 in the manner discussed above.

ii. Adjustments to STRIVE Therapy Minutes

Under the SNF PPS, while nursing services are fully reimbursed using a prospective case-mix adjusted algorithm, payment for therapy services is more closely linked to the amount of therapy actually received at a particular time. In the FY 2010 proposed rule (74 FR 22208, 22223, May 12, 2009), we noted that the STRIVE analysis included an examination of therapy services reimbursed under RUG–III, and we included a detailed explanation of the STRIVE therapy data collection methodology. The comments that we received on this subject, and our responses, appear below.

Comment: Several commenters questioned the collection and the analysis of therapy time, including the utilization of the unsupervised recording of therapy times during the collection of data on weekends.

Response: During the STRIVE study, we made every effort to train staff and provide data monitors to assist staff when questions or problems arose. However, very few onsite facility studies, including STRIVE, can provide monitoring on a 24-hour, 7-days-a-week basis. In general, the staff at the participating facilities worked hard to collect the staff time accurately, especially for the days where data were collected on an automated basis. It is apparent from our analysis that the therapy data were partially compromised by incomplete recording of therapy times during the days where the data were collected manually on paper forms. We believe we have provided sufficient information in both the proposed rule (74 FR 22223–25) and the TEP slides (available online at *http://www.cms.hhs.gov/SNFPPS/10_TimeStudy.asp*), and especially at the TEP meeting on March 11, 2009, on how we have identified this potential problem, and have adjusted the therapy time used in our analysis to address it. Information provided at the TEP meeting demonstrated that these adjustments had little impact on the RUG–IV case-mix indexes, and corresponded with the results in STRIVE facilities that had more complete therapy data collection. At the same time, the adjustments appeared to adjust therapy time successfully in more problematic facilities (where therapy time was much lower and appeared to be incomplete on days where staff used the paper tool versus days using PDAs), so that residents were distributed among therapy groups more consistently with the national pattern from Medicare claims than they would have been if unadjusted data were used.

We do recognize from the comments that one of the statistics provided in the proposed rule and in Slide #33 of the March 11 TEP presentation was incorrect: the percentage of all time collected that was concurrent therapy. Our contractor located a mistake made in the computation for this statistic alone that substantially inflated this percentage. As noted previously, the correct percentage of concurrent time is 28.26 percent. This error only affected the calculations performed to produce this one slide; the numbers used in all other analyses, the allocation of concurrent time, the derivation of RUG–IV, and the released public database were correct.

After this error was found, all calculations concerning concurrent therapy were reviewed. Our initial method of allocating concurrent time was to combine all resident time records for a staff member where there was any continuous overlap among the residents. These records were then used to calculate the time in therapy for each resident involved and the unduplicated staff time involved. The staff time was then allocated to each resident in proportion to resident time in therapy, yielding the allocated concurrent time for each resident. This method led to minor inaccuracies when a resident left an ongoing concurrent therapy group or a new resident entered an ongoing concurrent therapy group.

Based on the comments that we received, we reviewed our allocation method described above, and developed a more sensitive method based on a ''time slice'' approach. A staff member's time was divided into 1-minute ''time slices.'' When there was only one resident in a 1-minute time slice, the entire minute was assigned to that resident as individual therapy time. If there were multiple residents, the minute was divided equally among the residents as concurrent therapy time. All current time for a specific resident under the treatment of a specific staff member was then accumulated, separately as individual and concurrent time. This more accurate allocation caused only minor changes for individual residents, and had very little impact on aggregate results. The results referenced in this final rule incorporate these changes.

The two methods are contrasted in the following example. Assume that the therapist has a session of 30 minutes involving three residents. The first resident (''A'') arrives at the beginning of the session and stays for the entire 30 minutes. The second resident (''B'') arrives 10 minutes after the session begins and stays until the end (that is, 20 minutes). The third resident (''C'') arrives 20 minutes after the session begins and also stays until the session's end (that is, 10 minutes). The original research used a proportional method, in which each resident's time was considered as a percentage of the total person-minutes. This can be seen in Table 12. ''Resident A'' received 30 minutes of therapy, Resident B 20 minutes, and Resident C 10 minutes, for a total of 60 person-minutes. The proportional method would thus compute Resident A as having 30/60 (that is, 50 percent) of the 30-minute session time, or 15 minutes. The other two residents' times would be calculated similarly.

TABLE 12

Resident	Proportional method			Time slice method			
	Resident time in therapy	Proportion of resident time	Allocated time	Slice 1	Slice 2	Slice 3	Total
A	30	50.00%	15.00	10.00	5.00	3.33	18.33
B	20	33.33	10.00	0.00	5.00	3.33	8.33

TABLE 12—Continued

Resident	Proportional method			Time slice method			
	Resident time in therapy	Proportion of resident time	Allocated time	Slice 1	Slice 2	Slice 3	Total
C	10	16.67	5.00	0.00	0.00	3.33	3.33
Total	60	100.00	30.00				30.00
Session length	30			10.00	10.00	10.00	

We now determined that a more accurate approach would be to divide the session into ''slices,'' beginning when a resident joins or leaves the session. The minutes in each time slice are divided equally among all the residents receiving therapy during that time slice. In the example above, the first slice would consist of the first 10 minutes of the session, the second slice is minutes 11–20 of the session, and the third slice is minutes 21 to 30. As only one person is receiving therapy in the first slice, Resident A is credited with all 10 minutes of that slice (which is now reported as ''individual'' therapy time). In the second slice, there are two residents, so both Resident A and B each receive half of the 10 minutes in that slice, or 5 minutes each. Finally, in the third slice, there are three residents receiving therapy, so each receives a third of 10 minutes, or 3.33 minutes each. Summing across all three slices, Resident A is credited with 10 + 5 + 3.33 minutes, or 18.33 minutes of time. This example demonstrates that the improved methodology does make minor differences in time allocation, although the total allocated therapy time is not affected. Moreover, the two methods will provide identical results when all individuals receive therapy for the full session. Thus, the recomputation of therapy sessions using the time slice methodology, while more accurate, made only minor changes for individual residents.

Comment: Several commenters questioned the adjustment performed on therapy minutes, raising two issues: The first relates to ''forcing the data to approximate existing distributions of therapy times across RUG–53 categories,'' by which nothing new is learned. The second regards the paper survey data as part of the calculation of therapy weights and the commenters' opinion that it should be considered invalid and should not be used. While acknowledging the need to adjust the therapy minutes data, the commenter added that the proposed retroactive therapy data adjustments bring into question the accuracy and usefulness of the STRIVE data, especially in light of the small sample size. The commenter believed that these issues also affect the reorganization of residents within the RUG hierarchy, and invalidate the therapy and nursing weights and the subsequent budget neutrality adjustment. In addition, the commenter observed that retroactively adjusting the therapy minutes collected directly from therapists treating SNF patients appears contrary to the purpose and design of the time study, which was real-time, bedside measurement of the resources provided to SNF patients.

Response: While we are confident that the analyses conducted during the study are sufficient to adjust the therapy data for use in the RUG–IV model, we understand the commenters' concerns. As we have described in detail, the process used to adjust the therapy minutes (imputation of data elements that are missing or incorrect) is a standard statistical practice, with many methods available; thus, we do not believe it is contrary to the purpose and design of the time study. In STRIVE, changes in therapy minutes had little effect on the therapy CMIs of therapy groups as, once in a group, any statistical average will be relatively stable. However, revising the therapy times did have a substantial effect on the classification of individual residents. This was significant, as only those not meeting the RUG–IV therapy criteria would be eligible for the non-therapy categories from Extensive Services down through Reduced Physical Function, and the research to determine which characteristics differentiated the nursing time of these individuals would be properly focused. Alternately stated, while adjusting the therapy time did not substantially affect the CMI of the rehabilitation groups, it did change the classification of individual residents and was critical to proper analysis. Contrary to the assertions of these commenters, we believe that failure to adjust the therapy minutes would have had a negative impact on the classification of residents requiring complex medical care. Without the adjustment, we believe the therapy minutes would have been underreported, resulting in inaccurate classification of residents, with some residents inappropriately classified in lower-level RUGs. Thus, we are confident that our efforts to adjust for underreporting of therapy minutes actually increased the accuracy of the RUG–IV case-mix classification model.

Our approach to adjusting therapy addressed our concern that, in some facilities, therapists under-reported resident therapy time on weekends and other ''non-PDA'' days, including days where there was no supervision, either by STRIVE data monitors or by staff at the participating facility, of the data collection. However, at least a quarter of the facilities did report patterns of therapy time that appeared reasonable. We took care to include these times, even if paper based, when they seemed appropriate.

We found that the data obtained from facilities where the data collection had been most complete, closely matched the therapy time extrapolated to the entire week from the 3-day period where data had been collected electronically. A final comparison was made to verify the therapy minutes reported on the MDS that was completed during the time study. Again, the reported minutes were consistent with the extrapolation procedure we used. In addition, the RUG distribution, after the adjustment of therapy time, more closely matches the expected therapy RUG national distribution. This comparison was aimed solely at validating the accuracy of our adjustment procedures by comparing our study's RUG–III distribution with the known national distribution. It did not constrain in any way our ability to test alternative approaches to RUG classification. Thus, we are confident that the procedures we used to adjust for data collection were appropriate, and that the therapy analyses conducted during STRIVE accurately reflect therapy utilization overall. Accordingly, we do not believe that it is necessary to discard the paper surveys as the commenter suggested. However, we are also cognizant of the importance of therapy services in the RUG model, and plan to continue our analyses as part of our implementation and post-utilization monitoring of the RUG–IV system.

Comment: One commenter observed that no adjustments were made for variation in State practice laws with respect to supervision of physical therapy assistants, occupational therapy assistants and aides, and that due to an acute shortage of therapists in many rural communities, there is a tendency to use more therapy assistants under therapist supervision to the extent that State law allows such practices.

Response: While the commenter is correct that we did not examine State practice acts, we did collect data on the use of therapy assistants in nursing homes. To the best of our knowledge, all States recognize and license or certify therapy assistants. We found that the use of therapy assistants has increased significantly since the 1995/1997 time studies. We consider the use of therapy assistants to be appropriate to deliver therapy services when under the supervision of a therapist and within the scope of practice allowed by State law. We presume that the increasing use of therapy assistants is partially related to a current labor shortage for therapists, and partially related to payment incentives rewarding efficient delivery of care. The applicable State regulations governing aides are more heterogeneous. However, in the STRIVE study, we found that aides are being appropriately utilized to furnish support services to the licensed/certified therapists, a role that would be allowed in most if not all States.

Comment: One commenter expressed concern about extrapolating 3 days of therapy to 7. The commenter stated that it is inappropriate because weekend days and weekdays are not similar, and that Mondays and Fridays differ from mid-week (Tuesdays through Thursdays) due to admissions and meetings.

Response: We agree that it would have been inappropriate to directly extrapolate 3 days of therapy to 7, because 2 of those days (Saturday and Sunday) generally have very low amounts of therapy. However, we did not take the approach described by the commenter. Our adjustment procedure made use only of those weekend days that were actually reported; we never imputed a weekend therapy session. The only adjustment that we made to weekend sessions was to assume that the duration of those sessions matched the average duration of weekday sessions reported for the resident.

Generally, most participating SNFs provide therapy 5 days a week, and only a small subset provide therapy on weekends. Therefore, we agree with the commenter that weekend days and weekdays differ in the amount of therapy provided. However, the STRIVE study took this into account and gave credit only for weekend therapy when it was reported on the paper data collection tool. We did not extrapolate weekday therapy time to the weekend days, and agree with the commenter that such a practice would be inappropriate.

Although we noticed a significant reduction in therapy time when data were collected with the paper tool, we believe this is due to the data collection method and does not indicate a consistent pattern of significantly less therapy being delivered on Mondays or Fridays due to admissions and meetings. In several facilities, PDA data collection was used on Wednesday through Friday rather than Tuesday through Thursday. When the PDA was used on Friday, 21 percent of all therapy time was recorded for Friday. This is close to the 23 percent of time reported for Thursday. When paper data collection was used on Friday, only 12 percent of all therapy time was recorded, indicating a loss of data with the paper collection. If admissions and meetings were the cause of a significant decrease in therapy time, we would expect to see this pattern for all Fridays. Therefore, we believe that our adjustment methodology is a more accurate reflection of the services actually provided during the study.

iii. ADL Adjustments

RUG–IV, like RUG–III, uses a scale measuring Activities of Daily Living (ADLs) to identify residents with similar levels of physical function. This scale is used to sub-divide (''split'') each of the major hierarchical categories except Extensive Services. It is also used as part of the qualification criteria for many of the RUG–IV hierarchical categories (Extensive Services, Special High, Special Low, and Cognitive Performance and Behavioral Symptoms), and is used as part of the specific criteria for classifying patients to RUGs within certain categories. In the FY 2010 proposed rule (74 FR 22208, 22225–26, May 12, 2009), we proposed revisions to the RUG–IV ADL Index that reflect both clinical and statistical considerations, with the aim of scoring similarly those residents with similar function. The comments that we received on this issue, and our responses, appear below.

Comment: Many commenters agreed with the ADL adjustments, stating that the scale is more sensitive to functional status and allows for a finer analysis of changes in functional status over time. In addition, they agreed with standardizing the ADL index across the various levels of the RUG hierarchy.

Some commenters stated that the ADL scale does not capture provider burden as only 4 ADL areas are used in the calculation, and suggested that other ADL activities such as dressing and bathing should be included. A few commenters were concerned that by starting the ADL score at '0,' some providers may perceive a '0' as requiring no staff time, and that this may cause providers to discharge patients early, refuse to admit certain patients, or not provide the needed supervision or assistance. One commenter stated ''The staff time required to provide 'limited' assistance with bed mobility, transferring, toileting, and/or eating does not vary significantly enough from the staff time required to provide 'extensive' assistance for the same ADL activities.'' One commenter stated that changing the coding of ''Activity Did Not Occur During the Entire 7 Day Period'' from a code of (8) to a code of (0) for both self-performance and staff support was logical because the activity did not occur and, therefore, no resources were used to support the activity. However, one commenter expressed concern regarding the ADL score of ''0'' when the component ADL activity did not occur during the entire 7-day period, and suggested that it should be modified to take into consideration end-of-life situations. For patients in these situations, the commenter stated the ADL score may be low, but the level of resources to care for the resident may be significant, which would not be reflected in their ADL score.

Response: We agree that the new ADL scale is more sensitive and that standardization of the ADL index across all RUG hierarchies will improve our ability to measure functional status accurately. We did include other ADL areas during our analysis of STRIVE data including, but not limited to, bathing, dressing, and ambulation, as we did with the original analyses that established the RUG–III case-mix methodology. In both studies, we found that eating, bed mobility, transfers, and toileting were the strongest predictors of resource use, and included these four ADLs in the case-mix system. However, the resource time associated with all ADLs is captured in the nursing minutes assigned to each time study resident, and is reflected in payments under the SNF PPS. In addition, we do not believe that a change in the MDS coding requirements will result in premature discharge of patients or that a score of ''0'' will be incorrectly interpreted as indicating no need for care. First, we will provide instructions on the

meaning of the ADL codes in the MDS manual. Second and more importantly, a decision that a patient is able to be discharged should be based on clinical judgment, and should follow standardized facility operating protocols rather than be determined by an ADL index score recorded on an MDS.

Thus, we do not agree with the commenter's conclusion that the change in coding ADLs will have a negative impact on the care provided to patients in nursing homes. However, we will incorporate training on the new ADL index in our upcoming ''train-the-trainer'' sessions to mitigate concerns on the new scale and interpretation of its purpose.

We do not agree with the commenter who stated that there is no significant difference in staff resource time when providing limited assistance compared to extensive assistance. STRIVE data demonstrate a difference in staff resources among the various levels of assistance that are provided to nursing home residents. We do, however, agree that if resources are not provided for an ADL, then the ADL index should not reflect that care was rendered. It is important to note that the ADL index is based on the 4 late-loss ADL areas and, therefore, while one ADL activity (for example, transferring) may not have occurred during the entire 7-day look-back period, the other ADLs are usually occurring and would be included in the ADL index. We agree with the commenter that the ADL index may not fully reflect care needs for patients nearing the end of life. However, we note that the ADL index is only one factor used to determine resource use. The intensity of nursing staff time and resources for these individuals is reflected more completely in the STRIVE minutes and categorical classification.

Comment: Comments about the proposed ADL eating component changes were mixed, expressing both support and concern. A few commenters were pleased that we proposed to use both the Self-Performance and Support Provided items for eating, indicating that adding the ''support provided'' factor to the ADL eating component score is logical and in correlation with the other late-loss ADLs. One commenter was pleased to have Parenteral/IV and feeding tube items removed from the eating ADL, as they have been concerned that this may have been an incentive for providers to use feeding tubes rather than providing assistance to those residents who are able to eat through oral means. One commenter was concerned that the removal of feeding tubes from the ADL score for eating would not take into account the resources required to care for residents who must rely on tube feedings for nutrition, and that they would not be adequately reimbursed.

One commenter cited the statement, ''In the STRIVE analysis, we found that patients receiving One Person Physical Assist or more needed comparable staff resources to patients who were being fed by artificial means * * * the RUG–IV ADL component score does not use Parenteral/IV or feeding tube items.'' The commenter believed that the statement about comparable staff resources is inaccurate, as parenteral/IV or feeding tube assistance can only be done by a licensed nurse, while one person physical assist is most often that of a certified nurse assistant; thus, these are not comparable staff resources.

Response: The data from the STRIVE project indicate that using both the Self-Performance and Support Provided items for the eating ADL for all residents achieves a better categorization of residents who require assistance. In RUG–III, a person who receives nutrition via a feeding tube or parenteral/IV is assigned a ''3'' (the most dependent score for eating) regardless of the coding in section G, Physical Functioning and Structural Problems, specifically item G1Ah (eating, self-performance). In RUG–IV, instead of this person being automatically assigned the most dependent score for eating, the score will be based on both the Self-Performance and Support Provided codes. For the MDS 2.0 and the MDS 3.0, the assessor is to code how the resident eats and drinks, including nutritional intake via artificial means; for example, tube feeding, total parenteral nutrition. The assessor is expected to enter codes for eating when a person receives nutrition orally or through a feeding tube or other means. Therefore, the resources to care for a patient with tube feeding are captured on the MDS and in the ADL index and, thus, in reimbursement. We would like to clarify that when we discuss staff resources, we are using wage-weighted minutes. For example, when the licensed nurse provides nutrition to a resident via a feeding tube, the cost is more per hour but the time it takes is less relative to a situation in which an aide feeds a resident who requires total assistance. When an aide feeds a resident who requires total assistance, the cost per hour is less but the time required is greater. Therefore, the wage-weighted resource time is comparable. This was validated by the STRIVE study data.

In this final rule, we are finalizing the revisions to the RUG–IV ADL index as proposed in the FY 2010 proposed rule (74 FR 22225–27).

iv. ''Look-Back'' Period

In the RUG–III case-mix classification system, we identified five services that the data showed to require the highest levels of staff time use: Ventilator/respirator, tracheostomy, suctioning, IV medications, and transfusions. The instructions for coding these items in the MDS 2.0 specified that the item should be coded if it was furnished within the prior 14 days, even if the services were provided to the resident prior to admission to the SNF. In this way, the MDS 2.0 would collect data that should be considered during the patient care planning process. When the RUG–III system was developed, we retained the MDS 2.0 coding procedure regarding these 5 items, based on a clinical analysis suggesting that they would serve as a proxy for medical complexity and higher resource use after admission to the SNF. However, in the SNF PPS final rule for FY 2000 (64 FR 41668–69, July 30, 1999), we reserved the right to reconsider this policy in the future ''* * * if it should become evident in actual practice that this is not the case.'' In the FY 2010 proposed rule (74 FR 22208, 22227, May 12, 2009), we noted that we analyzed the STRIVE data to test the effectiveness of including services furnished during the prior hospital stay in the classification system. We found that, for these five services, utilization during the prior hospital stay does not, in fact, provide an effective proxy for medical complexity for SNF residents, and instead results in payments that are inappropriately high in many cases. Accordingly, we proposed to modify the look-back period under RUG–IV for items in section P1a, Special Treatments and Procedures, of the MDS 2.0, to include only those services that are provided after admission (or readmission) to the SNF. The comments that we received on this issue, and our responses, appear below.

Comment: Many commenters agreed that the look-back to the prior hospital stay should be changed so that only services furnished during the SNF stay are reflected in the SNF case-mix classification. In particular, in States that have rate equalization (that is, the private-pay resident must pay the rate established by the case-mix system), private-pay residents would now pay only for services received while a SNF resident. Several commenters believed that the SNF staff need to be aware of services provided to the resident during the acute stay, in order to develop an appropriate plan of care and ensure that

adequate services are provided during the SNF stay. However, some believed that this information does not need to be collected on the MDS, and recommended removing the first column for the Special Treatments, Procedures, and Programs (Section O) draft MDS 3.0 or making that column optional. Others disagreed with CMS changing the look-back into the hospital stay. Many argued that such a change would fail to account for the severity of the patient's condition upon arrival at the SNF. Others believed that eliminating the look-back would negatively affect quality of care provided to SNF residents and could result in increased readmissions back to the acute setting. Finally, one commenter stated ''limiting the look-back in section P1a to exclude hospital services would unfairly punish SNFs that provide valuable services to high-acuity rehabilitation patients whose care is more costly to provide.''

Response: As we stated in the proposed rule, we specifically collected staff time data on special treatments that are often provided in a hospital but are not often provided in a SNF after hospital discharge. Analysis of the STRIVE data shows that: (1) The ''look-back'' period does, in fact, capture services that are provided solely prior to admission to the SNF; and (2) there is a much lower utilization of staff resources for individuals who received certain treatments solely prior to the SNF stay compared to those who received those services while a resident of the SNF. In fact, the resources provided to patients who received treatments provided only prior to admission are similar to patients who never received those treatments in either setting. Again, the look-back does not provide an effective proxy for medical complexity and, thus, has resulted in payments that are inappropriately high for many cases. However, we do believe that for care planning purposes, the SNF staff should be aware of the services that were provided during the acute stay and, thus, we did not propose to eliminate the look-back from the assessment tool for these Special Treatments and Procedures. Instead, we proposed to expand the MDS 3.0 for these items to two columns. The first column allows providers to code those services that were provided prior to admission for care planning purposes.

We are concerned that commenters believe that eliminating the look-back to the hospital stay from the payment system will result in poor quality of care provided to SNF residents. The SNF is expected to provide the care required to achieve and/or maintain the resident's highest practicable level of well-being. However, as this concern was raised by several commenters, we will monitor the re-admission rates to hospitals and other proxies that may indicate poor care outcomes, such as QMs. In addition, we will work with the other CMS components to ensure that facilities are adhering to survey and certification requirements, including providing appropriate care to residents.

Further, we do not believe that limiting the look-back period for P1a services would unfairly punish SNFs that provide services to high-acuity patients. As stated above, the STRIVE data do not support the premise that services provided only during the hospital stay to SNF residents result in higher costs to the SNF. Limiting the look-back period helps to ensure that adequate and appropriate payments are made for services received during the SNF stay, while eliminating inappropriately high reimbursement for services that are provided solely prior to admission. Thus, if a patient receives high-acuity services during the SNF stay, those services should be adequately reimbursed. Therefore, we will eliminate the look-back period into the hospital stay for those specific services in section P1a on MDS 2.0, but we will maintain the ability for the provider to code those services provided prior to admission to the SNF on the MDS 3.0 by expanding the MDS 3.0 for these items to 2 columns. We believe that coding for these pre-admission services on the MDS 3.0 will allow providers to effectively capture these services for care planning purposes.

Comment: One commenter pointed out that the study for MDS 3.0 conducted by the RAND Corporation (RAND), a non-partisan economic and social policy research group, showed ''look-back periods were highlighted as a significant issue across the assessment (MDS 2.0) tool.'' The commenter further stated that CMS did not consider the findings on the STRIVE project with those of the RAND MDS 3.0 validation study. A few commenters were concerned that the changes to the look-back period made after the conclusion of the RAND analysis resulted in added burden in completing the MDS. They suggested that, prior to introducing the MDS 3.0, a new study should be done to validate the estimated time needed to complete the MDS 3.0.

Response: We do not agree with the assertion that we did not consider the RAND data when developing RUG–IV and establishing look-back periods for the various items used in payment. We concur with the RAND study that having multiple look-back periods on the assessment tool (for example, 7 days for some items, 30 days for others; some requiring look-back prior to admission to the SNF, while others only since admission to the SNF; and other look-back differences among the different items of the MDS) may lead to more opportunities for errors in coding, increase record review time and, thus, increase assessment burden. In making the final decisions on the look-back periods that would be applied to each MDS 3.0 item, we worked to balance three concerns: Data collection burden to the provider, consistency of look-back periods across items, and the sufficiency of the data points (that is, days of care) to assign an accurate case-mix classification for payment. Several of the look-back periods recommended by RAND were adjusted later by CMS to maximize their utility for payment and quality monitoring. In fact, RAND also reconsidered the 5-day therapy look-back period used in their study. They concluded that the 5-day look-back was too short to capture the therapy staff utilization and, thus, SNFs would be substantially underpaid if we adopted a shorter look-back. Therefore, both RAND and CMS favored changes to the look-back periods to enhance the accuracy of the MDS 3.0 responses. Finally, we do not believe a validation study is needed to estimate the time needed to complete the MDS 3.0, as none of the changes to the MDS 3.0 look-back periods extend the amount of data to be collected beyond the current MDS 2.0 collection period, and do not represent an additional burden to providers.

Comment: One commenter stated that the STRIVE analysis on look-back to services rendered solely in the hospital is flawed as only 5 treatments were used as the basis for this decision, and that some of these modalities are not widely available in the SNF setting. Another commenter stated that if our analysis on the items in section P1a of the MDS 2.0 assessment is accurate (specifically, that the staff resources involved when services were furnished solely during the hospital stay are significantly lower than when those services are furnished during the SNF stay), then MDS coding for Parenteral/IV feedings (K5a) should also specify that these services should only be coded when provided during the SNF stay, and not during the hospital stay.

Response: We do not agree that the change to the look-back period is based on a flawed analysis. The change to the look-back period affects only a small subset of the items reported on the MDS. Of these, we collected data on 6

of the 9 Special Treatment and Procedures that are currently used in the RUG–III classification system on the STRIVE Addendum (we inadvertently did not list oxygen therapy in the proposed rule as one of the special treatments and procedures on which we collected pre- and post-admission data; therefore, in response to this comment, we are now clarifying that we also collected data on oxygen therapy on the STRIVE Addendum). We considered a 7-day look-back period for services rendered prior to admission and after admission to the SNF on the STRIVE Addendum. We believe that we looked at a sufficient number of P1a services used in the RUG–III model to conclude appropriately that utilization of P1a services during the prior hospital stay is not an effective proxy for medical complexity during the SNF stay. The frequency of the services coded on the MDS based on the MDS Active Resident Information Report (found at *http://www.cms.hhs.gov/MDSPubQIandResRep.asp*) for the treatments we targeted on the STRIVE Addendum are as follows (first quarter 2006, STRIVE data collection began June 2006):

P1ac IV medications 9.5 percent
P1ag Oxygen 13.3 percent
P1ai Suctioning 1.2 percent
P1aj Tracheostomy care 1.1 percent
P1ak Transfusions 1.0 percent
P1al Ventilator or respirator .5 percent

For the 3 P1a services used in the RUG–III model for which we did not collect extra data on the STRIVE Addendum, the frequencies for coding for the same time frame are:

P1aa Chemotherapy .5 percent
P1ab Dialysis 1.5 percent
P1ah Radiation .1 percent

Of these, all 3 services are furnished to a small volume of SNF patients. Moreover, the actual service may sometimes be performed outside the SNF, and at least some of the individual services within each of these 3 categories are excluded from SNF consolidated billing and paid separately under Part B, outside of the bundled SNF PPS rate. Therefore, we believe it was appropriate to focus on the 6 P1a services listed above.

As noted above, we focused on certain services that, while they are frequently provided in a hospital, are furnished less frequently after the admission to the SNF. One of the main purposes of including P1a services on the STRIVE Addendum was to gather data to determine if utilization of these treatments in the hospital serves as a proxy for medical complexity for a SNF patient, as well as a predictor of SNF staff resource utilization. In fact, we collected data on all of the items used as qualifiers for the RUG–III Extensive Services category, as well as oxygen therapy, a Clinically Complex treatment coded frequently on the MDS 2.0. As discussed above, our analysis of 6 of the 9 look-back items listed above clearly indicated that utilization during a prior hospital stay is not an effective proxy for medical complexity for a SNF patient. Based on this, we believe that it is appropriate to eliminate the look-back period to the prior hospital stay for all P1a Special Treatments and Procedures to ensure that accurate and appropriate payments are made based on resources used during the SNF stay.

Finally, one commenter asked us to limit the look-back period for Parenteral/IV feedings (K5a) so that these services are coded on the MDS only when provided during the SNF stay, and not during the hospital stay.

We did include 2 items on the STRIVE Addendum for parenteral feedings. The first item asked the assessor to report the number of days that the parenteral feeding was administered in the facility over the last 7 days, while the second asked for the date on which the parenteral feeding was last administered. However, we were not able to use this information to determine with absolute certainty when the patient received the service in the SNF. When the data indicated a higher probability that the feeding was provided during the SNF stay as opposed to solely during the hospital stay, the resources were similar to when the data indicated that the feeding was provided exclusively in the hospital. In other words, for this particular treatment, the staff resources to care for a patient who received parenteral feeding only during the hospital stay and the staff resources to care for a patient who received the parenteral feeding in the SNF appeared to be comparable and, thus, indistinguishable. Therefore, based on the limited nature of the information we have available at this time, we do not believe that it would be appropriate to limit the look-back period for Parenteral/IV feedings (K5a) so that these services are coded on the MDS only when provided during the SNF stay (and not during the hospital stay). Thus, we will maintain our current MDS instructions for coding Parenteral/IV feedings (K5a), such that patients may be coded as receiving parenteral/IV feedings, regardless of whether they receive them before or after admission to the SNF.

Comment: One commenter stated that SNFs are admitting more complex patients and, thus, by eliminating the look-back into the hospital stay, CMS is ''reinforcing a compartmental approach towards assessing a patient's care needs.''

Response: We do not agree. As stated earlier, we will continue to have providers code services that are provided during the acute hospital stay on the MDS 3.0 for care planning purposes. Therefore, we continue to encourage the sharing of information between settings, and believe that the SNF will still be able to properly assess and develop an appropriate care plan based on services provided prior to SNF admission.

Comment: One commenter characterized the elimination of the look-back period into the hospital stay as a ''rate cutting measure.''

Response: Neither the MDS 3.0 nor the RUG–IV were designed as or function as ''rate-cutting measures.'' As discussed above, limiting the look-back period for P1a Special Treatments and Procedures ensures that adequate and appropriate payments are made for patients that actually receive these services during a SNF stay, while eliminating inappropriately high reimbursement for services that are provided solely prior to admission. Furthermore, by introducing the RUG–IV classification system in a budget neutral manner, we ensure that parity is maintained between aggregate payments to SNFs under RUG–III and RUG–IV. For FY 2011, the system is being designed so that overall payments under RUG–IV will be at the same level as what overall payments would have been under RUG–III if we had not changed to the new model. Although aggregate payments do not change, the distribution of payments does change, which is why the payment rates for the complex medical groups (that is, Extensive Care, Special Care, and Clinically Complex) will increase significantly.

As proposed in the FY 2010 proposed rule (74 FR 22227–28), we are modifying the look-back period under RUG–IV for the Special Treatment and Procedures currently listed in section P1a of the MDS 2.0, to include only those services that are provided after admission (or readmission) to the SNF. In addition, we will expand the MDS 3.0 for these items to 2 columns. The first column will allow providers to code services that were provided prior to SNF admission for care planning purposes.

v. Organizing the Nursing and Therapy Minutes

In the FY 2010 proposed rule (74 FR 22208, 22228, May 12, 2009), we discussed the proposed organization of nursing and therapy minutes under the RUG–IV model. The comments that we received on this subject have been addressed in detail in section III.C.1.b.ii of this final rule.

vi. Data Dissemination

Comment: One commenter stated lack of access to data limited the ability to determine whether or not the sample can be relied upon to generalize nationally. Another commenter said that the STRIVE data disseminated to date provided little information about the study's findings on resource utilization by provider type, size, and case mix.

Response: We do not agree with the comments indicating that we have provided insufficient data to evaluate this effort. Rather, from its very inception, we have taken every opportunity to seek input on and share available information about the progress of our research, not only through the rulemaking process, but also in Open Door Forums, at numerous Technical Expert Panels and other meetings, and on our Web site. In fact, we regard the exceptionally detailed and varied nature of the commenters' critiques of our supporting data as at least in part a direct reflection of the unusually large amount of data that we have made available to the public throughout this process. We note that even after the issuance of the FY 2010 SNF PPS proposed rule, we continued to respond to requests for technical assistance. We took questions on a daily basis, and posted additional technical materials on our Web sites so that all stakeholders could have access to the technical questions that we received. In addition, we note that in section III.C.1 of this final rule, we have addressed comments regarding the representativeness of the STRIVE sample.

We also wish to note that one of the large provider groups submitted a detailed report by an independent contractor, stating that the lack of available data precluded ruling out the possibility that the study was seriously flawed. While we appreciate the concerns raised in this report, we have no way of knowing what data were provided to the researcher in order to conduct the analysis, as we did not receive any requests for technical information or clarification. Thus, in section III.C.1 of this final rule, we have provided detailed responses to the independent researcher's report, but cannot accept the researcher's more global conclusions on methodological flaws and the validity of the study.

Finally, a few commenters expressed their concern that CMS has not provided them with the raw data used in the study, and cited the unavailability of raw data as the reason they could not adequately evaluate the RUG–IV model. CMS does not typically release analytic data files that contain data on participating facilities, participating employees, or on individual patients whose data are HIPAA-protected. We did, however, eliminate the personally identifiable data, and made a detailed analytic file available to all stakeholders. We believe that this file, in conjunction with the RUG–IV grouper, data on the anticipated redistribution of patient days under the RUG–IV, and the CMIs calculated for use in the RUG–IV model, provided more than sufficient data to evaluate the impact of the conversion to RUG–IV. Thus, we do not agree with the commenters who claimed that we failed to provide adequate data for the evaluation of the RUG–IV model.

Comment: One commenter requested CMS to provide the public with additional information about how occupational therapists were asked to record their time and interventions with residents using HCPCS codes through personal data assistants (PDAs) and a paper-based tool. The commenter expressed concern that therapists unfamiliar with HCPCS codes would be confused reconciling Medicare Part B HCPCS coding policies (CCI edits, 8 minute rule, *etc.*) with the ''click on/click off'' mentality of the STRIVE data collection PDA tool. The commenter was concerned that the inexperience of occupational therapists with these HCPCS codes could have skewed the study results.

Response: As part of the STRIVE study preparation, we worked with the therapists at the participating facilities, and trained them on study procedures. The therapists were not required to use HCPCS codes to report the modalities provided to each patient. Instead, the description of the services was included in the PDA by name, and the HCPCS code was listed next to it to assist those therapists who were more familiar with the codes than with the modality descriptions. We did not receive any complaints from the participating therapists that they were either unfamiliar with or did not know how to use HCPCS codes within the context of the STRIVE data collection.

Comment: A few commenters indicated that using an ''unvalidated RUG–IV grouper'' with a new MDS 3.0 assessment instrument is inconsistent with CMS's policies in developing the PPS for other Medicare providers, and does not meet OMB standards that regulatory analysis should be transparent and the results must be reproducible. In addition, a commenter noted that, in the interest of full disclosure and transparency, CMS has an obligation to disclose project limitations and uncertainties, and should consider additional research prior to rulemaking to evaluate such limitations.

Response: We do not agree with the commenters' assertions that we are proposing an ''unvalidated RUG–IV grouper.'' The methodology used to develop the RUG–IV grouper applies the same analytical procedures to the STRIVE data as were used to create the original RUG–III grouper. The validation process used to update the case-mix classification system to RUG–IV is described in detail in section III.C.1 of this final rule. In addition, we conducted detailed comparisons of the MDS 2.0 and MDS 3.0 to develop crosswalks, and tested these crosswalks to ensure that the RUG–IV grouper classified residents to the same groups using either the MDS 2.0 or MDS 3.0. These crosswalks have been posted on the CMS Web site at *http://www.cms.hhs.gov/nursinghomequalityinits/25_nhqimds30.asp*.

In addition, as evidenced by the detailed discussion in section III.C.1 of this final rule, we are confident that we have met OMB's requirements for regulatory analysis and full disclosure. Moreover, we evaluated the STRIVE findings at every stage of our research over the past 3½ years, and conducted additional analyses to test our findings and strengthen the validity of the RUG–IV model. As the evaluation of project findings was built into the project plan, we do not accept the assertion that additional research is needed before introducing the RUG–IV case-mix model for FY 2011.

2. The RUG–IV Classification System

In the FY 2010 proposed rule (74 FR 22208, 22229, May 12, 2009), we discussed the various features of the proposed RUG–IV model, and compared the proposed model to the existing RUG–III model that is currently in use. The comments that we received on this subject, and our responses, appear below.

General Comments

Comment: We received a variety of comments regarding the Medicare RUG–IV model, with some commenters expressing support and others

expressing concern over the proposed changes. One commenter characterized it as an improvement over the current Medicare RUG–III model that better represents the clinical needs and resource utilization of nursing home residents. Another commenter noted that, while a Medicaid model of RUG–IV has yet to be published, if the changes parallel the Medicare model, the result will be a more appropriate case-mix reimbursement system that fairly classifies residents. Commenters from a major industry organization commended CMS on its efforts to expand RUG–IV classifications accounting for the relative resource utilization of different case-mix groups. They believe the modification of the eight levels of hierarchy and the increase in the number of case-mix groups from 53 to 66 is a step in the right direction for allowing SNFs and therapists to define and document the patient's needs and resources more accurately, thus improving the quality of care. They encourage CMS's continued efforts in this area.

Other commenters questioned the accuracy of the RUG–IV model in capturing changes in acuity, such as the higher nursing complexity for patients in rehabilitation groups. While several commenters appreciated the added levels for extremely complex patients with ventilators and/or isolation, they were concerned that the RUG–IV model did not adequately recognize patients that had high-cost IV medication and pharmaceutical needs.

Response: The RUG–IV model was derived from the STRIVE data, and we believe that it reflects current practice and resource use in SNFs. However, we recognize that, no matter how accurately we identify typical practices and resource needs, there are atypical cases. In the FY 2010 SNF PPS proposed rule, we discussed our efforts to develop a separate method to reimburse for non-therapy ancillaries (NTAs), such as the IV medications and pharmaceuticals discussed by these commenters. We are committed to developing an NTA classification system as quickly as possible to recognize these higher costs.

Extensive Category

Comment: Several commenters supported the proposed changes in the Extensive Services Category in the RUG–IV model. A few commenters expressed concern over the removal of suctioning, noting if that if it is removed, Medicare will provide little reimbursement or incentive for SNFs to admit respiratory patients. One commenter noted that the frequent suctioning required by far utilizes increased nursing and respiratory therapist resources, even more so than trachesotomy care. The commenter stated that the proposal to move suctioning from the Extensive Care Category to a lower RUG category would significantly decrease their reimbursement.

Response: In the vast majority of cases, the STRIVE data showed that suctioning was highly correlated with the tracheostomy or ventilator services. Even in the absence of these two Extensive Care services, suctioning was associated with other respiratory conditions that are included in RUG–IV Special Care categories. We did find a small number of cases where suctioning was recorded on the MDS in the absence of any other respiratory condition or service. The data show that the staff resource time captured for this subset of suctioning patients was significantly lower than for patients reporting both suctioning and respiratory conditions. Eliminating suctioning as a RUG–IV qualifier only affects this smaller group where the service appears unrelated to respiratory conditions. Thus, we do not believe that the removal of suctioning as an independent qualifier will reduce the incentive for SNFs to admit respiratory patients or decrease reimbursement.

Special Care High and Special Care Low Categories

Comment: Several commenters supported the RUG–IV expansion and splitting of the RUG–III Special Care Categories into the Special Care High and Special Care Low Categories. These commenters also stated that while the addition of several new case-mix groups adds complexity to the model, the splitting of Special Care into a High and Low category adds finer distinctions of resource utilization and, thus, payment rates.

Response: CMS acknowledges the support of the commenters and concurs with the point of finer distinctions of resource utilization and payment rates by implementing a split of RUG–III Special Care Category into Special Care High and Special Care Low Categories in RUG–IV.

Fever with Dehydration

Comment: One commenter questioned the inclusion of dehydration as a qualifier with accompanying fever in the Special Care High Category versus the removal of dehydration alone as a qualifier in the Clinically Complex Category. To the commenter, the proposed rule appeared to indicate that dehydration as a qualifier has been removed from ''any'' category, implying that dehydration, even in combination with fever, would not contribute as a qualifying element to any RUG classification. The commenter questioned whether it was CMS's intention to leave dehydration as a qualifier in the Special Care High Category, in combination with fever; if so, then CMS should clarify the statement about dehydration in the proposed rule.

Response: As discussed in the FY 2010 proposed rule (74 FR 22231–34), dehydration was dropped as a qualifier in any category based on a finding by the American Medical Association (AMA) that there is no standard definition of dehydration among providers (*see* Faes, MC, ''Dehydration in Geriatrics,'' Geriatric Aging, 2007: 10(9): 590–596, available online at *http://www.medscape.com/viewarticle/567678*). We further stated that based on our MDS review, we believe that this qualifier is subject to a wide range of interpretation and, therefore, is unreliable as a standard for RUG classification. The inclusion of dehydration in conjunction with fever was inadvertent. In dropping dehydration as a qualifier in any category, for the reasons set forth above, dehydration should have been dropped as a qualifier accompanying fever. Thus, in response to the comment, we are clarifying that in RUG–IV, we are dropping dehydration as a qualifier accompanying fever in the Special Care High category. However, we are clarifying that fever in combination with pneumonia, vomiting, or weight loss are still qualifiers in the Special Care High category under RUG–IV.

Comment: One commenter indicated that the amount of nursing resources is directly correlated with the number of wounds a patient has, and that patients with multiple wounds would be better reflected in the Special Care High RUG category. For example, Patient A requires skilled treatment for two stage 2 wounds. The nurse is able to complete the wound care independently. Patient B requires skilled treatment for two stage 2, one stage 3, and two stage 4 wounds on various locations of the body; the nurse is able to complete the wound care independently, but it may take a significant amount of time to care for the wounds. The commenter believed that the more wounds a patient has, the more resources they will require.

Another commenter believed that Stage 2 pressure ulcers should be in Special Care Low, and that Stage 3 and 4 should be in Special Care High, because they require more nursing time and treatments than Stage 2 ulcers. One commenter was concerned that venous

and arterial ulcers may be misclassified, and that definitions should be available for the different types of ulcers.

Response: Based on these comments, we conducted numerous reviews of the STRIVE data regarding staff resources used to treat ulcers, and have determined that the research supports that we classify venous and arterial ulcers for payment purposes with pressure ulcers; however, it does not support separating wound care into 2 separate categories. We will maintain the policy outlined in the proposed rule and keep pressure ulcers in the Special Care Low category based on resource use associated with these conditions. As proposed, the patient will qualify for this category if 1 of the following is present along with 2 or more skin treatments:

- 2 or more Stage 2 pressure ulcers; or
- 1 or more Stage 3 or Stage 4 pressure ulcers.

In addition, based on our review of the STRIVE data, the patient will also qualify in the Special Care Low category if 1 of the following is present along with 2 or more skin treatments:

- 2 or more venous/arterial ulcers; or
- 1 Stage 2 pressure ulcer and 1 venous/arterial ulcer.

We will define the different types of ulcers in the RAI manual as the commenter suggested.

Comment: A few commenters questioned the elimination of several Special Care qualifiers. These included fever with tube feeding, and aphasia with tube feeding. While the commenters understood that CMS has proposed these changes as a result of the data derived from the STRIVE time study, they regarded the conclusion as counterintuitive to what is known to be in practice: For example, in the case of both fever and aphasia, it is clear that these conditions seriously complicate the course of treatment and result in significant added resources of both staff time and medical supplies. While the commenters commended the statistical analysis and modeling that went into these decisions, they asked that CMS reserve final judgment on these issues for review prior to finalization of RUG–IV.

Response: We believe that the STRIVE data accurately reflect wage-weighted staff time resources for aphasia with tube feeding. As discussed in the proposed rule (74 FR 22231), we are dropping aphasia based on the average staff resource time associated with that condition. As discussed in the FY 2010 proposed rule, we dropped the aphasia requirement because, based on the results of the STRIVE analysis, aphasia no longer correlated with tube feeding. Thus, we are retaining tube feeding as a Special Care Low qualifier, but are dropping aphasia. The mechanism of placement in a specific RUG group is such that a patient qualifying for the particular group had no other qualifiers for placement in a higher group. Had that been the case, then the patient would have been included in the higher group reflecting more resource utilization. Patients with aphasia frequently qualify for a higher Rehabilitation Category, because aphasia is often accompanied by another condition that warrants such a RUG classification. All of these medical factors blend into the overall resource utilization statistical mosaic for the RUG–IV system.

Based on the comments received, we reviewed the data on the staff resources required to treat patients with feeding tubes. We found that fever was a complicating factor and that the resources needed to treat a patient with both fever and a feeding tube were significantly higher than for a feeding tube alone. Thus, we will keep fever with tube feeding as a qualifier in the Special Care High category. Again, tube feeding alone remains as a Special Care Low item.

Clinically Complex Category

Comment: A few commenters responded positively to the expansion in the number of groups from 6 to 10 in the RUG–IV Clinically Complex Category. They noted that the expansion is due to increasing the number of ADL score breaks, particularly for moderate and more independent functioning residents.

Response: CMS acknowledges the support of the commenters and believes the expansion will capture a more accurate reflection of resource utilization in the SNF.

Pneumonia and Oxygen Therapy

Comment: One commenter stated that there appeared to be better reimbursement for pneumonia and oxygen therapy and was pleased that it would help with the care of these patients. Another commenter expressed concerns regarding oxygen therapy, stating this item can be gamed very easily. They recommended that CMS define what oxygen therapy is and specify a minimum amount of time/days for classification in the Clinically Complex Category. They pointed out that currently, SNFs can code this item if there is oxygen available on a PRN (''as needed'') basis, and that the resident needs to use it only once to qualify for the category.

Response: CMS has considered the suggestion of the commenters and reviewed the STRIVE data. In doing so, we have determined that, based on average resource use, oxygen therapy with respiratory failure, rather than oxygen therapy alone, should qualify for the Special Care Low Category, as the average resource time for oxygen therapy with respiratory failure is more consistent with the average resource use associated with the Special Care Low category. Oxygen therapy alone, based on average resource time, will qualify for the Clinically Complex Category. Regarding the suggestion for defined oxygen therapy regimens for classification in the Clinically Complex category, we note that the patient must require skilled services, and under the regulations at 42 CFR 409.33(b)(8), services that qualify as skilled nursing services include the initial phases of a regimen involving the administration of medical gases. Because the initial phases of an oxygen therapy regimen qualify as SNF services, we are not going to require a minimum number of days or amount of time for classification, and will maintain the MDS 2.0 coding instructions for oxygen therapy for use in the RUG–IV model.

Physician Orders

Comment: One commenter supported dropping physician orders as a qualifier due to lack of specificity and the variable nature of this qualifier, making it an unreliable predictor of resource use. Another commenter expressed confusion about the physician order qualifier, and whether it was CMS's intention to remove all physician orders as qualifiers in any category. A few commenters disagreed with the statement about physician orders being an unreliable predictor of resource use. One commenter with a background in nursing noted that it does not make sense to say that it does not take significant time to review new orders, carry them out, order medications from the pharmacy, order labs, *etc.,* and that this is one of the major reasons sub-acute units are busier than long-term care units. Another commenter stated that physician order changes are a good way to capture instability, and that the care of unstable residents can be more costly due to their increased use of lab tests, new medications, and nursing time.

Response: While the RUG–III model has used physician order changes as a proxy for instability, analysis of the STRIVE data did not support its continued use because of its lack of

specificity and variable nature. In an effort to achieve greater clarity and prevent misinterpretation, as we proposed, we are eliminating the physician orders qualifier from the Clinically Complex Category in RUG–IV. However, we are clarifying that we are retaining physician order changes in association with diabetes (that is, requiring daily insulin injections and physician insulin order changes on 2 or more days) in the Special Care High category because the STRIVE data show that physician orders in combination with diabetes with injections is a reliable predictor of resource use. The MDS 3.0 is being modified to collect physician order changes specifically related to the patient's diabetic condition.

Internal Bleeding

Comment: One commenter noted that as a result of the STRIVE study, internal bleeding was dropped as a qualifier. While the commenter understood that CMS has proposed these changes as a result of the data derived from the study, the commenter regarded the conclusion as counterintuitive to what is known to be in practice: This condition seriously complicates the course of treatment and the result is significant added resources of both staff time and medical supplies. Another commenter pointed out that transfusion services are costly to SNFs, and favored their inclusion as an indicator for RUG payment calculation, not simply for care planning purposes.

Response: CMS recognizes that internal bleeding can be a serious medical condition requiring an unusual amount of staff resources and supplies to control. However, the resource minutes derived from the STRIVE study were significantly lower than other conditions classified into the Clinically Complex category. These results suggest a high degree of variation in the conditions coded as internal bleeding that makes the item unreliable for use in a case-mix classification model. We wish to note that transfusions have been retained as a Clinically Complex qualifier in the RUG–IV model.

Dehydration

Comment: There were several comments about the removal of the dehydration qualifier for the Clinically Complex Category. Comments from a major industry organization agreed with CMS regarding the lack of a standard definition of dehydration, and that the signs and symptoms of dehydration may be vague and even absent in older adults. Commenters believed that continuing to use dehydration as a qualifier could result in inaccuracy in RUG classification. The commenters did not minimize the potentially serious nature of dehydration and the need for prompt medical attention in some cases, but rather, supported dropping it as a qualifier in order to improve coding accuracy.

Another commenter cited the American Medical Directors Association's (AMDA's) newly revised clinical practice guideline, ''Dehydration and Fluid Maintenance in the Long-Term Care Setting'' (*see http://www.cpgnews.org/DF/index.cfm*). Specifically, the commenter cited the AMDA as concluding that the confusion over the definition of the nonspecific, generic term dehydration results in confusion about the clinical diagnosis of dehydration in the long-term care (LTC) setting. According to the commenter, AMDA has concluded that dehydration is an unreliable quality of care indicator.

A number of commenters stated that while dehydration may be difficult to quantify (as stated in the proposed rule), the requirement to assess, plan, intervene, evaluate, and revise care plans for the patient at high risk of dehydration remains a significant clinical issue. The commenters further stated that instances whereby facilities fail to complete such assessment and documentation is not a valid reason to eliminate appropriate reimbursement for facilities that do provide the necessary standard of care.

Response: CMS agrees with the commenters stating that continuing use of dehydration as a qualifier could result in inaccuracy in RUG classification. As demonstrated by the wage-weighted staff time resource utilization, dehydration is an unreliable indicator of resource use. Therefore, dehydration has been removed as a qualifier from the Clinically Complex category of RUG–IV, and has also been removed as a qualifier accompanying fever in the Special Care High category. However, we would like to emphasize that we agree with the commenters regarding the severity of dehydration and the requirement for prompt medical attention. We expect that dehydration is seen in association with other services and conditions that are used as RUG–IV qualifiers. Thus, we do not expect that this change will discourage appropriate care or eliminate reimbursement for Medicare patients with skilled care needs.

IV Medications

Comment: Some commenters did not support the movement of the IV medications qualifier from the Extensive Services Category to the Clinically Complex category. The commenters indicated that IV medications drive high cost to the SNF, and this downward movement of IV medication will not cover the cost of purchasing most IV medications. The commenters recommended further study of the type of residents seen in the SNF setting, and reviewing the cost of providing that care in relationship to IV medications. If the shift to the Clinical Complex category would occur, the commenters recommended excluding the High cost IV medications from SNF consolidated billing.

Some commenters believed the inclusion of IV medications as an Extensive Services qualifier, as it is in the RUG–III classification system, appropriately captures the cost of providing the critical treatment these therapies offer to ill and injured patients.

Response: Although certain medications may have high costs, the STRIVE study data show that the average resource times related to IV medications are more reflective of conditions in the Clinically Complex category than the Extensive Services category. CMS recognizes the impact of high-cost medications on SNFs and is presently developing a protocol to assess the impact of non-therapy ancillaries, as discussed in the FY 2010 proposed rule (74 FR 22238–41). However, as discussed further in section III.G of this final rule, we currently do not have the statutory authority to exclude items such as IV medications from consolidated billing.

Look-Back Period for IV Medications

Comment: Some commenters expressed concern that the proposed RUG–IV model will eliminate all services provided in the acute setting, such as IV medications, as a qualifier for higher RUG categories. The commenters stated this eliminates the ''presumption of coverage'' that we clarified in the SNF PPS final rule of July 30, 1999 (64 FR 41666–41670), which allows a beneficiary who was in the acute setting for pneumonia, septicemia, and infectious diseases to be considered ''skilled'' through the first assessment reference date. The commenters stated that the removal of the IV fluid ''14-day hospital look-back'' qualifier for the SNF Extensive Services Category in RUG–IV fails to recognize the high risk of relapsing conditions with this patient population. The commenters believe this should be a consideration in skilled nursing assessment during the initial five-day assessment period, and that such care should be appropriately reimbursed, as it is in the current RUG

structure. These commenters stated that removal of this qualifier will lower the payment to SNFs, and that when IV medication does qualify, moving from Extensive Services to Clinically Complex will also result in lower payment. The commenters believed the nursing care of administering the IV will no longer count as a key factor in obtaining a refinement RUG and will essentially eliminate the refinement RUGs in most if not all Medicare stays. In addition, they believed that the reimbursement will not be enough to pay for the cost of the IV, let alone the cost of providing the nursing care required to administer the IV.

Several commenters believed the appropriate and necessary monitoring of the patient to prevent recurrence or exacerbation of the condition for which the IV medication was provided is a reason for inclusion in the Extensive Services category, and that it has not been considered in the removal of IV medication in the look-back period.

Some commenters noted that the STRIVE data analysis of the 14-day ''look back'' period for IV medication and 7-day ''look back'' period for IV fluids did not demonstrate a statistically significant difference in nursing time. The commenters suggested that CMS look at the nursing time spent monitoring when a resident has had an IV medication administered within the last 7 days, and factor it into the nursing component. The commenters believed that residents receiving IV medication in this time frame require a significant amount of nursing time to monitor side effects of the medications, as well as disease exacerbations. The commenters referenced literature indicating that SNFs have a lower rate of return to the hospital than other post acute settings; therefore, the time spent monitoring residents, notifying physicians of condition changes, and implementing care plan changes must be taken into consideration when making changes in the RUG system. The commenters recommended shortening the window as opposed to removing the provision altogether, that is, a 7-day look-back to capture IV meds. The commenters requested alternatives be considered before the proposed rule is implemented.

Response: CMS recognizes the concern of the nursing home community regarding levels of reimbursement. However, as discussed above in section III.C.1.b.iv of this final rule and in the proposed rule (74 FR 22228), our analysis of the STRIVE data supported the conclusion that the capture of certain preadmission services by the look-back does not provide an effective proxy for medical complexity in the SNF, and thus is not an effective predictor of subsequent resource intensity during the SNF stay. Therefore, we believe it is appropriate to eliminate the look-back to the hospital stay for P1a services, rather than adopt a shorter look-back period. However, we noted in the proposed rule that it is still important that the SNF consider preadmission services for care planning purposes and we have designed the MDS 3.0 accordingly. Regarding the IV medications qualifier, as discussed above, the STRIVE data showed that the average resource times related to IV medications are more reflective of conditions in the Clinically Complex category. Therefore, we believe that under RUG–IV, facilities will be appropriately reimbursed according to the wage-weighted resource staff time associated with a patient's condition. As discussed above, CMS recognizes the impact of high-cost IV medications on SNFs, and is developing a protocol to assess the impact of non-therapy ancillaries, as discussed in the FY 2010 proposed rule (74 FR 22238–41). Finally, we do not agree that eliminating the look-back period to the hospital stay eliminates the presumption of coverage, because even in the absence of the look-back, it remains possible for a resident to be assigned on the initial 5-day, Medicare-required assessment to one of the RUGs that we have designated as qualifying the resident for the presumption.

Patient Acuity and RN Care

Comment: Several commenters noted that the residents requiring IV medications are sick, as evidenced by the infection causing the need for IV antibiotics, and require extra nursing observation in addition to the RN time for IV starts, IV ordering, and IV administration. The commenters supported not coding the IVs that were given in the hospital, but questioned whether we are adequately accounting for the amount of care provided to residents receiving rehabilitation and in-house IVs, noting that there is no longer a provision for them to get a higher RUG rate. These commenters did not support dropping the IV medications and fluids to a lower RUG group, arguing that this is a situation requiring the presence, vigilance, and assessment skills of a RN. In addition, these commenters asserted that the complex nature of the residents of some SNFs can involve co-morbidities, non-verbal status with varying communication methods, various levels of cognitive abilities, and difficult feeding strategies that can best be treated within a specific type of facility, and that the patients are discharged from acute care much earlier than the typical geriatric resident.

Response: CMS appreciates the support of the recommendation not to include a 14-day IV look-back as a qualifier for the RUG–IV classification. We recognize and value the presence, vigilance, and assessment skills of an RN. However, all of the elements mentioned in the comment, including nursing observation time, IV starts, IV ordering, and IV administration, were captured in all of the nursing homes participating in the STRIVE time study. The STRIVE data did not reflect a statistically significant increase in wage-weighted staff time resource utilization for the patient population receiving IV medications, and the average staff resource time for these patients was more reflective of the Clinically Complex category.

Non-Patient Nursing Time

Comment: Some commenters objected to moving the IV medication qualifier to the Clinically Complex category and stated that the RUG–IV nursing case-mix index assigned to IV medications does not account for the additional expended nurse resources. They noted that those resources are affiliated with the increase in documentation associated with IV medication administration, and the specific nurse training required for effective administration and management of patients receiving IV medications; for example, when caring for a patient receiving IV medications, the nurse's time requirements go beyond the time he/she spends directly with the patient, and include completing detailed IV assessment flow sheets, preparing the IV medication, reviewing lab work and consulting with the pharmacist, and becoming IV certified.

Response: Administrative documentation and other non-patient nursing time were incorporated into the STRIVE time study. In addition, the costs of training and administrative documentation were captured in the 1995 base year for the SNF PPS's bundled rate; any bedside training and administrative documentation performed during the time study would have been captured. Further, as discussed above, the STRIVE results supported moving the IV medications qualifier to the Clinically Complex category.

Financial Hardship

Comment: Several commenters believed that dropping IV medications from the Rehabilitation/Extensive Services category and the Extensive

Services category will cause financial hardship to long-term care facilities, and undue stress to the residents. The commenters cited the following reasons:

- They are very expensive, which may be a factor for consideration in determining potential admissions to long-term care facilities. It is hard enough now not to lose money on patients requiring expensive IV medications.
- They are used for very ill residents who require more nursing hours than any of the conditions included in any of the Extensive Care or Special Care categories.

The commenters did not question the general findings of the STRIVE project, but expressed concern about the specific implications of those findings for IV medications used in the facilities.

One commenter requested that data analyses be performed to compare nursing home residents admitted with IV therapy to those admitted without IV therapy, both for their facilities' residents and for a benchmark of nursing home residents nationwide. The commenter presented the results of one such study. The national benchmark was constructed using MDS data for all clients from a specific organization and its members and includes more than 2,700 facilities nationwide with more than 400,000 MDS assessments. Two MDS variables were used in this analysis: (1) Item P1ac (IV medications), and (2) item K5a (IV fluids). The commenter's analysis of data from the specific facilities and from the national data showed statistically significant differences between the group with IV therapy and the group without IV therapy, with the former group having a higher level of acuity and a greater need for skilled nursing resources. The commenters questioned the validity of the STRIVE study, which demonstrated no time difference between giving a patient an oral antibiotic versus administering an IV antibiotic.

The commenters stated that most of the patients receiving IV therapy are elderly and have suffered a major illness or hospitalization and, thus, require the IV therapy they are receiving. These commenters questioned the incentive for SNFs to continue to provide IV therapy services if the RUG–IV system is implemented as proposed.

Another commenter pointed out that IV medications and IV fluids provided in a SNF require the presence of an RN in most States, and that facilities must employ RNs specifically to provide the residents with IV services, which can be costly in rural areas where there are shortages of healthcare professionals. The commenter asserted that prior to the RUG–53 refinement to the SNF PPS, residents requiring IV medications or fluids were frequently rejected by SNFs because of the expense and difficulty in finding nurses to provide care. The commenter expressed concern that bumping the IV medications down to the Clinically Complex category will again adversely affect resident admissions to nursing homes.

Response: The STRIVE study captured, and the data reflects, resource time expended by all staff levels. As discussed above, the STRIVE study indicated that the average resource times associated with IV medications are more reflective of conditions in the Clinically Complex category.

Thus, we believe that classification and reimbursement under the Clinically Complex category for IV medications is appropriate, and should not result in financial hardship. Under RUG–IV, reimbursement for patients with complex nursing needs such as IV therapy will increase significantly, and should be sufficient to cover the cost associated with these patients. We will, of course, continue to monitor utilization practices to determine whether there is any impact on access to or quality of care.

Still, as the payment under RUG–IV reflects the nursing resources and patient complexity associated with the provision of IV medications, we do not believe that access to care will be adversely affected. As discussed above, CMS recognizes the impact of high-cost medications on SNFs and is presently developing a protocol to assess the impact of non-therapy ancillaries as discussed in the FY 2010 proposed rule (74 FR 22238–41).

Behavioral Symptoms and Cognitive Performance Category

Comment: One commenter supported the combined Behavior Symptoms and Cognitive Performance Category in the RUG–IV model. This category combines the two separate categories of Impaired Cognition and Behavior Problems in RUG–III into the single new category with a combined total of 4 RUG groups as opposed to 4 in Impaired Cognition and another 4 in Behavior Problems.

One commenter noted that while patients would classify in this group when they display only behavioral symptoms, or when they display only issues of cognition, they also remain in this group even when they have both conditions. The commenter added that many residents have issues with both dementia and behavioral problems and probably require more resources or staff time to deal with both issues. The commenter believes that there needs to be an additional category with a higher CMI that recognizes the combination of both issues.

Response: During the meeting of the Technical Expert Panel in Spring 2009, this issue was discussed at some length. Unlike the results from other countries, the United States STRIVE time study analysis did not indicate that there was an increased wage-weighted staff time resource utilization with patients exhibiting both behavioral and cognitive issues. Reasons for this may include effective, monitored medication, and specialized, well-equipped nursing facility settings in this country. In addition, we need to consider whether the needs of individuals with cognitive impairment or serious behavior problems are addressed through specialized State programs similar to the Intermediate Care Facilities for the Mentally Retarded (ICFs/MR) for targeted populations.

Reduced Physical Function Category

Comment: One commenter supported the increased case-mix classification assigned to patients receiving restorative therapy in the Reduced Physical Function Category. The commenter believes this will better reflect the amount of nursing resources needed to implement an effective and efficient restorative program. A few commenters responded to CMS's request for comments on the tertiary split for restorative nursing in the RUG–IV model. Specifically, they noted a discrepancy between the reported service and the nursing minutes; in approximately half the Reduced Physical Function groups, the nursing minutes were lower for patients where restorative nursing was reported on the MDS than for patients who were not receiving the service. Commenters suggested most of the nursing rehabilitation may be provided by individuals under the direction of nursing staff who are not classified as nursing personnel, such as nurse aides on the floor, therapy aides, and recreation therapy aides. This, coupled with the facilities limiting the time these residents might have received from licensed nurses, could yield the results seen. Commenters suggested that it might be helpful to see whether licensed nurse time has been reduced for these residents inappropriately or if an additional use of aides has appropriately reduced the level of licensed nurse need. Regardless, the commenters believed that the retention of this split is crucial, as it encourages continued help for residents to maintain their highest physical functioning. Another commenter concurred with the

proposed rule's position that restorative nursing programs benefit all residents, and cited the findings of a Federal grant that studied nursing facilities in Colorado having good restorative nursing programs, including:

- Decrease in the number of acquired pressure ulcers.
- Increase in the number of residents ambulating independently.
- Increase in the number of residents feeding themselves.
- Decrease in the number of incontinent residents.
- Decrease in the number of Foley catheters.
- Decrease in the number of physical constraints.
- Increase in the number of residents involved in sensory stimulation, exercise, and grooming classes.
- Decrease in the number of contractures.
- Decrease in the number of accidents.
- Increase in the individual's mental stature and awareness.

Response: We appreciate the possible explanations of the reduced nursing minutes for patients receiving restorative nursing. It is plausible that much of the nursing rehabilitation may now be provided by aides and that the wage-weighted staff time resource utilization for the licensed nurses is now less than the time attributed to the various types of aides and assistants. As we proposed, we are retaining the tertiary split for restorative nursing in RUG–IV, as we believe that it benefits all patients. As the commenter suggested, we will consider monitoring restorative nursing to see whether licensed nurse time has been reduced for these residents inappropriately or if an additional use of aides has appropriately reduced the level of licensed nurse need.

Finally, we note that it was brought to our attention during the comment period that there were certain inconsistencies in our FY 2010 proposed rule. We noted these inconsistencies on our Web site, at *http://www.cms.hhs.gov/snfpps/02_spotlight.asp*. First, we identified some inconsistencies between the preamble text at 74 FR 22231 and the tables in the proposed rule (Table 14 and Table C in the Addendum) regarding the qualifying conditions for the Special Care High, Special Care Low, and Clinically Complex categories. We are clarifying that the information in the tables was accurate, with the correction noted below. In addition, we identified a necessary technical correction to Table C in the Addendum of the FY 2010 proposed rule. The Special Care High, Special Care Low, and Clinically Complex categories for RUG–IV stated in the Notes section, ''Signs of depression used for end splits; PHQ score <= 9 or CPS >=3.'' This should have read, ''Signs of depression used for end splits consisted of PHQ score >=9.5.''

Accordingly, we are finalizing the RUG–IV classification system as proposed in the FY 2010 proposed rule (74 FR 22229–36) for implementation in FY 2011, with the corrections noted above and with the following modifications:

- Fever with feeding tube has been added to Special Care High;
- We are clarifying that dehydration has been deleted as a qualifier in any category, including the Special Care and Clinically Complex categories;
- Respiratory failure in combination with oxygen therapy while a resident is added to Special Care Low;
- Oxygen therapy alone while a resident is moved to Clinically Complex; and
- A patient will also qualify in the Special Care Low category if 1 of the following is present along with 2 or more skin treatments:
  - 2 or more venous/arterial ulcers; or
  - 1 Stage 2 pressure ulcer and 1 venous/arterial ulcer.

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Table 13
Crosswalk of MDS 3.0 Items and RUG-IV Groups

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
ULTRA HIGH REHABILITATION PLUS EXTENSIVE SERVICES Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline 3 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RUX RUL
VERY HIGH REHABILITATION PLUS EXTENSIVE SERVICES: **Rehabilitation Rx 500 minutes/week minimum** AND **At least 1 rehabilitation discipline 5 days/week** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RVX RVL
HIGH REHABILITATION PLUS EXTENSIVE			

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
SERVICES **Rehabilitation Rx 325 minutes/week minimum** AND **At least 1 rehabilitation discipline 5 days/week;** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RHX RHL
MEDIUM REHABILITATION PLUS EXTENSIVE SERVICES **Rehabilitation Rx 150 minutes/week minimum** AND **5 days any combination of 3 rehabilitation disciplines;** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RMX RML
LOW REHABILITATION PLUS EXTENSIVE SERVICES **Rehabilitation Rx 45 minutes/week minimum** **AND**	2-16	Not Used	RLX

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
3 days any combination of 3 rehabilitation disciplines; AND **Restorative nursing 6 days/week, 2 services (see Reduced Physical Function (below) for restorative nursing services);** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more			
ULTRA HIGH REHABILITATION Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline 3 days/week	11-16 6-10 0-5	Not Used Not Used Not Used	RUC RUB RUA
VERY HIGH REHABILITATION Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	11-16 6-10 0-5	Not Used Not Used Not Used	RVC RVB RVA
HIGH REHABILITATION **Rehabilitation Rx 325 minutes/week minimum** AND At least 1 rehabilitation discipline 5 days/week	11-16 6-10 0-5	Not Used Not Used Not Used	RHC RHB RHA
MEDIUM REHABILITATION **Rehabilitation Rx 150 minutes/week**	11-16 6-10	Not Used Not Used	RMC RMB

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
minimum AND 5 days any combination of 3 rehabilitation disciplines	0-5	Not Used	RMA
LOW REHABILITATION **Rehabilitation Rx 45 minutes/week minimum** AND **3 days any combination of 3 rehabilitation** **disciplines;** AND Restorative nursing 6 days/week, 2 services (see Reduced Physical Function for restorative nursing services)	11-16 0-10	Not Used Not Used	RLB RLA
EXTENSIVE SERVICES Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	2-16 2-16 2-16	Tracheostomy care and ventilator/respirator Tracheostomy care or ventilator/respirator Isolation for active infectious disease	ES3 ES2 ES1
SPECIAL CARE HIGH **Comatose; septicemia; diabetes with daily** **injections and order change on 2 or more days;** **quadriplegia with ADL score >=5; chronic** **obstructive pulmonary disease and shortness of**	15-16 15-16 11-14 11-14 6-10 6-10 2-5 2-5	Signs of Depression No Signs Signs of Depression No Signs Signs of Depression	HE2 HE1 HD2 HD1 HC2 HC1 HB2 HB1

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
breath when lying flat; fever with pneumonia, or vomiting, or weight loss, or feeding tube; parenteral/IV feedings; respiratory therapy for 7 days AND ADL score of 2 or more		No Signs Signs of Depression No Signs	
SPECIAL CARE LOW Cerebral palsy, multiple sclerosis, or Parkinson's disease with ADL score >=5; respiratory failure and oxygen therapy while a resident; feeding tube (calories >= 51% or calories = 26-50% and fluid >= 501cc); ulcers (2 or more stage II or 1 or more stage III or IV pressure ulcers; or 2 or more venous/arterial ulcers; or 1 stage II pressure ulcer and 1 venous/arterial ulcer) with 2 or more skin care treatments; foot infection/diabetic foot ulcer/open lesions of foot with treatment; radiation therapy while a resident; dialysis while a resident AND ADL score of 2 or more	15-16 15-16 11-14 11-14 6-10 6-10 2-5 2-5	Signs of Depression No Signs Signs of Depression No Signs Signs of Depression No Signs Signs of Depression No Signs	LE2 LE1 LD2 LD1 LC2 LC1 LB2 LB1
CLINICALLY COMPLEX **Extensive Services, Special Care High or Special Care Low qualifier and ADL score of 0 or 1** OR Pneumonia; hemiplegia with ADL score >=5; surgical wounds or open lesions with treatment; burns; chemotherapy while a resident; oxygen therapy while a resident; IV medications while a resident; transfusions while a resident	15-16 15-16 11-14 11-14 6-10 6-10 2-5 2-5 0-1 0-1	Signs of Depression No Signs Signs of Depression No Signs Signs of Depression No Signs Signs of Depression No Signs Signs of	CE2 CE1 CD2 CD1 CC2 CC1 CB2 CB1 CA2 CA1

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
		Depression No Signs	
BEHAVIORAL SYMPTOMS and COGNITIVE PERFORMANCE **Cognitive impairment BIMS score <=9 or** **CPS >=3** **OR** hallucinations or delusions OR physical or verbal behavioral symptoms toward others, other behavioral symptoms, rejection of care, or wandering AND ADL score <=5 See Reduced Physical Function for restorative nursing services	2-5 2-5 0-1 0-1	2 or more restorative nursing on 6+ days/wk Less restorative nursing 2 or more restorative nursing on 6+ days/wk Less restorative nursing	BB2 BB1 BA2 BA1
REDUCED PHYSICAL FUNCTION Restorative nursing services: • Urinary and/or bowel training program • passive and/or active ROM • amputation/prosthesis care training • splint or brace assistance • dressing or grooming training • eating or swallowing training • transfer training • bed mobility and/or walking training • communication training NOTES:	15-16 15-16 11-14 11-14 6-10 6-10 2-5 2-5 0-1	2 or more restorative nursing on 6+ days/wk Less restorative nursing 2 or more restorative nursing on 6+ days/wk Less restorative	PE2 PE1 PD2 PD1 PC2 PC1 PB2 PB1 PA2

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
No clinical variables used	0-1	nursing 2 or more restorative nursing on 6+ days/wk Less restorative nursing 2 or more restorative nursing on 6+ days/wk Less restorative nursing 2 or more restorative nursing on 6+ days/wk Less restorative nursing	PA1
Default			AAA

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3. Development of the FY 2011 Case-Mix Indexes

Section 1888(e)(4)(G)(i) of the Act requires that the Federal rates be adjusted for case mix. Pursuant to the statute, such adjustment must be based on a resident classification system, established by the Secretary, that accounts for the relative resource utilization of different patient types. The case-mix adjustment must be based on resident assessment data and other data the Secretary considers appropriate.

As discussed in the previous section, we are finalizing the RUG–IV model to be implemented in FY 2011. The RUG–IV update uses data collected in 2006–2007 during the STRIVE project, and reflects current medical practice and resource use in SNFs across the country. Our description of the proposed RUG–IV model in the FY 2010 proposed rule included a discussion of the development of the case-mix indexes to be used under this model (74 FR 22208, 22236–22238, May 12, 2009).

The case-mix indexes will be applied to the unadjusted rates resulting in 66 separate rates, each corresponding with one of the 66 RUG–IV classification groups. To determine the appropriate payment rate, SNFs will classify each of their patients into a RUG–IV group based on assessment data from the MDS 3.0.

Our intent in implementing RUG–IV is to allocate payments more accurately based on current medical practice and updated staff resource data obtained during the STRIVE study, and not to decrease or increase overall expenditures. Thus, consistent with the policy in place when we transitioned to the RUG–III 53-group model in FY 2006 (as discussed in section III.B.2.b of this final rule), we believe that overall expenditures under the RUG–IV model should maintain parity with overall expenditures under the RUG–III 53-group model. Therefore, we simulated payments under the RUG–III 53-group model and the RUG–IV 66-group model to ensure that the change in classification systems did not result in greater or lesser aggregate payments.

We used the resource minute data collected from STRIVE to create a new set of unadjusted relative weights, or case-mix indexes (CMIs), for the RUG–IV model as described in the proposed rule (74 FR 22208, 22236–22238, May 12, 2009). We then compared the CMIs for the RUG–53 and RUG–66 models in a way that is intended to ensure that estimated total payments under the 66-group RUG–IV model would be equal to those payments that would have been made under the 53-group RUG–III model. In the FY 2010 proposed rule, we stated that we used STRIVE data with sample weights applied and FY 2007 claims data (the most recent final claims data available at the time) to compare the distribution of payment days by RUG category in the 53-group model with the anticipated payments by RUG category in the new 66-group RUG–IV model. However, after the

proposed rule was published, final FY 2008 claims data became available. As we stated in the proposed rule, in the absence of actual RUG–IV utilization, we believe that the most recent final claims data are the best source available, as they are closest to the FY 2011 timeframe. Because our intent, as expressed in the FY 2010 proposed rule, was to use the most recent data available, we updated our analysis using FY 2008 final claims data to enhance the accuracy of our calculation of the adjustment necessary to achieve parity between the RUG–53 model and RUG–IV. Our projections of future utilization patterns under the new case-mix system indicated that the 66-group RUG–IV model would produce lower overall payments than under the original RUG–III 53-group model. Therefore, consistent with the policy in place when we transitioned to the RUG–III 53-group model in FY 2006 (as discussed in section III.B.2.b of this final rule), we proposed to provide for an adjustment to the nursing CMIs that would achieve ''parity'' between the old and new models (that is, would not cause any change in overall payment levels). Based on our analysis using FY 2008 claims data, the adjustment to the nursing weights necessary to achieve ''parity'' is an upward adjustment of 59.4 percent.

The parity adjustment relies on projecting the utilization for a new classification system, RUG–IV, based on a new assessment instrument, MDS 3.0. Our calculation of the parity adjustment uses the most recent data available to estimate RUG–IV utilization for FY 2011. In the absence of actual RUG–IV utilization data for this timeframe, we believe the most recent data are the best source available, as they are closest to the FY 2011 timeframe. As actual data for RUG–IV utilization become available, we intend to assess the effectiveness of the parity adjustment in maintaining budget neutrality and, if necessary, to recalibrate the adjustment in future years.

We intend to actively monitor the changes in beneficiary access and utilization patterns as a response to the implementation of RUG–IV. For example, we anticipate that the changes to the Extensive Services category could result in increased beneficiary access for patients with severe respiratory conditions. In addition, we intend to monitor utilization for any potential coding changes that could occur as a result of the changes to the SNF PPS. If, in future years, evidence becomes available that indicates that a change in aggregate payments are a result of changes in the coding or classification of residents that do not reflect real changes in case mix, CMS will consider the authority given to the Secretary under Section 1888(e)(4)(F) of the Act to provide for an adjustment to the unadjusted Federal per diem rates so as to eliminate the effect of such coding and classification changes.

We are finalizing the RUG–IV CMIs utilizing the methodology discussed. The final RUG–IV CMIs reflecting the parity adjustment are displayed in Table 14 and, as discussed in the previous section, we will implement these CMIs with the RUG–IV system beginning in FY 2011.

TABLE 14—RUG–IV CASE-MIX INDEXES

RUG	Nursing index	Therapy index
RUX	3.55	1.87
RUL	3.41	1.87
RVX	3.48	1.28
RVL	2.92	1.28
RHX	3.40	0.85
RHL	2.86	0.85
RMX	3.28	0.55
RML	2.92	0.55
RLX	3.01	0.28
RUC	2.08	1.87
RUB	2.08	1.87
RUA	1.32	1.87
RVC	2.00	1.28
RVB	1.48	1.28
RVA	1.47	1.28
RHC	1.92	0.85
RHB	1.59	0.85
RHA	1.22	0.85
RMC	1.81	0.55
RMB	1.62	0.55
RMA	1.12	0.55
RLB	1.99	0.28
RLA	0.94	0.28
ES3	3.55	.....
ES2	2.65	.....
ES1	2.29	.....
HE2	2.20	.....
HE1	1.72	.....
HD2	2.02	.....
HD1	1.58	.....
HC2	1.87	.....
HC1	1.47	.....
HB2	1.84	.....
HB1	1.45	.....
LE2	1.94	.....
LE1	1.52	.....
LD2	1.84	.....
LD1	1.45	.....
LC2	1.54	.....
LC1	1.21	.....
LB2	1.44	.....
LB1	1.13	.....
CE2	1.66	.....
CE1	1.49	.....
CD2	1.54	.....
CD1	1.37	.....
CC2	1.28	.....
CC1	1.14	.....
CB2	1.14	.....
CB1	1.01	.....
CA2	0.87	.....
CA1	0.77	.....
BB2	0.96	.....
BB1	0.89	.....
BA2	0.69	.....
BA1	0.64	.....
PE2	1.49	.....
PE1	1.39	.....
PD2	1.37	.....
PD1	1.27	.....
PC2	1.09	.....
PC1	1.01	.....
PB2	0.83	.....
PB1	0.77	.....
PA2	0.58	.....
PA1	0.54	.....

The comments that we received on this subject, and our responses, appear below.

Comment: Several commenters questioned our use of Bureau of Labor Statistics data to determine the wage-weighted staff time. Some suggested that we should have used industry sources instead. One commenter believed that the BLS data we used (2006) should be updated to 2008. A few commenters said that we did not include enough information about how the wage weights were calculated.

Response: In the STRIVE study, wage-weighted nursing and rehabilitation staff times were computed at the resident level by multiplying the number of minutes of care that were provided by each staff type by a wage weight for that staff type, and then summing over all staff types.

We believe we included sufficient information regarding how the wage weights were calculated in the FY 2010 proposed rule (74 FR 22237). To establish wage weights for each staff type, the STRIVE study obtained national median wage values for staff types from the May 2006 Bureau of Labor Statistics/Occupational Employment Statistics (BLS/OES). Next, we computed the ratio of median salaries for the different nursing and rehabilitation therapy staff to the median salary of a certified nurse aide. These ratios were used as salary weights for each staff category. The BLS/OES provides national data by staff type for Nursing Care Facilities and is publicly available. We considered many other sources of wage data, such as the BLS National Compensation Survey Employer Cost for Employee Compensation product; however, this product does not provide national averages and is not very specific to nursing homes. We also considered survey data collected by the industry. We found that these data were less

nationally representative, as they were collected for a smaller number of facilities and for specific types of nursing homes. In addition, they were more limited in the staff types collected. BLS/OES data contained nearly all of the staff types we encountered during the STRIVE data collection.

The STRIVE study allowed facilities to select from a wide range of staff type categories. For example, there were 11 different categories for non-licensed aide staff, as follows:

- Certified Medication Aide.
- Certified Nursing Assistant (CNA).
- Geriatric Nursing Assistant.
- Resident Care Technician.
- Restorative Aide.
- Feeding Aide.
- Transportation.
- Bath Aide.
- Non-certified care tech.
- Clinical Associate.
- Psychological Therapy Aide.

When one of these staff categories appeared in the BLS/OES, then the corresponding median hourly wage for that category was used by the STRIVE study. The participating facilities used a variety of titles for staff with similar job duties; for example, different kinds of certified nurse assistants (CNAs) or aides. When a staff category did not appear in the BLS/OES, a decision was made to set the wage for STRIVE computations to a value relative to most comparable staff category available in BLS/OES. The relative value used was based on an assessment of the functions performed by the staff in relation to the functions performed by the most comparable staff category available in BLS/OES. For example, ''restorative aide'' did not occur in BLS/OES and the wage for restorative aide was set to the 75th percentile of CNA wage. ''Geriatric nursing assistant'' did not appear in the BLS/OES and the wage for this staff type was set to the median CNA wage. ''Bath aide'' was not listed in the BLS/OES and the wage for this staff type was set to the 25th percentile of CNA wage, as aides in this staffing category were restricted to a single function. Generally, the few staff categories that were not available in the BLS/OES reported very few resident-specific time minutes.

BLS/OES is widely used as a source for average salary information. In fact, both MedPAC (''Report to Congress: Promoting Greater Efficiency in Medicare'', June 2007) and Acumen, LLC (*http://www.acumenllc.com/reports/cms*) have considered the BLS data for use in an alternative method to compute the wage index. Considering all of the alternatives, we believe that the BLS/OES represents the best source of data to establish the STRIVE wage weights.

The following table presents the STRIVE study wages and corresponding wage weights. Wage weights were standardized so that the CNA value equaled 1.00. This allowed an interpretation of a wage-weighted time as ''CNA equivalent minutes.''

TABLE 15—STRIVE STUDY WAGES AND CORRESPONDING WAGE WEIGHTS

Job title	Decision *	Median hourly wage (2006$)	Wage weight
Nursing Staff			
Registered Nurse	Use BLS median	$27.54	2.58
Nurse Practitioner	Use median RN wage	27.54	2.58
Licensed Practical Nurse	Use BLS median	17.57	1.65
Licensed Vocational Nurse	Use median Licensed Practical Nurse wage	17.57	1.65
Certified Medication Aide	Use median CNA wage	10.67	1.00
Certified Nursing Assistant (CNA)	Use BLS median	10.67	1.00
Geriatric Nursing Assistant	Use median CNA wage	10.67	1.00
Resident Care Technician	Use median CNA wage	10.67	1.00
Restorative Aide	Use 75th percentile CNA wage	12.80	1.20
Feeding Aide	Use 25th percentile CNA wage	9.09	0.85
Transportation	Use 25th percentile CNA wage	9.09	0.85
Bath Aide	Use 25th percentile CNA wage	9.09	0.85
Non-certified care tech	Use 25th percentile CNA wage	9.09	0.85
Clinical Associate	Use median CNA wage	10.67	1.00
Respiratory Therapist	Use BLS median	22.80	2.14
Respiratory Therapy Assistant	Use BLS median	18.81	1.76
Psychological Therapy Aide	Use BLS median	11.49	1.08
Therapy Staff			
Physical Therapist	Use BLS median	31.83	2.98
Physical Therapy Assistant	Use BLS median	19.88	1.86
Physical Therapy Aide	Use BLS median	10.61	0.99
Occupational Therapist	Use BLS median	29.07	2.72
Occupational Therapy Assistant	Use BLS median	20.22	1.90
Occupational Therapy Aide	Use BLS median	12.03	1.13
Speech Language Pathologist	Use BLS median	27.74	2.60
Audiologist	Use BLS median	27.46	2.57
Therapy Aide	Use the average of PT & OT aides	11.32	1.06
Therapy Transport	Use the average of PT & OT aides	11.32	1.06

We note that staff types not included in this table were not considered in calculating nursing time in the STRIVE study. Some staff types (for example, nurse practitioner and dialysis technician) were excluded because there was little or no time for this staff type in the STRIVE study. Others were excluded because their services are not covered under Medicare Part A (for example, acupuncturist) or their services are not included in the Medicare Part A nursing rate component (for example, dietitian).

Finally, we used 2006 BLS/OES data to construct the wage weights, and although more recent data are available, we believe that the 2006 data represent the wages related to the staffing patterns in use during a period of time when the STRIVE data were collected. Although the absolute wages change over time, we have evaluated the differences in the wage weights from 2006–2008 and find that wage weights for most staff types over this period are stable. In other words, although the absolute wages change, the relative wages between staff types are not changing significantly. Therefore, we are finalizing our decision to use the 2006 BLS/OES data to calculate the wage weights used to construct the case-mix indexes.

Comment: Some commenters suggested that the parity adjustment be applied to both the nursing and therapy indexes.

Response: We considered this as an alternative to applying the parity adjustment entirely to the nursing CMIs. However, we believe it is most appropriate to apply the parity adjustment to the nursing CMIs. The parity adjustment accounts for the difference in payments between the RUG–III and RUG–IV systems accumulated across all RUGs. The nursing CMIs are applied to each of the 66 RUGs in the RUG–IV payment system and, therefore, we believe it is most appropriate to apply that adjustment to all RUGs. When applying a portion of the parity adjustment to the therapy CMIs, aggregate payment rates for therapy RUGs do not uniformly increase compared to aggregate payment rates for therapy RUGs if calculated by applying the entire parity adjustment to the nursing CMIs. The nursing component, even for most therapy groups, is usually the largest contributor to the aggregate payment rate.

Comment: One commenter noted RUB and RUC, and RVA and RVB have the same case-mix index for RUG–IV. For RUG–III, ''B'' ADL pays more than ''A,'' and ''C'' pays more than ''B.'' The commenter stated that this does not account for the increased resources used when providing care for a patient with ''B'' ADLs versus ''C'' ADLs, or ''A'' ADLs versus ''B'' ADLs.

Response: The RUG–IV CMIs are based on the time resource data from the STRIVE project. In the situations that the commenter cites, the STRIVE data indicated less nursing time for RUC than RUB and the resulting CMI for RUC would be less than that for RUB. A situation where the time resource use for groups within a category does not increase with increasing ADL scores is often referred to as an ''ADL inversion.'' The STRIVE data produced a few of these types of inversions, and they have existed in previous time studies as well. Previous time studies have adjusted for most of these inversions before calculating final CMIs. We believe it is appropriate to adjust these inversions so that the CMIs reflect higher resource use for more dependent patients and eliminate payment incentives that may cause practice patterns to be altered. Therefore, using the method described in section III.C.1.a of this final rule, we decided to ''smooth'' the inversion by combining a pair of groups and assigning the weighted average across the 2 groups as the mean resource time for each group. This is why the final means, and therefore the CMIs, for RUB and RUC are equal. We believe this is preferable to allowing the reimbursement for less dependent patients to be higher than the reimbursement for patients that are more dependent. We note that the CMI for RVB is slightly higher than the CMI for RVA using the final database.

4. Relationship of RUG–IV Classification System to Existing Skilled Nursing Facility Level-of-Care Criteria

As discussed previously in section III.B.5 of this final rule, the existing level of care presumption currently applies to the upper 35 groups of the refined 53-group RUG–III model. In the FY 2010 proposed rule (74 FR 22208, 22238, May 12, 2009), we proposed that under the new 66-group RUG–IV model, this presumption would apply to the upper 52 groups, as encompassed by the following categories: Rehabilitation Plus Extensive Services; Ultra High Rehabilitation; Very High Rehabilitation; High Rehabilitation; Medium Rehabilitation; Low Rehabilitation; Extensive Services; Special Care High; Special Care Low; and, Clinically Complex. We received no comments on this proposal, and in this final rule, we are implementing this provision as proposed.

5. Prospective Payment for SNF Nontherapy Ancillary Costs

The FY 2010 proposed rule discussed the issue of payment for nontherapy ancillary costs under the SNF PPS (74 FR 22208, 22238–22241, May 12, 2009). This discussion described the previous research that has been conducted in this area as well as current policy and analysis, and also specifically examined this issue as it relates to the temporary AIDS add-on payment established by section 511 of the MMA (*see* section I.E of this final rule). The comments that we received on this subject, and our responses, appear below.

Comment: A commenter stated that payments for ventilator services are inadequate to prevent ventilator patients from experiencing access barriers in SNFs. The commenter urged CMS to consider MedPAC's proposal to adjust payments to account specifically for nontherapy ancillary services, of which non-nursing ventilator services are a part. Several commenters also stated that CMS should provide for a rate adjustment specific to providers of ventilator services to compensate them for ventilator-related costs not covered under the PPS as currently configured or as proposed to be modified in the proposed rule. Further, commenters proposed that an outlier payment or add-on similar to the AIDS add-on be adopted for ventilator patients as an interim measure.

Response: Ventilator patients are addressed in our proposal for a redefined Extensive Services group. Our proposal does not make any changes in the method of paying for NTA costs; all such payments continue to be proportional to the nursing costs paid in the relevant case-mix group. Because the nursing component weight for Extensive Services will rise substantially under our refinements, payments for NTA costs associated with these patients will also rise substantially. However, we recognize the need for further research to revise the payment methodology for NTA costs, as described in our approach to the analysis in the proposed rule (74 FR 22238). We are reviewing MedPAC's NTA cost predictors as part of this work. The suggestion of an outlier payment or add-on payment cannot be implemented under current law, as we have no statutory authority to make such a change.

Comment: A commenter stated that the criteria we described for a system to adjust payments for NTA services by case mix appear reasonable, but went on to emphasize that CMS has not been able to identify appropriate case-mix adjustments for NTA in multiple prior efforts. The commenter further looks forward to seeing whether the new criteria produce a methodology that explains more than 20 percent of the variation in NTA needs of patients.

Response: We acknowledge that past efforts have not been uniformly successful and resulted in no implementable proposals. We have not targeted any specific level of ''goodness of fit'' for a future methodology. However, we note that the quality of the data available to conduct this research could significantly affect the explanatory power of any model that we may develop.

Comment: Several commenters recommended that we consider an outlier payment for NTA services or specifically, for intravenous medications. One commenter cited facilities that are losing money due to the high cost of the IV medications. Another commenter stated that under our proposal, bariatric, wound care, and certain chemotherapy patients, among others, incur unaccounted-for equipment and/or drug costs, resulting in restricted access for these patients. The commenter suggested that an outlier payment structure would remedy this situation.

Response: As we note elsewhere in this final rule, we have no statutory authority at this time to implement an outlier policy for NTA services. We welcome information about the incidence of high-cost IV medication days, bariatric patient days requiring special equipment, and other incidence information which could inform future efforts to design an outlier policy, if it is authorized.

Comment: A commenter stated that a payment add-on for non-therapy ancillary costs would be worth exploring.

Response: As discussed above, we do not have statutory authority to implement an outlier or add-on payment for NTA services. However, we discussed the possibility of implementing a case-mix adjustment for NTA services in the proposed rule. We believe that we currently have authority to create a separate NTA component of the Federal per diem rate, which would be carved out of the existing nursing component. Such a proposal would be contingent on developing a workable methodology for predicting NTA costs per day. The discussion in the proposed rule described the criteria that we envision for such a system. At the inception of the SNF PPS, average daily NTA costs were included in the nursing component. Any new, carved-out component would, in effect, recover the original costs from the nursing component and adjust them separately for case mix, using information that better predicts NTA costs than does the RUG methodology. However, this does not mean that overall expenditures under the SNF PPS would increase as a result of the creation of this NTA component and index.

Comment: A commenter criticized the RUG–IV proposal for removing IV patients from the Extensive Services group on the basis that staff time caring for such patients is not sufficiently large, noting that the actual drug costs for IV patients were not included in the staff time data.

Response: We recognize that the RUG–IV proposal did not take drug costs directly into account. The STRIVE study showed that collecting accurate and complete primary data on drug costs was not feasible. We anticipate that future work on paying for NTA costs, of which IV drugs are a part, will rely on administrative data resources. Under RUG–III, nursing weights for IV patients ranged from 1.17 to 1.72. However, the changes we are implementing to the case-mix classification system reallocated to the nursing component of the SNF PPS payment savings derived from more accurate accounting for therapy time. As a result, nursing weights for IV therapy patients range from .73 to 3.43, depending on whether IV therapy co-occurs with other qualifying conditions, such as infection isolation, septicemia, *etc.*

Comment: A commenter stated that ventilator-dependent patients should have their own classification.

Response: The revised Extensive Services group includes only three types of patients: Tracheostomy, ventilator/respirator, and infection isolation. Analysis of the STRIVE time study data suggested that these patients had similarly high nursing costs. Thus, it is likely that subdividing this group to classify ventilator patients separately would needlessly complicate the SNF PPS.

Comment: A number of commenters, while urging us to maintain the existing AIDS add-on until an alternate payment methodology can be developed, also indicated that we should consider creating a similar add-on payment mechanism for anti-rejection drugs, low molecular weight heparin, appetite stimulating agents, and erythropoiesis stimulating agents.

Response: We note that in contrast to the AIDS add-on (which was specifically created by section 511 of the MMA), the law contains no similar add-on payment authority for the other services mentioned.

D. Minimum Data Set, Version 3.0 (MDS 3.0)

Sections 1819(f)(6)(A)–(B) and 1919(f)(6)(A)–(B) of the Act, as amended by the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987), require the Secretary to specify a Minimum Data Set (MDS) of core elements and common definitions for use by nursing homes in conducting assessments of their residents, and to designate one or more instruments which are consistent with these specifications. As stated in regulations at § 483.20, Medicare- and Medicaid-participating nursing homes must conduct initially and periodically ''a comprehensive, accurate, standardized, reproducible assessment'' of each nursing home resident's functional capacity. The FY 2010 proposed rule included an examination of various aspects of a new version of the MDS, MDS 3.0 (74 FR 22208, 22241, May 12, 2009), as discussed in the following sections.

1. Description of the MDS 3.0

The FY 2010 proposed rule described the major features of the MDS 3.0 (74 FR 22241). We determined that including information on the MDS 3.0 would be beneficial to stakeholders, as RUG–IV and MDS 3.0 will be introduced at the same time, as requested by virtually all stakeholders last year. Even though we included a discussion of the MDS 3.0 in the SNF PPS proposed rule, the instrument itself was not proposed. However, we did receive many comments on the MDS 3.0, which we summarize below.

Comment: Some of the general comments regarding the MDS 3.0 conveyed support, while others raised concerns about burden and the amount of testing that has been performed on the instrument. There were many comments that sought clarification or offered suggestions for items included in the draft MDS 3.0 item set posted at *http://www.cms.hhs.gov/NursingHomeQualityInits/Downloads/MDS30DraftItemSetv26.pdf.*

Response: We chose to use the SNF PPS rule to announce the upcoming October 2010 scheduled implementation of the MDS 3.0 and appreciates the comments in support of it. Concerning the comments about the possibility of increased burden and the need for additional testing of the instrument before implementation, findings from the pilot testing of MDS 3.0 in 2008 did not suggest that the MDS 3.0 was overly burdensome. We believe that any more recent changes made to the MDS 3.0 are minor and not substantive and, thus, that additional testing is not necessary.

Concerning the comments seeking clarification of the draft MDS 3.0 item set, CMS believes that these issues will be addressed with the MDS 3.0 RAI Manual and MDS 3.0 Final Item Set that are scheduled to be published on the CMS Web site, *http://www.cms.hhs.gov,* in October 2010. The specific recommendations for new or revised items for the MDS 3.0 instrument have been forwarded to the MDS 3.0 development team at CMS for review and consideration. The MDS 3.0 RAI Manual, Data Set, and Data Specifications are scheduled to be

published in October 2009 with subsequent implementation of the MDS 3.0 in October 2010. This time frame provides for an entire year for CMS, its contractors, and SNFs to prepare and train in anticipation of the October 1, 2010 implementation date.

Comment: Some comments discussed the MDS 3.0 item set content and format of the ''paper'' tool. Among the issues raised were: Maintaining the MDS 2.0 section G, ADL items, and DAVE discrepancy rates; the order of section A being problematic for the paper version when reviewing the assessment; adopting the OASIS diagnosis format; providing greater resident involvement by implementing interview tools; the need for pressure ulcer items to be more clinically based; suggestions for adding specific diagnoses to section I; and concerns that section Q may affect State agency staff resources. One commenter suggested that CMS simply address the specific problem areas with MDS 2.0, such as pressure ulcers, and not change any other aspects of it. Another commenter requested that the RAI manual be made available by August 1, 2009.

Response: We will take into consideration the suggestions submitted in response to the SNF PPS proposed rule. We agree that the MDS 3.0 provides a greater resident involvement in care and that the items being surveyed are more clinically based than the existing MDS 2.0. However, given the current specifications of the MDS 2.0, we are unable to adopt the commenter's suggestion of simply revising certain problematic items, due to limitations in the data string.

We understand the concern of maintaining the MDS 2.0 scoring system for ADLs. We have revised the ADL-Self-performance response codes to address a care planning concern raised by stakeholders. While we agree that the Data Assessment and Verification (DAVE) findings on discrepancy rates for the ADL items are high, the DAVE contractor did not, as part of its analysis, factor into account the degree or severity of the discrepancy. For example, in a situation where one assessor coded a resident as supervision, the DAVE project did not consider whether the second assessor coded the same person as limited assistance, extensive assistance, or total dependence, but simply determined whether the codes were the same. We are currently working with stakeholders to ensure that the MDS 3.0 RAI manual provides clear guidance.

While we want to ensure that a paper version of the MDS 3.0 is user-friendly, we encourage providers and users to move toward an electronic model. We will take into consideration the concerns provided to us on the record layout.

Comment: One commenter stated that CMS has ''tinkered'' with the assessment tool, which creates confusion and jeopardizes timely rollout. Another asserted that MDS 3.0 does not meet the criteria CMS set out to accomplish. One commenter requested CMS to ''batch'' revisions to the MDS 3.0 and implement in a systematic fashion. Another suggested that CMS provide a ''journal'' of all changes in a central location that is available to all users and assessors. One commenter remarked that the data gathered during the STRIVE project is not valid for evaluating the effectiveness of the proposed MDS 3.0 assessment.

Response: Our goals for updating the assessment instrument used in nursing homes were to introduce advances in assessment measurement, increase relevance of items, improve accuracy and validity of the tool, and increase our knowledge of residents' experience of care by introducing more resident interview items. We believe we have achieved these goals, as evidenced by features such as the following:

- Addition of pressure ulcer items where the clinician reports the actual stage of the ulcer, not the appearance;
- Use of resident interview items for mood and other areas;
- Use of valid and reliable assessment tools, such as the Brief Interview for Mental Status; and
- Improvement of pain assessment items.

Therefore, we do not agree with the assertion that we did not accomplish what we had intended.

We have stated from the outset of releasing version 3.0 of the MDS that it was in draft form, and that providers and users should not consider the draft version final. We have built upon RAND's study to improve the assessment further and ensure that it meets, as much as possible, the needs of multiple users, such as Medicaid State Agencies for payment purposes and return-to-the-community initiatives. Lastly, the STRIVE project did not ''evaluate'' the effectiveness of the MDS 3.0. RAND's responsibility was to improve the clinical effectiveness of the instrument. They were not required to ensure that quality measures and indicators or the RUG classification systems were kept fully ''intact.'' RAND was aware of the other purposes of the MDS and did take this into consideration during their study and analysis. We did not approach the issue with the belief that a single project would meet the needs of all users, and have actually incorporated lessons learned from other CMS projects, such as the CARE tool. The STRIVE project did not evaluate the effectiveness of the MDS 3.0. In fact, the STRIVE study was conducted at the same time the RAND staff were testing the pilot MDS 3.0 instrument. The STRIVE contractor did conduct analysis to ensure that payment systems and quality measures were not negatively affected based on data collected under the MDS 3.0 project.

Currently, we post updates to the MDS 2.0 on the CMS Web site so that all users and assessors are able to access the changes. Our expectation is that the MDS 3.0 instrument and RAI manual will not require updates for some time. However, the format, that is, the item numbering and layout, as well as the specifications, will provide us with the ability to update the tool in a simple and quick method when the need arises. Finally, we will take into consideration the comment on ''batching'' updates, and will work with stakeholders to ensure that they have access to the updates in a timely fashion.

Comment: A few recommendations were received on the MDS 3.0's relationship to Health Information Technology (HIT) standards. The recommendations include:

- Increasing efforts in Federally-mandated initiatives to adopt cost-effective use of information technology in healthcare settings;
- Consider present and future data use and exchange requirements to format and exchange MDS 3.0 data;
- Incorporate all standardized terminology approved by Consolidated Health Informatics (CHI), Office of the National Coordinator for Health Information Technology (ONC), National Institute of Standards and Technology (NIST), or American National Standards Institute (ANSI) in all HIT projects; and
- Consider incorporating all available approved terminology and exchange standards for use in all Health Information Exchange or HIT projects.

Contained in the comments was the suggestion that if CMS were unable to carry out the approach outlined in the bullets above for MDS 3.0, then CMS should consider placing efforts on the CARE tool.

Response: CMS appreciates the comments that were submitted with regard to HIT standards and will consider these comments as the MDS 3.0 is implemented.

2. MDS Elements, Common Definitions, and Resident Assessment Protocols (RAPs) Used under the MDS

The FY 2010 proposed rule included a discussion of the MDS 3.0's MDS elements, common definitions, and RAPs (74 FR 22243). The comments that we received on this subject, and our responses, appear below.

Comment: One commenter expressed concern about our proposal to remove language identifying MDS domains and common definitions at §§ 483.315(e)(1) through (18) and instead reference the domain requirements at § 483.20(b)(1)(i) through (xviii) and use the RAI manual for specific details regarding the MDS domains and common definitions. Although the commenter acknowledged the need for us to make timely MDS changes, the commenter stated that removing the MDS domains and common definitions could affect assessment reliability, consistency, accuracy, validity, and reimbursement, and could deny the public a meaningful voice in challenging proposed changes or offering official recommendations.

Response: Rapid changes in clinical practice make it imperative for us to have the flexibility to change or add to the MDS domains and common definitions quickly in order to protect the health and safety of nursing home patients.

For example, the CDC Advisory Committee on Immunization Practices (ACIP) has recommended vaccination against the varicella zoster virus (VZV, that is, chicken pox) for individuals over age 60. VZV can reactivate clinically decades after initial infection to cause herpes zoster (that is, shingles), a localized and generally painful cutaneous eruption that occurs most frequently among older adults and affects approximately 1 million individuals in the United States every year. A common complication of zoster is post-herpetic neuralgia (PHN), a chronic pain condition that can last months or even years. Complications include involvement of the eye that can threaten sight, bacterial super infections, and disfiguring facial scarring. Another example is the annual CDC ACIP recommendations regarding the provision of influenza vaccinations in relation to the timing and duration of the influenza season. Based on recommendations such as these, we need the flexibility to add or change vaccinations promptly to the MDS domains.

In a December 23, 1997 final rule (62 FR 67174), we removed the MDS and its instructions from the regulation text that was inserted in the December 28, 1992 proposed rule (57 FR 61414). In that final rule, we noted this was necessary in order to allow us to easily modify the MDS so that it requires collection of information that is clinically relevant and meets evaluative needs as clinical practice evolves (62 FR 67174, 67203). These notations still continue to reflect our current view.

In the past, as we have proposed changes to the MDS domains and common definitions, we have given the public ample opportunity to comment through the use of CMS Open Door Forums and Town Hall meetings; dedicated mailboxes for comments; CMS Web site postings; and meetings with stakeholder organizations. We believe that in directly discussing and negotiating with affected parties, it will be possible to maintain an MDS assessment process that is clinically relevant while also obtaining public comment. We will continue to use these venues to solicit public comments on proposed changes, and we believe they are sufficient to allow robust public input and address the commenter's concerns. Therefore, we are not accepting the comment. Accordingly, this final rule removes the language identifying MDS domains and common definitions at §§ 483.315(e)(1) through (18), and instead references the domain requirements at § 483.20(b)(1)(i) through (xviii). We will use the RAI Manual for specific details regarding the MDS domains and common definitions.

Comment: One commenter expressed concern that the proposed rule did not specify when an MDS is considered to be complete, noting that this information is currently available for the MDS 2.0 in the RAI User's Manual.

Response: Federal regulations at 42 CFR 483.20(i)(1) and (2) require the RN assessment coordinator to sign and certify that the assessment is complete. This completion attestation is made when the MDS assessment is considered complete; the timing varies depending on the assessment type. Federal regulations at 42 CFR 483.20(b)(2) and (c) specify the timeframes for conducting the various assessment types. As the commenter noted, this specific information is currently available for MDS 2.0 in the RAI User's Manual. As this information will continue to be provided for MDS 3.0 in the RAI User's Manual and is already covered in the regulations text, we believe that this information is adequately provided.

Comment: Although commenters expressed various concerns, several were supportive of the proposed changes to the MDS 3.0 RAPs.

Response: We were pleased with the support expressed through the comments. While it is true that the structure of the proposed changes to the MDS 3.0 RAPs process was not fully specified in the proposed rule, CMS is aware of most of the issues raised in the comments, and has been actively working on them. We have provided responses to specific comments in the following paragraphs.

Comment: We received a few comments requesting us to clarify that, while RAPs are no longer mandatory, it is CMS's intent that facilities must continue to use care area triggers (CATs) from the MDS and current, evidence-based clinical guidance or resources to assist them in the care planning process.

Response: CMS values the opinions and insights provided by our stakeholders, and we plan to clarify that this is, in fact, our intent. As the planning for the RAI process instructions moves forward, we fully intend to clarify our instructions in this area and will continue to involve our stakeholders.

Comment: Several commenters expressed concern about the level of burden that might be imposed by no longer mandating the use of the RAPs and, therefore, leaving the determination of what clinical guidance/practice tools will be used in the care planning decision process to the discretion of the facilities. The commenters indicated that such a system would create inefficiencies and inequalities in the care delivery system, and also expressed concern about how CATs and outside resources will be utilized for guidance in the future.

Response: When the RAPs were originally developed, facilities lacked easy access to Internet resources, which is no longer the case. A great many clinical practice guidelines have been developed by professional organizations and government agencies, many of which are available at no cost. The RAPs were limited in the number of topics they covered and, due to ongoing changes in clinical practice, they would need to be regularly updated by CMS, necessitating changes to the requirements. We believe this is no longer necessary or efficient, as the relevant information is now widely available from a variety of authoritative sources. At this phase in the planning effort, CMS has developed a set of tools (formerly known as RAPs) that will be available for facility use via the MDS manual; however, they will not be mandatory. We are also publishing in the manual a list of other resources that practitioners can use, most of which are available at no cost. The facility's

clinical team can use these resources or any others that they deem appropriate. We found the comments very helpful, and expect that these resources will minimize any burden as much as possible.

Comment: We received a few comments pointing out the need for CMS to partner with its stakeholders and nursing home industry experts to design care planning practices, including development of a Technical Expert Panel. Commenters suggested including clarification in the RAI manual regarding the use of an interdisciplinary team approach.

Response: We have reported on our work and progress regarding the care areas and care planning as part of the RAI process in stakeholder meetings and on Open Door Forum calls. As the planning for the RAI process instructions moves forward, we will continue to involve our stakeholders.

Comment: Several commenters pointed out the need for CMS to reconsider the use of CATs in relation to the care planning process.

Response: While it is true that the structure of the proposed changes to the MDS 3.0 RAPs process was not fully specified in the proposed rule, we agree that the proposed rule's language regarding the use of CATs did not adequately convey the proposed changes. We also acknowledge that CATs represent only one part of a dynamic process and may also cause industry confusion. Accordingly, the final rule includes the term ''Care Area Assessment'' (CAA) to denote the process that was formerly known as the RAPs process. However, CMS will continue to use the CATs terminology to represent the triggers from the MDS for a particular care area problem or issue. Of course, we plan to continue to involve our stakeholders as the planning for the RAI process instructions moves forward, and we will continue to work to clarify the care planning process.

Comment: A few commenters questioned how the State Survey Agencies (SSAs) would handle their nursing home surveys without the direction of the RAPs.

Response: The specific issues that were raised about the design of the nursing home survey program are beyond the scope of this final rule. However, it is important to note that CMS is fully aware of this issue and is working to provide direction to the SSAs about the full range of guidance or resources they may encounter, including instructions that are provided to facilities through the RAI manual. We appreciate the careful consideration that this comment reflected, and will bring it to the attention of appropriate CMS staff.

Comment: In addition to the comments that we received on the proposed change to the RAPs, several commenters provided discussion of specific issues involving prescriptive care planning and the use of electronic RAPs for nursing homes.

Response: The specific issues that were raised about the design of care planning and the use of electronic RAPs for nursing homes are beyond the scope of this final rule. However, we appreciate the careful consideration that these comments reflected, and will bring them to the attention of appropriate CMS staff.

3. Data Submission Requirements under the MDS 3.0

The FY 2010 proposed rule included a discussion of data submission requirements under the MDS 3.0 (74 FR 22243). The comments that we received on this subject, and our responses, appear below.

Comment: One commenter voiced concerns regarding whether the proposal for SNFs to submit resident assessment data to the national CMS system rather than to the States will require a change in electronic software programs at the facility level to accommodate reporting directly to the Federal level. The commenter also stated that, if this is the case, adequate time should be provided for this transition software.

Response: There is no software program change required, as the MDS data will be collected centrally at the Federal level rather than from each State. However, there will be a new software program required to implement the new MDS 3.0 data and file specifications. CMS believes that adequate time is being provided for this development.

Comment: One commenter noted that the proposed 14-day timeframe for transmission of MDS data will shorten the current time period by 2 weeks. The commenter also observed that in some States, this requirement (or even a shorter time period) has already been imposed at the State level for a number of years. The commenter pointed out that the State of Washington, where submissions must be within 10 days of completion for the MDS to be considered timely, finds that this requirement has improved the quality of MDS submissions, with fewer submissions ''falling through the cracks.'' Another commenter remarked that State agencies will be able to better track those residents who would like to return to the community. A few commenters opposed shortening the submission requirement to 14 days, stating that this would pose a hardship on nurses who have ''other responsibilities,'' may be difficult in small nursing homes, and would increase the pressure to complete assessments.

Response: We appreciate the comment informing CMS that some States currently have stricter submission requirements than the one we proposed. We are pleased to learn that a submission timeframe of 14 days or less is working well in those States that already have such a requirement in place. We anticipate that there will be an equally smooth transition for facilities in the remaining States. Further, swing-bed facilities have been required to submit their MDS assessments within 14 days of completion since 2002. These facilities tend to have fewer SNF patients than most nursing homes and also tend to have shorter lengths of stay. In fact, swing-bed facilities do not appear to have difficulty meeting this requirement. Therefore, we do not agree that shortening the submission time frame to 14 days will be problematic or cause hardship on facilities. In fact, almost 75 percent of the MDS assessments are submitted by nursing homes within 14 days of completion. We are concerned with the comment that shortening the submission time frame will create pressure to complete assessments. We have outlined the requirements for completing MDS assessments in the RAI manual. The submission time frame is based on the completion date of the assessment. Thus, the submission time frame does not drive the completion of assessments; rather, the reverse is true—the completion of the assessment determines the submission date. Lastly, as noted by commenters' remarks on obtaining quality measures on swing beds as discussed below in section III.H of this final rule, we are simply holding both types of providers to the same standards.

Comment: Several commenters expressed concern and confusion over the requirement that facilities have 7 days after completing a resident's assessment to be capable of transmitting that assessment data. They also questioned what the term ''capable'' meant, and whether this requirement re-instituted the ''locking'' concept that has been inactive for several years.

Response: The regulations at 42 CFR 483.20(f)(2) regarding facility capability to transmit a resident's assessment data within 7 days of completing the assessment is not new, nor did we

propose it through this rule. What we did propose was changing the language to note that facilities must be capable of transmitting to the CMS System instead of to the State. It is not our intent to re-institute the ''locking'' concept. The term ''capable'' as used in the regulations text here means that the facility has encoded the MDS assessment information and put that data into a format that conforms to standard record layouts and data dictionaries defined by CMS and the State.

Comment: One commenter expressed confusion over the requirements regarding State responsibilities with respect to MDS 3.0 data. Specifically, the commenter questioned State responsibilities regarding supporting and maintaining the MDS State system and database, the receipt of facility data from CMS, and the resolution of all errors. The commenter noted that the States are not in a position to ensure that all errors are resolved, as some (such as a late submission) cannot be resolved.

Response: The provision at 42 CFR 483.315(h) regarding the requirements for the State to maintain an MDS database and ensure that a facility resolves errors upon receipt of data is not new, nor did we propose it through this rule. What we did propose was changing the language to note that States must continue to maintain an MDS database for receipt of facility data from CMS. We also added the term ''support'' to the regulations at 42 CFR 483.315(h)(1) to note that each State is still responsible for supporting all their users and uses of the MDS 3.0 data. It is our intent for the regulation text regarding facility data at 42 CFR 483.315(h)(3) to denote that MDS 3.0 data are received by the States from the CMS system. We agree with the commenter that some facility data errors, such as a late submission, may not be able to be resolved completely. Our intent through this language was simply to retain the requirement for States to work with their respective facilities to resolve errors. However, after further consideration of this issue, we are retracting our proposal to include the term ''all'' in the regulation text at 42 CFR 483.315(h)(3). In addition, as it has come to our attention that the regulation text at 42 CFR 483.315(h) did not adequately convey who in the State had the responsibilities regarding the State MDS database, we have added the term ''agency,'' in order to indicate that these are responsibilities of the State Survey Agency.

4. Proposed Change to Section T of the Resident Assessment Instrument (RAI) under the MDS 3.0

In the context of the MDS 3.0 discussion, the FY 2010 proposed rule proposed certain revisions to the reporting of therapy services effective October 1, 2010 (74 FR 22244). First, we proposed to eliminate Section T of the RAI. In addition, we proposed (a) to revise the therapy reporting procedures related to short-stay patients so that the appropriate therapy level is calculated using items that will be reported on the MDS 3.0 (using the procedures set forth in the proposed rule); (b) to provide SNFs with the option to use the Other Medicare Required Assessment (OMRA) to signal the start of therapy; and (c) to require SNFs to complete an OMRA with an ARD that is set 1 to 3 days (rather than 8 to 10 days) from the last day therapy services were provided. A more detailed description of the proposals appears in the SNF PPS proposed rule for FY 2010 (74 FR 22244). The comments that we received on these proposed revisions, and our responses, appear below.

Comment: Several commenters supported the elimination of section T (items T1b, c, d) of the MDS, thereby preventing Medicare from paying for therapy services that were ordered, but not actually furnished to patients. They stated that these changes will increase the accuracy of payments to providers. Other commenters were opposed to the elimination of section T, indicating that the proposed change reflected a payment model more akin to fee-for-service than a prospective payment. Some commenters stated that eliminating section T would result in providers not being paid for therapy services that they actually provide during the first 14 days of a SNF stay. They also believed that there would be financial pressure to provide less care than the beneficiary needs.

Response: As we stated in the proposed rule, the GAO found that one-quarter of the patients classified using estimated minutes of therapy did not receive the amount of therapy they were assessed as needing, while three-quarters eventually did. Further, the GAO found that in 2001, half of the patients initially categorized in the Medium and High Rehabilitation groups did not actually receive the minimum amount of therapy required to be classified in those groups, due in part to the use of estimated therapy minutes. We agree that by eliminating section T, there is a risk that the therapy data would not be captured for some patient days where the service was actually provided. However, we also proposed to provide for an optional start-of-therapy OMRA with an ARD that is set 5 to 7 days from the first day therapy services are provided. Based on this OMRA, payment for the start of therapy would begin the day that therapy is started. We proposed that a SNF may complete a start-of-therapy OMRA when therapy started between MDS observation periods. However, in response to comments stating that under our proposed revised reporting procedures, providers may not be paid for therapy services that they actually provide during the first 14 days, we are allowing SNFs to complete the optional start-of-therapy OMRA not only when therapy starts in between assessment windows, but also when therapy has started within the Medicare-required assessment window. For the second situation, the optional start-of-therapy OMRA may be completed as a stand-alone assessment or it may be combined with a scheduled Medicare-required assessment. For example, the SNF must complete a 5-day Medicare-required assessment with an ARD between day 1 and day 8. If therapy begins on day 5 and if the provider chooses day 7 as the 5-day ARD, then only 3 days of therapy, at most, would have been provided by the ARD and, thus, a rehabilitation RUG would not have been assigned (or achieved). The provider may then complete an optional start-of-therapy OMRA with an ARD of day 9, 10, or 11. If the provider chooses day 11, then the start-of-therapy OMRA may be combined with the 14-day Medicare-required assessment (day 11 is in the assessment window of the 14-day Medicare-required assessment). Payment for the rehabilitation RUG would begin on the day that therapy started, for example, day 5, and would continue until day 30 as long as the SNF level of care coverage requirements are met, and/or therapy was not discontinued, and/or another assessment was not required that resulted in a different RUG assignment. If the provider chooses day 9 or day 10 as the ARD for the optional start-of-therapy OMRA, the Rehabilitation RUG would also begin on the day therapy started, but the provider would also be required to complete a 14-day Medicare-required assessment as long as the patient continues to meet SNF level of care requirements and remains in the facility after day 14. Lastly, if the provider chooses not to complete the optional start-of-therapy OMRA, either as a stand-alone or in combination with a Medicare-required assessment, the rehabilitation RUG would then begin

with the payment period of the next Medicare-required assessment. As the provider may complete the optional start-of-therapy OMRA in situations where therapy has started within the assessment window, but a rehabilitation RUG was not assigned because the daily requirement had not been met, we do not believe that eliminating section T will result in ''financial pressures'' to provide less care than the resident requires. Therefore, after review of the comments, effective October 1, 2010, we will delete section T (T1b, c, d) from the MDS 3.0 as we proposed in the FY 2010 SNF PPS proposed rule. In addition, we will implement the optional start-of-therapy OMRA, which may be completed not only when therapy starts in between assessment windows, but also when therapy has started in a Medicare-required assessment window. As explained above, we believe that the option to use the start-of-therapy OMRA, regardless of when therapy starts, eliminates the risk that therapy data would not be captured for some patient days.

Comment: Several commenters stated that eliminating the projection could result in a mismatch of the therapy plan of care with the beneficiary's needs or a misallocation of the therapy resources that the beneficiary requires, because section T assists the therapist in making clinical projections which, in turn, results in better coordination of care.

Response: While we are eliminating the projection of therapy services in section T, we are also providing for a start-of-therapy OMRA. We rely on the clinician's judgment to make decisions on the need for and volume and frequency of therapy services. The documentation currently required in section T under the MDS 2.0 simply shows the results of the clinical evaluation. We do not believe that a projection methodology can serve to provide clinical guidance to a therapist and, thus, we do not expect that the elimination of this particular documentation requirement will adversely affect patient care.

Comment: Several commenters supported the voluntary start-of-therapy OMRA so that patients can be assigned to rehabilitation RUGs based on when therapy services are started, especially when therapy is started outside the assessment reference window. Many commenters also supported the change to the end-of-therapy assessment. They stated that these proposed changes will increase the accuracy of payments to providers. However, some commenters disagreed with introducing either the optional start-of-therapy OMRA or the end-of-therapy OMRA, stating that increasing the number of assessments providers will need to complete would represent an added burden. A few suggested that CMS should develop a methodology to compensate facilities for the added burden of work associated with the OMRAs. One commenter disagreed with changing the end-of-therapy OMRA ARD from 8–10 days after the discontinuation of therapy to the proposed 1 to 3 days, as a therapy RUG might still be assigned. One commenter suggested that requiring SNFs to complete an OMRA within 1 to 3 days following therapy discharge could affect the nurse's assessment of the need for skilled nursing services. These commenters also asserted that the proposed change would deny patients valuable time in recovery while being closely observed by nursing for 7 days following the discharge from therapy, and could potentially cause an inappropriate over-utilization of the OMRA by triggering additional assessments (which might not have been necessary if the patient had been maintained in a therapy group). Some commenters stated that when therapy is not provided for a few days due to an illness, an end-of-therapy OMRA would be required and then a start-of-therapy OMRA once the patient is again able to participate in therapy. They believe this would increase the number of assessments required and, thus, would represent an added burden.

Response: We agree with the commenters that the changes to provide for a voluntary start-of-therapy OMRA and a required end-of-therapy OMRA will result in more accurate payments to providers. Under current practice, the assessment reference date (ARD) for the OMRA is required to be set within 8 to 10 days of the end of all therapies. The proposed change that we are adopting in this final rule would simply require the ARD for the end-of-therapy OMRA to be set in a shorter time frame, that is, no more than 3 days following the cessation of all therapies, and would not increase the number of assessments. Further, the start-of-therapy OMRA is completely voluntary and is not required and, thus, we do not believe it is an additional burden. In addition, because the provider would be able to combine the start-of-therapy OMRA with a Medicare-required assessment, there would be no additional burden. However, we are aware that completing the stand-alone voluntary start-of-therapy OMRA might result in an increase of assessments. Therefore, in response to concerns expressed by commenters regarding the increase in the number of assessments, we will provide for an abbreviated OMRA for the stand-alone start-of-therapy OMRA, which will include only the required demographic information (needed for all assessment types), the therapy items, restorative therapy items and bladder and bowel training items, and the extensive services items. The other clinical payment items would not be required, as the purpose of the optional start-of-therapy OMRA is to classify a person in a rehabilitation RUG (including Rehabilitation plus Extensive Services). In addition, we note that commenters expressed concern regarding the possibility that our revised ARD requirement for the end-of-therapy OMRA may increase the number of assessments needed. Although we do not agree that changing the ARD requirement for the end-of-therapy OMRA would increase the number of assessments required, in order to alleviate the commenter's concerns and because the MDS 3.0 gives us the capability, we will also shorten the end-of-therapy OMRA so that it consists only of the required demographic items and all of the payment items (unlike the MPAF, which includes all of the required demographic items, the payment items, and many other clinical items). However, as discussed above, we do not agree that CMS is requiring additional assessments. We note that the start-of-therapy OMRA is optional, thus making it entirely voluntary and not required. CMS has no authority to provide for additional reimbursement for this assessment itself; however, the voluntary start-of-therapy OMRA would typically be completed when assignment to the new therapy group would result in higher reimbursement. The end-of-therapy OMRA is already required and, therefore, the cost of completing the end-of-therapy OMRA is already included in the payment rates for SNFs.

In reality, we have actually reduced the burden associated with the end-of-therapy OMRA, by including only the required demographic items and payment items. As we stated in the proposed rule, we have included the ability to provide two Medicare RUG classifications. The first will be the ''therapy'' RUG, which is based on all of the payment items, including the rehabilitation items. The second RUG is the ''non-therapy'' RUG. This RUG classification will not consider any of the rehabilitation items when assigning a RUG. Therefore, when submitting a claim for days of service after therapy has been discontinued, the provider would use the ''non-therapy'' RUG. We will provide detailed MDS coding and

billing instructions in the Internet-only Manuals and the RAI Manual.

We do not agree that requiring SNFs to complete an OMRA within 1 to 3 days following the discontinuation of therapy would result in patients being denied valuable recovery time by no longer paying for therapy services for 7 days after all therapy is discontinued. It is the responsibility of the professional therapist to determine when a patient has met the goals established for the patient in the therapy plan of care, and to avoid discontinuing therapy prematurely. If this determination is appropriately made by the therapist, we do not believe requiring an OMRA to be completed within 1 to 3 days after the discontinuation of therapy should cause inappropriate utilization of the OMRA triggering additional assessments. Also, we do not believe that changing the ARD for the end-of-therapy OMRA will affect the assessment of the need for continued skilled nursing services, as the nursing needs of a resident should not be affected by whether therapy is being provided. The SNF should be providing for all of the resident's needs during the entire SNF stay, regardless of when the ARD for the end-of-therapy OMRA is required to be set. In addition, if the patient continues to receive skilled nursing after the therapy has been discontinued, the patient will continue to be covered under the Medicare Part A benefit until such time as a skilled level of care is no longer required. For these reasons, we do not agree that additional assessments would be needed, or that additional days paid at the therapy RUG would affect the recovery of the patient or the assessment of the need for continued skilled nursing services.

We do not agree with the commenters that a brief illness would increase the number of required assessments. As stated in the ''daily basis'' criteria at 42 CFR 409.34(b), ''a break of one to two days in the furnishing of rehabilitation services will not preclude coverage if discharge would not be practical for the one or two days during which, for instance, the physician has suspended the therapy sessions because the patient exhibited extreme fatigue.'' Therefore, according to these regulations, a brief illness would not necessarily result in the provider having to complete an end-of-therapy OMRA. Based on the concerns expressed by these commenters, we would like to take this opportunity to help ensure that the end-of-therapy OMRA is completed timely and appropriately. We proposed that the end-of-therapy OMRA be completed with an ARD of 1 to 3 days after the discontinuation of all therapies (speech-language pathology services and occupational and physical therapies). For purposes of the ARD for an end-of-therapy OMRA, the provider shall consider day 1 the day after all therapies are discontinued. When a facility provides rehabilitation therapies five days a week (Monday through Friday), we would like to clarify that day 1 would correspond to the first day, following the cessation of therapy services, on which therapy services would normally be provided. For example, if all therapies are discontinued on October 15, 2010 (which is a Friday), the next day that therapy would normally be provided would be Monday, October 18, and this day would become day 1 after therapies were discontinued. The provider would have the ability to choose the ARD to be set on October 18 (day 1), October 19 (day 2), or October 20 (day 3). As set forth in 42 CFR 409.34(a)(2), when therapy services are not available 7 days a week, therapy services must be needed and provided at least 5 days a week. When a facility only provides therapy 5 days a week, the therapy department would not be open on the weekend. Therefore, the weekend days would not be counted toward the establishment of the ARD for the end-of-therapy OMRA. Again, as discussed above, we believe the ability to choose the ARD up to 3 days after the discontinuation of all therapies will not lead to over-utilization of OMRAs.

Comment: Commenters had various understandings of what constitutes a short stay. In their comments regarding our revisions to section T and the therapy reporting procedures (that is, therapy reporting procedures for short-stay patients, implementation of a start-of-therapy OMRA, and revised ARD for the end-of-therapy OMRA), a few commenters provided examples of a short-stay resident with different lengths of stay. Their remarks varied from the first ''few'' days to the first 5 days of the SNF stay. Comments regarding the STRIVE project on a short stay often cited 7 days as being a short stay (that is, a discharge before day 8).

Response: We realize that our discussion in the FY 2010 SNF PPS proposed rule of the revised reporting of therapy services for short-stay patients (74 FR 22245) may have caused confusion. When the SNF PPS was introduced in July 1998, we expanded the collection of MDS data to include new assessments that were primarily used to determine payment. These Medicare-required assessments were defined in our May 1998 SNF rule (63 FR 26252, 26265–69), and processing instructions are included in the MDS manual.

For SNF PPS purposes, SNFs are required to complete the Medicare-required 5-day assessment in order to initiate Medicare payment for the stay. The facility captures clinical data with an ARD from days 1 through 8 of the covered stay on this Medicare-required 5-day assessment, which is then used to assign the patient to a RUG group. Generally, the RUG group assigned using the Medicare 5-day assessment is used to pay for up to 14 days of the covered stay.

Since the inception of the SNF PPS, CMS has allowed providers to record therapy services based on a projection via section T of the MDS. This projection can only be made when two criteria are met. First, the need for therapy must have been established through a therapy evaluation and a physician's order. Second, therapy could not be initiated early enough in the beneficiary's stay to capture (on the Medicare-required 5-day assessment) the 5 days of therapy required to assign a therapy case-mix group. The projected therapy days and minutes are used in the calculation of the assigned RUG, thus allowing an SNF to receive payment for therapy services that it plans to provide to a beneficiary in the beginning of the stay. Even when patients are discharged before the Medicare 5-day assessment can be fully completed (that is, prior to day 8, the last allowed date that can be used to report the MDS clinical data), providers are still expected to complete section T as accurately as possible and submit at least a partial Medicare-required 5-day assessment. Because the Medicare-required 5 day assessment may be performed until day 8 of the resident's stay, we believe that it is appropriate to define a short-stay patient as one who is discharged on day 8 or earlier.

Based on the comments that we received, it appears that our proposal regarding the revised therapy reporting procedures for short-stay patients (74 FR 22245) may have caused some confusion among commenters, as we inadvertently described a short-stay patient as a patient who is discharged prior to day 14. Therefore, we are clarifying in this final rule that short-stay patients are patients who are discharged on day 8 or earlier, and that the revised reporting procedures for short-stay patients apply to those patients who are discharged on day 8 or earlier. The RUG–IV group established under this revised reporting procedure can then be used to reimburse SNFs at the therapy rate from day 1 to the date of short-stay discharge.

Comment: A few commenters stated that our proposed methodology for determining the assigned rehabilitation RUG for short-stay patients did not account for therapy services that are provided at a higher level than Medium, even though the SNF may have provided greater amounts of therapy, such as one of the High rehabilitation groups. They expressed concern that by only allowing for Rehabilitation Low and Medium categories, SNFs would not be adequately reimbursed for providing a more intense level of therapy and, thus, some patients may not receive the appropriate and adequate amount of therapy in the beginning of the SNF stay.

Response: We agree that for residents who are discharged early in the post-hospital stay (day 8 or earlier) and have not been able to complete 5 days of therapy, and when the SNF has provided therapy at the intensity of Rehabilitation High or greater, the resident should be able to be assigned to a rehabilitation RUG greater than Medium. We also agree that the SNF should be adequately reimbursed for the therapy services they provided. Thus, when calculating the rehabilitation RUG for a resident who is discharged early in the post-hospital stay (day 8 or earlier) and when the patient has not been able to report delivery of 5 days of therapy on the 5-day MDS 3.0, a therapy RUG will be calculated by using items from the MDS 3.0. As proposed, these items will include: the actual number of therapy minutes provided, the date of admission, the date therapy started, the patient's ADL level, and the ARD. In addition, as stated in the proposed rule, if the average daily therapy minutes provided are between 15–29 minutes, the record will be assigned to the Rehabilitation Low category (RLx). In addition, in response to comments received, the assignment for other rehabilitation categories will be based on the average daily minutes of therapy provided, as follows:

- Average daily therapy minutes are between 30–64 minutes, a Rehabilitation Medium category (RMx).
- Average daily therapy minutes are between 65–99 minutes, a Rehabilitation High category (RHx).
- Average daily therapy minutes are between 100–143 minutes, a Rehabilitation Very High category (RVx).
- Average daily therapy minutes are 144 or greater, a Rehabilitation Ultra High category (RUx).

We determined the minutes above for each rehabilitation RUG category by taking the minimum required minutes for each category and dividing by 5, which represents the minimum weekly required number of days of therapy according to the SNF level of care criteria's daily basis requirement (42 CFR 409.34). Accordingly, we are taking this opportunity to update the example that we provided in the FY 2010 proposed rule regarding the therapy reporting procedure for short-stay patients. Physical therapy is started on day 4 and the resident is discharged on day 7; the resident received 65 minutes of individual therapy on day 4, 70 minutes of individual therapy on day 5, 73 minutes of individual therapy on day 6, and 67 minutes of individual therapy on day 7. The ARD on the assessment is day 7. The total physical therapy minutes provided are 275. The average number of daily therapy minutes is 68.75. The rehabilitation RUG assigned will be RHx (the average daily therapy minutes are between 65–99).

We are reiterating that this policy only applies to the short-stay resident whose stay is 8 days or less and who received less than 5 days of therapy. Also, as stated in the proposed rule, the ADL index will be based on the ADL level reported on the MDS. Together, the ADL index and the average daily therapy minutes determine the RUG–IV group that will be assigned. We will provide detailed instructions in the online Medicare manuals and the MDS 3.0 RAI Manual.

Comment: A few commenters requested that we clarify how the ARD should be set for the start-of-therapy OMRA. They believe CMS intended to say that the ARD would be set 4–6 days after the start of therapy, rather than 5–7.

Response: We understand the confusion that may have arisen from the use of the phrase ''5–7 days after therapy starts.'' We will, therefore, take the opportunity to provide an example to clarify the policy. As we stated above, if therapy starts on day 5 of the stay, the provider may set the ARD for the optional start-of-therapy OMRA on day 9, 10, or 11. The day that therapy starts is counted as day 1. The purpose of stating 5–7 days and counting the therapy start date as day 1 was to coincide with the look-back period when completing the MDS. The look-back for the therapy items for days and minutes on the MDS is 7 days. The concept is for the provider to capture the first day of therapy when completing the MDS. Therefore, 5 days from the start of therapy is day 9 (day 5=1, day 6=2, day 7=3, day 8=4, day 9=5). If, on the other hand, the SNF chooses day 7 after the start of therapy in the previous example (which would be day 11 of the stay), the day that therapy started (day 5) would still be captured in the look-back period. We will work with industry stakeholders to ensure that our instructions in Medicare manuals and the RAI Manual are clear.

Comment: Several comments stated that changes in discontinuing therapy at a skilled level may create technical issues with regard to a resident receiving Part B therapy during a Part A stay.

Response: This comment would appear to reflect a misunderstanding of the SNF benefit structure, as a resident cannot receive Part B therapy during a Part A stay. Under the SNF PPS, the Part A payment represents payment in full for all costs (routine, ancillary, and capital-related) incurred by the facility to provide care to the resident, including those services that were previously covered under Part B.

Comment: Several commenters stated that reporting the dates that physical and/or occupational therapy and/or speech-language pathology services start and end on the claim when billing a rehabilitation RUG will be burdensome.

Response: We are in the process of evaluating our data needs to support both RUG–IV and a possible separate NTA payment mechanism. Changes to billing requirements will be introduced through updated instructions in the claims processing manuals, and will be addressed in our FY 2011 SNF PPS proposed rule as appropriate.

Therefore, effective October 1, 2010, we will eliminate section T of the MDS and revise the therapy reporting procedures as proposed in the FY 2010 proposed rule (74 FR 22244–46) (that is, reporting procedures for short-stay patients, implementation of an optional start-of-therapy OMRA, and revised ARD for the end-of-therapy OMRA), with the modifications and clarifications discussed above.

E. Other Issues

1. Invitation of Comments on Possible Quarterly Reporting of Nursing Home Staffing Data

Although we did not propose specific regulatory language in this area under the FY 2010 proposed rule, we did request public comment on a possible requirement for nursing homes to report nursing staffing data to CMS on a quarterly basis.

Comment: Although commenters expressed various concerns, most were supportive of the proposed quarterly payroll-based collection of staffing data.

Response: We were pleased with the level of support expressed through the comments. While it is true that the design of the proposed electronic

payroll-based nursing home staffing data collection system was not fully specified in the proposed rule, CMS is aware of most of the issues raised in the comments, and has been actively working on them. We provide responses to specific comments in the following paragraphs.

Comment: We received several comments pointing out the need for CMS to partner with its stakeholders during the design of any new staffing data collection.

Response: CMS values the opinions and insights provided by our stakeholders. We have reported on our funded staffing studies and other efforts to improve the accuracy of nursing home staffing data in stakeholder meetings and conference calls, and on Open Door Forum calls. As the planning for a payroll-based data collection system moves forward, we certainly plan to continue to involve our stakeholders.

Comment: Several commenters expressed concern about the level of administrative burden that might be imposed by a quarterly payroll-based reporting system for staffing data. One commenter believed that such a system would create inefficiencies in the care delivery system.

Response: CMS shares the commenters' concern about the need to avoid unnecessary administrative burden, and for this reason, we specifically requested comments in the proposed rule on the level of burden to nursing homes imposed by a quarterly payroll-based reporting system for staffing data. We would hope to minimize any burden to the extent possible, and we found the comments very helpful.

Comment: A few commenters raised the issue of the financial cost to individual nursing homes of a computerized staffing collection system: For the cost of software and updates, initial costs for the introduction of a computerized payroll system, or added costs with payroll vendors.

Response: The financial cost to nursing homes of providing quarterly payroll-based staffing data electronically is also an area of concern to CMS. As with the administrative burden, we would also hope to design and implement the system in such a way as to minimize any burden to the extent possible. The comments provided were very helpful to our planning.

Comment: A few commenters expressed concern about issues of privacy involved with the use of payroll data.

Response: This data collection effort is currently in a planning phase, but we want to be clear that it is not our intention to collect names, social security numbers, or wage data for staff members. CMS is interested in each staff member's time spent caring for residents, and in the start and end date of service in the facility. We envision each staff member's data being identified with a facility-level identification number and, within the facility data, an individual staff member identification number.

Comment: One commenter pointed out the need under any new system for careful and consistent directions for coding of staff categories and for consistent directions on how to handle non-productive versus productive time.

Response: We agree that clear, consistent directions for specifying staff categories and for handling non-productive time are vital to ensuring accuracy of any data collected.

Comment: Several commenters pointed out the importance of including data in the proposed system that would allow the calculation of staff turnover and retention.

Response: We agree that data to address turnover and retention are important to include in a staffing data collection system. Staff turnover and staff retention measures were developed as part of the CMS-funded ''Development of Staffing Quality Measures'' Project (2003–2008). Both measures were found to be related to the quality of care in the nursing home.

Comment: Several commenters pointed out the need to carefully address collection of contract and agency staff data. Specifically, one commenter was concerned with the burden of potentially having to hand-sort invoices as a basis for data reporting.

Response: An assessment of the best way to collect staffing data for contract and agency staff is currently being conducted under a CMS-funded study. While we currently believe that an auditable source of data such as invoices would be preferable, we are awaiting the results of our study. We appreciate the comment, and are conscious of the level of effort entailed in a system requiring hand-sorting.

Comment: A few commenters discussed the need for a data collection system to allow a ''complete staffing picture'' by including therapists, physician extenders, and other staff providing resident care.

Response: This data collection effort is currently in a planning phase. At this point it is not entirely clear which staff categories will be included in the data collection. Being able to see a ''complete staffing picture'' for a facility would certainly be helpful, and we will take the comment into account.

Comment: A commenter pointed out the need for any new system to be sensitive to the staffing patterns of culture change facilities and to allow the staff to be fairly represented.

Response: We are aware of concerns that the currently used staffing form (CMS–671) does not well accommodate the broad range of newer nursing home care staff roles. The staffing patterns of culture change facilities are good examples of this issue. We will be sensitive to this concern in developing the definitions for the payroll-based data collection system.

Comment: We received a few comments urging that any staffing data collected be standardized for acuity (or case-mix) of residents and for the facility census.

Response: Facility-level staffing data that are currently posted on the CMS Nursing Home Compare Web site are expressed as hours of care per resident per day, so they are, in effect, standardized for the census of the facility. Although the staffing data used in the Five Star Quality Rating System calculations are case-mix adjusted using Resource Utilization Group categories, the case-mix adjusted measures themselves are not reported. We will give consideration to the comment as we plan for implementing the payroll-based system.

Comment: Several commenters suggested that any quarterly collection of staffing data could be most easily accomplished through the use of the MDS reporting systems.

Response: At this phase in the planning efforts, we are considering the use of the MDS reporting system, as well as several other options.

Comment: A commenter suggested basing any new system on the publicly posted staffing information in each facility that is currently required by CMS. The data include nursing home census and staffing resources by shift.

Response: We have been funding work concerned with ensuring the accuracy of nursing home staffing data since 1998, with the beginning of the Phase I Staffing Study (designed to investigate the appropriateness of minimum staffing ratios in nursing homes). The results of both the Phase I and the Phase II Staffing Studies suggested that using payroll data as a basis for staffing produced more accurate data than other sources, such as cost reports or the current Online Survey Certification and Reporting System (OSCAR), which houses the data collected at the time of survey. A later CMS-funded Study (Development of

Staffing Quality Measures (SQM)—2003–2008), following the advice of a panel of technical experts, provided a further assessment of the use of payroll data for staffing. This study assembled a database of payroll data from 1453 nursing homes and, using those data, developed a number of measures of direct care staffing, including turnover and retention. A comparison of these data with OSCAR data showed clear differences.

While we have not assessed the relative accuracy of the staffing data posted publicly in each facility compared to payroll data, the research base supports the use of payroll data as a more accurate source for staffing data.

Comment: Several commenters suggested uses of the data that involved collection of wage data in addition to staffing time data.

Response: The payroll-based staffing data collection, as it is currently proposed, does not include collection of wage data.

Comment: In addition to the comments that we received on the proposed quarterly staffing data collection, several commenters provided discussion of specific issues involving the CMS Five Star Quality Rating System for Nursing Homes.

Response: The specific issues that were raised about the design of the Five Star Quality Rating System for Nursing Homes and the calculations involved in the rating system are beyond the scope of this final rule. However, we appreciate the careful consideration that these comments reflected, and we will direct them to the attention of appropriate staff in CMS.

2. Miscellaneous Technical Corrections and Clarifications

In the FY 2010 proposed rule, we proposed to correct the paragraph heading in the regulations text at § 483.75(j), by removing the phrase ''Level B requirement:'' and italicizing the remaining text in the heading (''*Laboratory services*''). We received no comments on this proposal, and in this final rule, we are revising this portion of the regulations text as proposed.

F. The Skilled Nursing Facility Market Basket Index

Section 1888(e)(5)(A) of the Act requires us to establish a SNF market basket index (input price index), that reflects changes over time in the prices of an appropriate mix of goods and services included in the SNF PPS. In the FY 2010 proposed rule, we stated that the proposed rule incorporated the latest available projections of the SNF market basket index. In this final rule, we are updating projections based on the latest available projections at the time of publication. Accordingly, we have developed a SNF market basket index that encompasses the most commonly used cost categories for SNF routine services, ancillary services, and capital-related expenses.

Comment: One commenter stated that the SNF market basket factor is defective and continues to understate compensation, pharmacy, and operating costs, and that current market basket weights do not reflect changing staffing, higher pharmacy costs, and rising liability insurance.

Response: The 2004-based SNF market basket is a fixed-weight index that is intended to measure the price increases associated with the same mix of goods and services over time. The market basket is not intended to measure actual costs and, therefore, we do not accept the commenter's argument that the SNF market basket factor is defective and continues to understate compensation, pharmacy, and operating costs. The current FY 2010 market basket update factor of 2.2 percent is based on the IHS Global Insight (IGI) second quarter 2009 forecast, and reflects the projected price changes for all cost categories in the market basket (including those associated with compensation, pharmacy, and other operating costs). IGI is a nationally recognized economic and financial forecasting firm that contracts with CMS to forecast the components of the market baskets.

We also do not agree with the commenter's claim that the market basket does not reflect changing staffing costs, higher pharmacy costs, and rising liability insurance. For the FY 2008 final rule (72 FR 43424–43429), we adopted a revised and rebased 2004-based SNF market basket that reflected the 2004 cost structures of Medicare-participating SNFs. The previous SNF market basket was based on the 1997 cost structures for Medicare-participating SNFs. The major cost weights of the 2004-based SNF market basket, which are inclusive of compensation, pharmacy, and professional liability insurance, were derived mainly from 2004 Medicare cost reports. During the rebasing process, we revised our methodology for calculating the pharmacy cost weight to incorporate an estimate of Medicaid drug expenses (72 FR 43426) incurred by SNFs. The inclusion of these costs resulted in a pharmacy cost weight for the 2004-based SNF market basket that was twice as large as that of the 1997-based market basket pharmacy cost weight. We also explicitly designated a professional liability insurance cost category (which was not a separate cost category in the 1997-based SNF market basket due to lack of sufficient data). As a result, we believe the current SNF market basket cost weights reflect the cost structures of Medicare-participating SNFs.

Each year, we calculate a revised labor-related share based on the relative importance of labor-related cost categories in the input price index. Table 16 summarizes the updated labor-related share for FY 2010.

TABLE 16—LABOR-RELATED RELATIVE IMPORTANCE, FY 2009 AND FY 2010

	Relative importance, labor-related, FY 2009 08:2 forecast*	Relative importance, labor-related, FY 2010 09:2 forecast
Wages and salaries	51.003	51.078
Employee benefits	11.547	11.533
Nonmedical professional fees	1.331	1.323
Labor-intensive services	3.434	3.446
Capital-related (.391)	2.468	2.460
Total	69.783	69.840

*Published in the **Federal Register** (73 FR 46434); based on the second quarter 2009 IHS Global Insight Inc. revised forecast.

1. Use of the Skilled Nursing Facility Market Basket Percentage

Section 1888(e)(5)(B) of the Act defines the SNF market basket percentage as the percentage change in the SNF market basket index from the average of the previous FY to the average of the current FY. For the Federal rates established in this final rule, we use the percentage increase in the SNF market basket index to compute the update factor for FY 2010. This is based on the IHS Global Insight, Inc. (formerly DRI–WEFA) second quarter 2009 forecast (with historical data through the first quarter 2009) of the FY 2010 percentage increase in the FY 2004-based SNF market basket index for routine, ancillary, and capital-related expenses, to compute the update factor in this final rule. Finally, as discussed in section I.A. of this final rule, we no longer compute update factors to adjust a facility-specific portion of the SNF PPS rates, because the initial three-phase transition period from facility-specific to full Federal rates that started with cost reporting periods beginning in July 1998 has expired.

2. Market Basket Forecast Error Adjustment

As discussed in the FY 2004 supplemental proposed rule (68 FR 34768, June 10, 2003) and finalized in the FY 2004 final rule (68 FR 46067, August 4, 2003), the regulations at § 413.337(d)(2) provide for an adjustment to account for market basket forecast error. The initial adjustment applied to the update of the FY 2003 rate for FY 2004, and took into account the cumulative forecast error for the period from FY 2000 through FY 2002. Subsequent adjustments in succeeding FYs take into account the forecast error from the most recently available FY for which there is final data, and apply whenever the difference between the forecasted and actual change in the market basket exceeds a specified threshold. We originally used a 0.25 percentage point threshold for this purpose; however, for the reasons specified in the FY 2008 SNF PPS final rule (72 FR 43425, August 3, 2007), we adopted a 0.5 percentage point threshold effective with FY 2008. As discussed previously in section I.F.2. of this final rule, because the difference between the estimated and actual amounts of increase in the market basket index for FY 2008 (the most recently available FY for which there is final data) does not exceed the 0.5 percentage point threshold, the payment rates for FY 2010 do not include a forecast error adjustment.

Comment: One commenter suggested that CMS apply a cumulative forecast error to account for all of the variations in the market basket forecasts since FY 2004 (that is, as of when CMS implemented the market basket forecast error correction policy.) The commenter asserted that the forecast adjustment process did not work as intended, citing the lack of any annual adjustments in subsequent years as evidence. The commenter recommended that the policy be modified to provide for an FY 2010 cumulative adjustment of 1.0 percent to restore these ''lost'' dollars to the SNF industry.

Response: For FY 2004, CMS applied a one-time, cumulative forecast error correction of 3.26 percent (68 FR 46036, August 4, 2003). Since that time, the forecast errors have been relatively small and clustered near zero. We believe the forecast error correction should be applied only when the degree of forecast error in any given year is such that the SNF PPS base payment rate does not adequately reflect the historical price changes faced by SNFs. Accordingly, we continue to believe that the forecast error adjustment mechanism should appropriately be reserved for the type of major, unexpected change that initially gave rise to this policy, rather than the minor variances that are a routine and inherent aspect of this type of statistical measurement. Further, we note that all of the Medicare prospective systems use an annual market basket adjustment factor to update rates to reflect inflation in the prices of goods and services used by providers.

3. Federal Rate Update Factor

Section 1888(e)(4)(E)(ii)(IV) of the Act requires that the update factor used to establish the FY 2010 Federal rates be at a level equal to the full market basket percentage change. Accordingly, to establish the update factor, we determined the total growth from the average market basket level for the period of October 1, 2008 through September 30, 2009 to the average market basket level for the period of October 1, 2009 through September 30, 2010. Using this process, the market basket update factor for FY 2010 SNF PPS Federal rates is 2.2 percent. We used this update factor to compute the Federal portion of the SNF PPS rate shown in Tables 2 and 3.

G. Consolidated Billing

Section 4432(b) of the BBA established a consolidated billing requirement that places the Medicare billing responsibility for virtually all of the services that the SNF's residents receive with the SNF, except for a small number of services that the statute specifically identifies as being excluded from this provision. As noted previously in section I. of this final rule, subsequent legislation enacted a number of modifications in the consolidated billing provision.

Specifically, section 103 of the BBRA amended this provision by further excluding a number of individual ''high-cost, low-probability'' services, identified by the Healthcare Common Procedure Coding System (HCPCS) codes, within several broader categories (chemotherapy and its administration, radioisotope services, and customized prosthetic devices) that otherwise remained subject to the provision. We discuss this BBRA amendment in greater detail in the proposed and final rules for FY 2001 (65 FR 19231–19232, April 10, 2000, and 65 FR 46790–46795, July 31, 2000), as well as in Program Memorandum AB–00–18 (Change Request #1070), issued March 2000, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/ab001860.pdf*.

Section 313 of the BIPA further amended this provision by repealing its Part B aspect; that is, its applicability to services furnished to a resident during a SNF stay that Medicare Part A does not cover. (However, physical, occupational, and speech-language therapy remain subject to consolidated billing, regardless of whether the resident who receives these services is in a covered Part A stay.) We discuss this BIPA amendment in greater detail in the proposed and final rules for FY 2002 (66 FR 24020–24021, May 10, 2001, and 66 FR 39587–39588, July 31, 2001).

In addition, section 410 of the MMA amended this provision by excluding certain practitioner and other services furnished to SNF residents by RHCs and FQHCs. We discuss this MMA amendment in greater detail in the update notice for FY 2005 (69 FR 45818–45819, July 30, 2004), as well as in Program Transmittal #390 (Change Request #3575), issued December 10, 2004, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/r390cp.pdf*.

Further, while not substantively revising the consolidated billing requirement itself, a related provision was enacted in the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA, Pub. L. 110–275). Specifically, section 149 of MIPPA amended section 1834(m)(4)(C)(ii) of the Act to create a new subclause (VII), which adds SNFs (as defined in section 1819(a) of the Act)

to the list of entities that can serve as a telehealth ''originating site'' (that is, the location at which an eligible individual can receive, through the use of a telecommunications system, services furnished by a physician or other practitioner who is located elsewhere at a ''distant site'').

As explained in the Medicare Physician Fee Schedule (PFS) final rule for Calendar Year (CY) 2009 (73 FR 69726, 69879, November 19, 2008), a telehealth originating site receives a facility fee which is always separately payable under Part B outside of any other payment methodology. Section 149(b) of MIPPA amended section 1888(e)(2)(A)(ii) of the Act to exclude telehealth services furnished under section 1834(m)(4)(C)(ii)(VII) of the Act from the definition of ''covered skilled nursing facility services'' that are paid under the SNF PPS. Thus, a SNF ''* * * can receive separate payment for a telehealth originating site facility fee even in those instances where it also receives a bundled per diem payment under the SNF PPS for a resident's covered Part A stay'' (73 FR 69881). By contrast, under section 1834(m)(2)(A) of the Act, a telehealth distant site service is payable under Part B to an eligible physician or practitioner only to the same extent that it would have been so payable if furnished without the use of a telecommunications system. Thus, as explained in the CY 2009 PFS final rule, eligible distant site physicians or practitioners can receive payment for a telehealth service that they furnish

* * * only if the service is separately payable under the PFS when furnished in a face-to-face encounter at that location. For example, we pay distant site physicians or practitioners for furnishing services via telehealth only if such services are not included in a bundled payment to the facility that serves as the originating site (73 FR 69880).

This means that in those situations where a SNF serves as the telehealth originating site, the distant site professional services would be separately payable under Part B only to the extent that they are not already included in the SNF PPS bundled *per diem* payment and subject to consolidated billing. Thus, for a type of practitioner whose services are not otherwise excluded from consolidated billing when furnished during a face-to-face encounter, the use of a telehealth distant site would not serve to unbundle those services. In fact, consolidated billing does exclude the professional services of physicians, along with those of most of the other types of telehealth practitioners that the law specifies at section 1842(b)(18)(C) of the Act, that is, physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, certified nurse midwives, and clinical psychologists (*see* section 1888(e)(2)(A)(ii) of the Act and 42 CFR 411.15(p)(2)). However, the services of clinical social workers, registered dietitians and nutrition professionals remain subject to consolidated billing when furnished to a SNF's Part A resident and, thus, cannot qualify for separate Part B payment as telehealth distant site services in this situation. Additional information on this provision appears in Program Transmittal #1635 (Change Request #6215), issued November 14, 2008, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/R1635CP.pdf*.

To date, the Congress has enacted no further legislation affecting the consolidated billing provision. However, as noted above and explained in the proposed rule for FY 2001 (65 FR 19232, April 10, 2000), the amendments enacted in section 103 of the BBRA not only identified for exclusion from this provision a number of particular service codes within four specified categories (that is, chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices), but also gave the Secretary ''* * * the authority to designate additional, individual services for exclusion within each of the specified service categories.'' In the proposed rule for FY 2001, we also noted that the BBRA Conference report (H.R. Rep. No. 106–479 at 854 (1999) (Conf. Rep.)) characterizes the individual services that this legislation targets for exclusion as ''* * * high-cost, low probability events that could have devastating financial impacts because their costs far exceed the payment [SNFs] receive under the prospective payment system * * *''. According to the conferees, section 103(a) ''is an attempt to exclude from the PPS certain services and costly items that are provided infrequently in SNFs. * * * For example, * * * specific chemotherapy drugs * * * not typically administered in a SNF, or * * * requiring special staff expertise to administer * * *.'' By contrast, the remaining services within those four categories are not excluded (thus leaving all of those services subject to SNF consolidated billing), because they are relatively inexpensive and are furnished routinely in SNFs.

As we further explained in the final rule for FY 2001 (65 FR 46790, July 31, 2000), and as our longstanding policy, any additional service codes that we might designate for exclusion under our discretionary authority must meet the same statutory criteria used in identifying the original codes excluded from consolidated billing under section 103(a) of the BBRA: They must fall within one of the four service categories specified in the BBRA, and they also must meet the same standards of high cost and low probability in the SNF setting, as discussed in the BBRA Conference report. Accordingly, we characterized this statutory authority to identify additional service codes for exclusion ''* * * as essentially affording the flexibility to revise the list of excluded codes in response to changes of major significance that may occur over time (for example, the development of new medical technologies or other advances in the state of medical practice)'' (65 FR 46791). In the FY 2010 proposed rule, we specifically invited public comments identifying codes in any of these four service categories (chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices) representing recent medical advances that might meet our criteria for exclusion from SNF consolidated billing (74 FR 22208, 22249, May 12, 2009). The comments that we received on this subject, and our responses, appear below.

Comment: Several commenters submitted additional chemotherapy codes that they recommended for exclusion from consolidated billing.

Response: A review of the particular chemotherapy codes that commenters submitted in response to the proposed rule's solicitation for comment revealed that many of them were codes that had already been submitted for consideration in past years, and which we had already decided previously not to exclude. Other codes that commenters submitted were themselves already in existence as of July 1, 1999, but did not fall within the specific code ranges statutorily designated for exclusion in the BBRA. As the statute does not specifically exclude these already-existing codes (and as further discussed later in this section of the final rule), we are not adding them to the exclusion list. Most of the other codes submitted represent services that, for various reasons, do not meet the statutory criteria for exclusion. For example, some represent oral medications that can be administered routinely in SNFs and are not reasonably characterized as ''requiring special staff expertise to administer'' in accordance with the previously-cited BBRA Conference report language. Other codes do not meet the BBRA

Conference report's threshold criteria of high cost (that is, an item whose ''* * * costs far exceed the payment [SNFs] receive under the prospective payment system'') and low probability that the Congress imposed in enacting this exclusion. Still others represent drugs that are administered in conjunction with chemotherapy to address side effects such as nausea; however, as such drugs are not in themselves inherently chemotherapeutic in nature, they do not fall within the excluded chemotherapy category designated in the BBRA. Two particular codes that a commenter offered as possible candidates for the chemotherapy exclusion actually are not anti-cancer drugs, but rather, are used in hormone therapy and for the treatment of certain types of anemia, respectively. Finally, some other codes that were submitted represent services that, in fact, are already excluded from consolidated billing under existing instructions.

Comment: Some commenters reiterated previous suggestions on expanding the existing chemotherapy exclusion to encompass related drugs that are commonly administered in conjunction with chemotherapy in order to treat the side effects of the chemotherapy drugs. The commenters cited examples such as anti-emetics (anti-nausea drugs) and erythropoietin (EPO).

Response: As we have noted previously in this final rule and in response to comments on this issue in the past (most recently, in the August 8, 2008 SNF PPS final rule for FY 2009 (73 FR 46437)), the BBRA authorizes us to identify additional services for exclusion only within those particular service categories—chemotherapy and its administration; radioisotope services; and, customized prosthetic devices—that it has designated for this purpose, and does not give us the authority to exclude other services which, though they may be related, fall outside of the specified service categories themselves. Thus, while anti-emetics, for example, are commonly administered in conjunction with chemotherapy, they are not themselves inherently chemotherapeutic in nature and, consequently, do not fall within the excluded chemotherapy category designated in the BBRA. We also explained in the FY 2008 final rule that the existing statutory exclusion from consolidated billing for EPO is effectively defined by the scope of coverage under the Part B EPO benefit at section 1861(s)(2)(O) of the Act; that benefit, in turn, specifically limits EPO coverage to dialysis patients, and does not provide for such coverage in any other, non-dialysis situations such as chemotherapy (72 FR 43432).

Comment: One comment concerned our longstanding view, most recently discussed in the SNF PPS final rule for FY 2009 (73 FR 46436, August 8, 2008) and the SNF PPS proposed rule for FY 2010 (74 FR 22249, May 12, 2009), that the authority granted by the BBRA to identify additional codes for exclusion within the designated categories essentially serves to confer ''* * * the flexibility to revise the list of excluded codes in response to changes of major significance *that may occur over time* (for example, the development of new medical technologies or other advances in the state of medical practice)'' (emphasis added). Our position has always been that this discretionary authority applies solely to codes that were created subsequent to the enactment of the BBRA, and not to those codes that were already in existence as of July 1, 1999 (the date that the legislation itself uses as the reference point for identifying those codes that it designates for exclusion). Implicit in this position is an assumption that if a particular code was already in existence as of that date but not designated for exclusion, this indicated the Congress's intent for that code to remain within the SNF PPS bundle.

One commenter took exception to this position and cited the Conference report that accompanied the BBRA (H.R. Rep. No. 106–479 at 854 (1999) (Conf. Rep.)), which gives two examples of potential problems with the practice of ''* * * excluding services or items from the [SNF] PPS by specifying codes in legislation'':

- Some already-existing items that meet the exclusion criteria may have inadvertently been left off of the original exclusion list.
- New, extremely costly items may come into use or codes may change over time.

The commenter then asserted that our discretionary authority to identify additional codes for exclusion should apply not only to the latter concern, but also to the former one as well. As a result, the commenter argued that our periodic review of the codes for possible additional exclusions from consolidated billing should not be limited to only new and revised codes, but should also consider the entire set of codes that were already in existence as of the BBRA legislation's reference date, July 1, 1999.

Response: In contrast to the new and revised codes that reflect an ongoing process of change within the coding system, the codes that were in existence as of the BBRA reference date (July 1, 1999) essentially comprise a closed code set at this point, one that remains static and unchanging from year to year. Accordingly, we do not believe that it would be either necessary or appropriate to conduct recurring reviews of this particular code set once it has received an initial review. Moreover, we note that after identifying the two potential problems with designating exclusions by code as discussed above, the BBRA Conference report that the commenter cites then goes on to issue two specific directives: it confers on the Secretary the authority ''* * * to review *periodically* and modify, as needed, the list of excluded services'' (emphasis added), and it also directs the GAO ''* * * to review the codes of the excluded items and make recommendations on whether the criteria for their exclusion are appropriate *by July 1, 2000''* (emphasis added). Accordingly, we believe it is clear that the GAO's short-term, one-time-only review of the exclusion codes would serve to encompass those codes already in existence as of the BBRA reference date, while the Secretary's ongoing authority to conduct reviews ''periodically'' was intended to address changes in the coding system that occur *subsequent* to that point.

Comment: Although the FY 2010 SNF PPS proposed rule specifically invited comments on possible exclusions within the particular service categories identified in the BBRA legislation, a number of commenters took this opportunity to reiterate concerns about other aspects of consolidated billing. For example, some commenters reiterated past comments made on previous rules, urging CMS to unbundle additional service categories. The commenters identified services such as hyperbaric oxygen treatments, observation services, and blood transfusions as appropriate candidates for exclusion. They also repeated previous calls to expand the existing exclusion for certain high-intensity outpatient hospital services to encompass services furnished in other, nonhospital settings, arguing that such nonhospital services may be cheaper and more accessible in certain localities (such as rural settings) than those furnished by hospitals. Some commenters expressed support for expanding the existing, partial exclusion of ambulance services from consolidated billing to encompass all ambulance services, but they also acknowledged that creating such an exclusion of an entire service category would require legislation by the

Congress. Another commenter recommended conducting a comprehensive overhaul of the entire set of existing consolidated billing exclusions, in a way that would streamline and simplify the current complex set of exclusion rules and make it easier to administer.

Response: As we have consistently stated (most recently, in the August 8, 2008 SNF PPS final rule for FY 2009 (73 FR 46436)), the BBRA authorizes us to identify additional services for exclusion only within those particular service categories—chemotherapy and its administration; radioisotope services; and, customized prosthetic devices—that it has designated for this purpose, and does not give us the authority to carve out entire service categories beyond those specified in the law. Accordingly, as the particular services that these commenters recommended for exclusion do not fall within one of the specific service categories designated for this purpose in the statute itself, these services remain subject to consolidated billing.

We have also included in a number of previous rules an explanation of the setting-specific nature of the exclusion for certain high-intensity outpatient hospital services—most recently, in the FY 2009 SNF PPS final rule (73 FR 46436, August 8, 2008):

> We believe the comments that reflect previous suggestions for expanding this administrative exclusion to encompass services furnished in non-hospital settings indicate a continued misunderstanding of the underlying purpose of this provision. As we have consistently noted in response to comments on this issue in previous years * * * and as also explained in Medicare Learning Network (MLN) Matters article SE0432 (available online at *http://www.cms.hhs.gov/MLNMattersArticles/downloads/SE0432.pdf*), the rationale for establishing this exclusion was to address those types of services that are so far beyond the normal scope of SNF care that they require the intensity of the hospital setting in order to be furnished safely and effectively.
>
> Moreover, we note that when the Congress enacted the consolidated billing exclusion for certain RHC and FQHC services in section 410 of the MMA, the accompanying legislative history's description of present law acknowledged that the existing exclusions for exceptionally intensive outpatient services are specifically limited to ''* * * certain outpatient services *from a Medicare-participating hospital or critical access hospital* * * *'' (emphasis added). (*See* the House Ways and Means Committee Report (H. Rep. No. 108–178, Part 2 at 209), and the Conference Report (H. Conf. Rep. No. 108–391 at 641).) Therefore, these services are excluded from SNF consolidated billing only when furnished in the outpatient hospital or CAH setting, and not when furnished in other, freestanding (non-hospital or non-CAH) settings.

Further, the authority for us to establish a categorical exclusion for these services that would apply irrespective of the setting in which they are furnished does not exist in current law. In addition, with regard to the relative availability of such services in hospital versus nonhospital settings, we have also noted previously that:

> * * * to the extent that advances in medical practice over time may make it feasible to perform such a service more widely in a less intensive, nonhospital setting, this would not argue in favor of excluding the nonhospital performance of the service from consolidated billing under these regulations, but rather, would call into question whether the service should continue to be excluded from consolidated billing at all, even when performed in the hospital setting (70 FR 45049, August 4, 2005).

Regarding the comment on ambulance services, we agree with the commenters that carving out an entire service category from consolidated billing would require legislation by the Congress, and cannot be accomplished administratively. Finally, with reference to the suggestion for a comprehensive overhaul of the existing consolidated billing rules, while the commenter's interest in promoting improved ease of administration is understandable, we note that current law contains no authority to adopt the suggested approach.

Comment: Some comments cited ongoing concerns about the SNF PPS's ability to account accurately for the cost of NTAs, and suggested that we create additional consolidated billing exclusions for certain exceptionally high-cost drugs as a means of addressing those concerns.

Response: We note that, as mentioned previously in section III.C.2 of this final rule, we are continuing to conduct research relating to the treatment of NTAs under the SNF PPS, including the exploration of possible modifications in the case-mix classification system that might further improve its accuracy in accounting for these costs. However, as we indicated in the SNF PPS final rule for FY 2002 (66 FR 39588, July 31, 2001), and again in the SNF PPS final rule for FY 2004 (68 FR 46062, August 4, 2003), ''* * * we do not share the view * * * that the creation of additional exclusions from consolidated billing could serve, in effect, as an interim substitute for [such] refinements.'' Rather, we believe ''* * * that payment adjustments relating to case-mix would best be accomplished directly through refinements in the case-mix classification system'' itself.

Comment: In contrast to the preceding comments that advocated expanding the existing exclusion of certain exceptionally intensive outpatient services to encompass freestanding (nonhospital) settings, one commenter specifically acknowledged this exclusion's restriction to the hospital setting, and then proceeded to recommend a particular drug, natalizumab (Tysabri®, HCPCS code J2323) for exclusion on this basis. Natalizumab is an intravenous infusion drug used for treating multiple sclerosis in cases where alternative therapies are not feasible. The commenter indicated that natalizumab not only meets the general criteria of high cost, low probability, and inelastic demand (that is, the service is unlikely to be overprovided even if separate payment under Part B becomes available for it) that characterize services under the exclusion, but also has a number of specific characteristics that could reasonably be viewed as requiring the intensity of the hospital setting for its safe and effective administration. The commenter noted that under the terms of this drug's approval by the Food and Drug Administration (FDA), natalizumab is subject to a complex risk minimization action plan (RiskMAP) protocol that requires highly specialized expertise in its administration. The commenter also cited an FDA notice in the **Federal Register** (73 FR 16313, March 27, 2008), including natalizumab in a list of drugs that are deemed to have in effect an approved risk evaluation and mitigation strategy (REMS). (The REMS is designed to address certain drugs that, while providing an important benefit to patients, can be especially dangerous if not used properly.) The FDA notice also indicated that such drugs have in effect a number of elements to assure safe use, including their being ''* * * dispensed to patients only in certain health care settings, such as hospitals . * * *'' Accordingly, the commenter also suggested that we consider similarly excluding the other drugs identified in the FDA notice (which, like natalizumab, are deemed to have an approved REMS in effect).

Response: We believe that the commenter's observations merit further study to determine whether drugs of this type might, in fact, meet the outpatient hospital services exclusion's longstanding threshold (most recently discussed, as noted previously, in the FY 2009 SNF PPS final rule (74 FR 46436, August 8, 2008)) of being ''* * * so far beyond the normal scope of SNF care that they require the intensity of

the hospital setting in order to be furnished safely and effectively.'' Accordingly, we plan to examine the appropriateness of designating one or more of these drugs as exceptionally intensive outpatient hospital services for purposes of exclusion from consolidated billing. As we noted in the discussion of the outpatient hospital exclusion in the SNF PPS final rule for FY 2000 (64 FR 41676, July 30, 1999), while any broad refinements in the outpatient hospital exclusion's underlying policy itself (which might be necessitated by the development of the outpatient hospital PPS) ''* * * would be made through future rulemaking,'' modifying the list of individual services encompassed by the exclusion would occur ''* * * in future instructions.'' Accordingly, we would use program instructions as the vehicle for specifying any additional services that we may decide to designate as qualifying for exclusion on this basis.

H. Application of the SNF PPS to SNF Services Furnished by Swing-Bed Hospitals; Quality Monitoring of Swing-Bed Hospitals

In accordance with section 1888(e)(7) of the Act, as amended by section 203 of the BIPA, Part A pays CAHs on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, effective with cost reporting periods beginning on or after July 1, 2002, the swing-bed services of non-CAH rural hospitals are paid under the SNF PPS. As explained in the final rule for FY 2002 (66 FR 39562, July 31, 2001), we selected this effective date consistent with the statutory provision to integrate swing-bed rural hospitals into the SNF PPS by the end of the SNF transition period, June 30, 2002.

Accordingly, all non-CAH swing-bed rural hospitals have come under the SNF PPS as of June 30, 2003. Therefore, all rates and wage indexes outlined in earlier sections of this final rule for the SNF PPS also apply to all non-CAH swing-bed rural hospitals. A complete discussion of assessment schedules, the MDS and the transmission software (RAVEN–SB for Swing Beds) appears in the final rule for FY 2002 (66 FR 39562, July 31, 2001). The latest changes in the MDS for swing-bed rural hospitals appear on the SNF PPS Web site, *http://www.cms.hhs.gov/snfpps*. It is our intention to include rural hospital swing beds in the transition to the MDS 3.0 effective October 1, 2010, and to adopt the RUG–IV classification for swing-bed facilities on that same date. Under the RUG–III payment model, swing-bed hospitals have not been comprehensively monitored for quality of care, but have been required to submit four types of abbreviated MDS assessments: The abbreviated Medicare Assessments submitted on days 5, 14, 30, 60, and 90 used to determine payment under the SNF PPS, entry and discharge tracking assessments, the clinical change assessments, and the Other Medicare Required Assessments (OMRAs). The limited use of the MDS for quality monitoring was established because we believed that swing-bed units, as parts of rural hospitals, were already subject to the hospital quality review process. In addition, our analyses showed that the average length of stay in swing-bed facilities was significantly lower than in either hospital-based or freestanding SNFs, and that our existing quality measures might be unable to evaluate short-stay patient care accurately. Thus, in the FY 2002 final rule referenced above (65 FR 39590), we decided that we would not ''require swing-bed facilities to perform the care planning and quality monitoring components included in the full MDS * * *'' at that point. At the same time, we explained our intention of including ''* * * an analysis of swing-bed requirements in our comprehensive reevaluation of all post-acute data needs, and in the design of any future assessment and data collection tools.''

Since that time, we have expanded our quality analysis in a variety of settings, and have made SNF information publicly available through Nursing Home Compare and other initiatives. While developing ways to monitor and compare quality across swing-bed facilities and between swing-bed facilities and other SNFs would increase swing-bed facility data collection and transmission requirements, it would also increase the information available to patients, families, and oversight agencies for making placement decisions and evaluating the quality of care furnished by swing-bed facilities. For these reasons, in the FY 2010 proposed rule (74 FR 22208, 22250, May 12, 2009), we stated that we were considering a change in the swing-bed MDS (SB–MDS) reporting requirements that would go into effect with the introduction of the MDS 3.0. Since the current SB–MDS does not include the items needed to evaluate quality in the same way as for other nursing facilities, we proposed to eliminate the SB–MDS, and replace it with the MDS 3.0 equivalent of the Medicare Payment Assessment Form (MPAF) that captures all of the items used in determining quality measures. Accordingly, in the FY 2010 proposed rule (74 FR 22208, 22250, May 12, 2009), we solicited comments on expanding swing-bed MDS reporting requirements to apply the quality monitoring mechanism in place for all other SNF PPS facilities to rural swing-bed hospitals. The comments that we received on this subject, and our responses, appear below.

Comment: Some commenters supported the quality monitoring of swing-bed services, while others opposed it. Those who opposed quality monitoring of swing-bed services asserted that the existing hospital quality review process is sufficient, and that the short length of stays for swing-bed patients would not result in reliable measures. The commenters were also concerned with the burden associated with additional paperwork. A few commenters stated that this would impose a burden on CAHs. Those who supported quality monitoring of swing-bed services argued that it would help achieve greater consistency between the swing-bed and SNF settings, and would allow consumers to make the same quality comparisons and evaluations for swing beds as for SNFs.

Response: When the Congress enacted the swing-bed program, it described swing-bed services as ''* * * services of the type which, if furnished by a skilled nursing facility, would constitute extended care services'' (section 1883(a)(1) of the Act). Therefore, we believe it is appropriate and in the best interest of beneficiaries to monitor the quality of care provided in swing-bed hospitals similar to the manner in which we monitor quality of care for SNFs, and to be able to inform consumers of the various choices they have for post acute care services in their community. We are cognizant of the short length of stays in swing beds and realize that the current CMS quality measures may not be applicable in many instances for swing-bed providers. However, we will not be able to make a sound decision unless we first gather the data to determine the best avenue for measuring quality similar to SNFs. Based on comments received, we will limit the items to be collected in the MDS 3.0 swing-bed assessment to the required demographic, payment, and quality items. The MDS 3.0 swing-bed assessment will be similar to the MDS 3.0 MPAF; however, it will contain fewer items, as the MPAF includes clinical items that are not required for payment or quality measures. We will begin collecting the data from swing-bed facilities starting October 1, 2010, and then, once sufficient information is obtained, we will conduct an analysis

that includes (but is not limited to) the following: (1) Whether the length of stay in swing beds is adequate to measure changes (or outcomes) in patient care; (2) Whether these changes are measurable and attainable; and (3) Which quality measures are appropriate. We will also determine the best venue to share quality data on swing beds with consumers. Because CAHs are not subject to SNF PPS and MDS requirements at this time, they will not be required to complete the MDS 3.0 and, thus, are not affected by the policy to collect quality data from swing beds based on MDS data.

IV. Provisions of the Final Rule

This final rule incorporates the provisions of the regulations text of the proposed rule (74 FR 22208), as herein modified. We have adopted the proposed changes from the above captioned proposed rule with regard to the Resident Assessment Instrument under the MDS 3.0 (including an implementation schedule) provision that will be introduced in conjunction with the RUG–IV classification system.

In § 483.315(h), we have removed the term ''survey'' and replaced it with ''agency''.

In § 483.315(h)(3), we have removed the word ''all''.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

Section 483.20 Resident Assessment

Section 483.20(b) requires the facility to make a comprehensive assessment of a resident's needs using the resident assessment instrument (RAI) provided by the State.

Section 483.20(f)(3) requires upon completion of the RAI for the facility to electronically transmit encoded, accurate, complete MDS data to the CMS system.

While there is burden associated with the requirements found under Section 483.20, they are currently approved under OMB# 0938–0739.

Section 483.315 Specification of Resident Assessment Instrument

Section 483.315(h) requires the facility to support and maintain the CMS State system and database and analyze data and generate and transmit reports as specified by CMS.

While there is burden associated with this requirement, we believe this requirement is exempt from the PRA as stated in sections 4204(b) and 4214(d) of the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987, Pub. L. 100–203), which specifically waive PRA requirements with respect to the revised requirements for participation introduced by the nursing home reform legislation.

In the FY 2002 SNF PPS proposed rule (66 FR 24026–28, May 10, 2001) and final rule (66 FR 39594–96, July 31, 2001), we invited and discussed public comments on the information collection aspects of establishing the existing, abbreviated MDS completion requirements that apply to rural swing-bed hospitals paid under the SNF PPS (CMS–10064, OMB# 0938–0872, 73 FR 30105, May 23, 2008). Similarly, in the FY 2010 proposed rule (74 FR 22208, 22250, May 12, 2009), we invited public comment with respect to the expansion of MDS reporting requirements so that the quality measures currently in place for all other SNF PPS facilities can be applied to swing-bed hospitals, as discussed previously in section III.H of this final rule. Specifically, we proposed to replace the SB–MDS with the MDS 3.0 version of the MPAF.

If you comment on these information collection and recordkeeping requirements, please submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget,

Attention: CMS Desk Officer, [1410–F].

Fax: (202) 395–6974; or

E-mail: OIRA_submission@omb.eop.gov.

VI. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (September 19, 1980, RFA, Pub. L. 96–354), section 1102(b) of the Social Security Act (the Act), the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This final rule is an economically significant rule under Executive Order 12866, because we estimate the FY 2010 impact reflects a $690 million increase from the update to the payment rates and a $1.05 billion reduction (on an incurred basis) from the recalibration of the case-mix adjustment, thereby yielding a net decrease of $360 million in payments to SNFs. For FY 2011, we estimate that there will be no aggregate impact on payments as a result of the implementation of the RUG–IV model, which will be introduced on a budget neutral basis. The final FY 2011 impacts will be issued prior to August 1, 2010, and will include the FY 2011 market basket update, FY 2011 wage index, and any further FY 2011 policy changes. Furthermore, we are also considering this a major rule as defined in the Congressional Review Act (5 U.S.C. 804(2)).

The update set forth in this final rule would apply to payments in FY 2010. In addition, we include a preliminary estimate of the impact of the introduction of the RUG–IV model on FY 2011 payments. In accordance with the requirements of the Act, we will publish a notice for each subsequent FY that will provide for an update to the payment rates and include an associated impact analysis. Therefore, final estimates for FY 2011 will be published prior to August 1, 2010.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small businesses or other small entities. For

purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Most SNFs and most other providers and suppliers are small entities, either by their nonprofit status or by having revenues of $13.5 million or less in any 1 year. For purposes of the RFA, approximately 51 percent of SNFs are considered small businesses according to the Small Business Administration's latest size standards, with total revenues of $13.5 million or less in any 1 year (for further information, *see http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*). Individuals and States are not included in the definition of a small entity. In addition, approximately 29 percent of SNFs are nonprofit organizations.

This final rule updates the SNF PPS rates published in the final rule for FY 2009 (73 FR 46416, August 8, 2008) and the associated correction notice (73 FR 56998, October 1, 2008), thereby decreasing net payments by an estimated $360 million. As indicated in Table 17a, the effect on facilities will be a net negative impact of 1.1 percent. The total impact reflects a $1.05 billion reduction from the recalibration of the case-mix adjustment, offset by a $690 million increase from the update to the payment rates. We also note that the percent decrease will vary due to the distributional impact of the FY 2010 wage indexes and the degree of Medicare utilization. For FY 2011, we estimate that there will be no aggregate impact on payments due to the introduction of the RUG–IV model. However, we estimate that there will be distributional impacts that vary from slight increases to slight decreases due to the case-mix distribution of individual providers.

Guidance issued by the Department of Health and Human Services, on the proper assessment of the impact on small entities in rulemakings, utilizes a revenue impact of 3 to 5 percent as a significance threshold under the RFA. While this final rule is considered economically significant, its relative impact on SNFs overall is small because Medicare is a relatively minor payer source for nursing home care. We estimate that Medicare covers approximately 10 percent of service days, and approximately 20 percent of payments. However, the distribution of days and payments is highly variable, with the majority of SNFs having significantly lower Medicare utilization. As a result, for most facilities, the impact to total facility revenues, considering all payers, should be substantially less than those shown in Table 17a. Therefore, the Secretary has determined that this final rule would not have a significant impact on a substantial number of small entities. However, in view of the potential economic impact on small entities, we have considered alternatives as described in section III.K.3 of this final rule.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. This final rule will affect small rural hospitals that (a) furnish SNF services under a swing-bed agreement or (b) have a hospital-based SNF. We anticipate that the impact on small rural hospitals will be similar to the impact on SNF providers overall. Therefore, the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates regulations that impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule would have no substantial direct effect on State and local governments, preempt State law, or otherwise have Federalism implications. Further, while we realize that there is an impact on the Federal portion of the Medicaid payment, we have not yet determined the specific amount of that impact. However, we are working closely with State survey and Medicaid agencies to gain a better understanding of the impact from the transition to MDS 3.0 and the RUG–IV model.

Section 202 of UMRA also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2009, that threshold is approximately $133 million. This final rule would not impose spending costs on State, local, or Tribal governments in the aggregate, or by the private sector, of $133 million.

B. Anticipated Effects

This final rule sets forth updates of the SNF PPS rates contained in the final rule for FY 2009 (73 FR 46416, August 8, 2008) and the associated correction notice (73 FR 56998, October 1, 2008). Based on the above, we estimate the FY 2010 impact would be a net decrease of $360 million in payments to SNFs (this reflects a $1.05 billion reduction from the recalibration of the case-mix adjustment, offset by a $690 million increase from the update to the payment rates). The impact analysis of this final rule represents the projected effects of the changes in the SNF PPS from FY 2009 to FY 2010. We assess the effects by estimating payments while holding all other payment-related variables constant. Although the best data available is utilized, there is no attempt to predict behavioral responses to these changes, or to make adjustments for future changes in such variables as days or case-mix. In addition, we provide an impact analysis projecting the changes for FY 2011 due to the introduction of the RUG–IV model.

Certain events may occur to limit the scope or accuracy of our impact analysis, as this analysis is future-oriented and, thus, very susceptible to forecasting errors due to certain events that may occur within the assessed impact time period. Some examples of possible events may include newly legislated general Medicare program funding changes by the Congress, or changes specifically related to SNFs. In addition, changes to the Medicare program may continue to be made as a result of previously enacted legislation, or new statutory provisions. Although these changes may not be specific to the SNF PPS, the nature of the Medicare program is that the changes may interact and, thus, the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon SNFs.

In accordance with section 1888(e)(4)(E) of the Act, we update the payment rates for FY 2009 by a factor equal to the full market basket index percentage increase plus the FY 2008 forecast error adjustment to determine the payment rates for FY 2010. The special AIDS add-on established by section 511 of the MMA remains in effect until ''* * * such date as the Secretary certifies that there is an appropriate adjustment in the case mix * * *.'' We have not provided a separate impact analysis for the MMA provision. Our latest estimates indicate that there are slightly more than 2,700 beneficiaries who qualify for the AIDS add-on payment. The impact to Medicare is included in the ''total'' column of Table 17a. In updating the rates for FY 2010, we make a number of standard annual revisions and clarifications mentioned elsewhere in

this final rule (for example, the update to the wage and market basket indexes used for adjusting the Federal rates). These revisions increase payments to SNFs by approximately $690 million.

We estimate the net decrease in payments associated with this final rule to be $360 million for FY 2010. The decrease of $1.05 billion due to the recalibration of the case-mix adjustment, together with the market basket increase of $690 million, results in a net decrease of $360 million.

The FY 2010 impacts appear in Table 17a. The breakdown of the various categories of data in the table follows.

The first column shows the breakdown of all SNFs by urban or rural status, hospital-based or freestanding status, and census region.

The first row of figures in the first column describes the estimated effects of the various changes on all facilities. The next six rows show the effects on facilities split by hospital-based, freestanding, urban, and rural categories. The urban and rural designations are based on the location of the facility under the CBSA designation. The next twenty-two rows show the effects on urban versus rural status by census region.

The second column in the table shows the number of facilities in the impact database.

The third column of the table shows the effect of the annual update to the wage index. This represents the effect of using the most recent wage data available. The total impact of this change is zero percent; however, there are distributional effects of the change.

The fourth column shows the effect of recalibrating the case-mix adjustment to the nursing CMIs. As explained previously in section II.B.2 of this final rule, we are proposing this recalibration so that the CMIs more accurately reflect parity in expenditures under the refined, 53-group RUG system introduced in 2006 relative to payments made under the original, 44-group RUG system, and in order to keep the NTA component at the appropriate level specified in the FY 2006 SNF PPS final rule. The total impact of this change is a decrease of 3.3 percent. We note that some individual providers may experience larger decreases in payments than others due to case-mix utilization.

The fifth column shows the effect of all of the changes on the FY 2010 payments. The market basket increase of 2.2 percentage points is constant for all providers and, though not shown individually, is included in the total column. It is projected that aggregate payments will decrease by 1.1 percent, assuming facilities do not change their care delivery and billing practices in response.

As can be seen from Table 17a, the combined effects of all of the changes vary by specific types of providers and by location. For example, though nearly all facilities would experience payment decreases, providers in the rural Mountain region would show a slight increase of 0.1 percent for FY 2010 total payments. Of those facilities showing decreases, facilities in the urban New England and urban Mountain areas of the country show the smallest decreases.

TABLE 17A—PROJECTED IMPACT TO THE SNF PPS FOR FY 2010

	Number of facilities	Update wage data (percent)	Revised CMIs (percent)	Total FY 2010 change (percent)
Total	15,307	0.0	−3.3	−1.1
Urban	10,586	0.1	−3.3	−1.1
Rural	4,721	−0.3	−3.1	−1.3
Hospital based urban	1,675	−0.1	−3.4	−1.4
Freestanding urban	8,911	0.1	−3.3	−1.1
Hospital based rural	1,065	−0.2	−3.3	−1.4
Freestanding rural	3,656	−0.3	−3.1	−1.3
Urban by region:				
New England	832	0.8	−3.4	−0.5
Middle Atlantic	1,489	−0.1	−3.5	−1.4
South Atlantic	1,742	0.0	−3.2	−1.1
East North Central	2,024	−0.2	−3.2	−1.3
East South Central	539	−0.4	−3.3	−1.5
West North Central	874	0.3	−3.3	−0.9
West South Central	1,200	−0.4	−3.2	−1.5
Mountain	478	0.8	−3.2	−0.3
Pacific	1,402	0.4	−3.3	−0.8
Outlying	6	−0.1	−3.6	−1.5
Rural by region:				
New England	148	−0.8	−3.1	−1.8
Middle Atlantic	254	0.0	−3.3	−1.2
South Atlantic	593	0.0	−3.1	−1.0
East North Central	930	−0.5	−3.1	−1.5
East South Central	533	−0.2	−3.1	−1.2
West North Central	1,092	−0.5	−3.3	−1.6
West South Central	788	−0.5	−3.1	−1.4
Mountain	247	1.2	−3.2	0.1
Pacific	134	−0.3	−3.2	−1.3
Outlying	2	1.1	−3.9	−0.7
Ownership:				
Government	652	−0.2	−3.5	−1.5
Proprietary	11,302	0.0	−3.2	−1.1
Voluntary	3,353	0.1	−3.4	−1.1

Note: The Total column includes the 2.2 percent market basket increase.

Table 17b shows the estimated effects for the FY 2011 distributional changes due to the proposed RUG–IV classification system. Though the aggregate impact shows no change in total payments, it is estimated that some facilities will experience payment increases while others experience payment decreases due to the Medicare utilization under RUG–IV. For example, providers in the urban New England and urban Middle Atlantic regions show increases of 1.3 percent, while providers in the rural East North Central region show a decrease of 1.5 percent. In addition, voluntary providers show an increase of 0.2 percent, while there is no change for proprietary facilities in aggregate.

TABLE 17B—PROJECTED IMPACT OF RUG–IV FOR FY 2011

	Number of facilities	RUG–IV (percent)
Total	15,443	0.0
Urban	10,516	0.3
Rural	4,927	−0.8
Hospital based urban	609	−1.4
Freestanding urban	9,907	0.4
Hospital based rural	426	−0.8
Freestanding rural	4,501	−0.8
Urban by region:		
New England	833	1.3
Middle Atlantic	1,479	1.3
South Atlantic	1,724	−0.6
East North Central	2,018	0.0
East South Central	523	1.2
West North Central	864	0.1
West South Central	1,169	0.9
Mountain	472	−0.5
Pacific	1,427	0.2
Outlying	7	0.5
Rural by region:		
New England	155	−1.3
Middle Atlantic	270	0.6
South Atlantic	622	−0.9
East North Central	945	−1.5
East South Central	557	−0.1
West North Central	1,123	−0.2
West South Central	846	−1.2
Mountain	265	−0.9
Pacific	144	−1.1
Outlying	0	0.0
Ownership:		
Government	840	1.4
Proprietary	10,539	0.0
Voluntary	4,064	0.2

Note: The wage index column is not included for FY 2011, as the FY 2011 wage index is unknown. In addition, the Total column is not included for FY 2011, as the market basket is unknown.

Comment: Several commenters expressed concern that the proposed RUG–IV case-mix classification system would adversely affect them from a fiscal standpoint. One commenter specifically cited the proposal to allocate concurrent therapy and the change in the method to calculate the ADL index.

Response: The aggregate impact of the RUG–IV case-mix classification is budget neutral. We caution providers on determining the fiscal impact of RUG–IV based on only one or two areas of the entire system. Although we are making changes to the ADL index and allocation of concurrent therapy, the total payment rate is based on the combination of the nursing and therapy components. Total payment rates for therapy groups are not projected to decrease. Even after we consider that many patients will fall into lower rehabilitation RUGs under the allocation of concurrent therapy, because of the increase to the nursing CMIs to adjust for parity, total payment rates may actually be higher under RUG–IV for some comparable patients. We realize that there are distributional effects determined by an individual provider's case-mix utilization and some providers will be negatively affected. In examining the impacts presented in the table above for FY 2011, there are subsets of providers that are positively affected and other subsets that are negatively affected. However, in looking at large subsets such as the ownership type, proprietary owners are expected to be budget neutral, whereas voluntary providers are expected to see a slight increase in payments (0.2 percent) compared to RUG–III.

Another effect of the introduction of the RUG–IV model is a re-distribution of dollars between payment groups that focus on rehabilitation in contrast to those focused primarily on nursing services. In order to further understand the changes to specific provider types and case-mix, we evaluated the individual effect on the nursing and therapy portion of total payments. Table 18 shows the nursing and therapy percentage change as a portion of total payments by comparing the nursing and therapy rate components using the RUG–III CMIs and RUG–IV CMIs. As shown in Table 18, although hospital-based facilities do not show as large an increase in the nursing portion of total payments, they also show a slightly smaller decrease in the therapy portion of their payments. We expect that facilities providing more intensive

nursing services will show increases in payments under the proposed RUG–IV model.

TABLE 18—PERCENTAGE CHANGE IN PAYMENT FOR THE NURSING AND THERAPY COMPONENTS

Rate component	Urban (percent)	Rural (percent)
Nursing CMIs—Freestanding	21.8	20.7
Nursing CMIs—Hospital-Based	11.0	11.6
Therapy CMIs—Freestanding	−41.5	−41.2
Therapy CMIs—Hospital-Based	−41.1	−40.7

We further note that while this analysis is focused primarily on the anticipated impact to the Medicare program, we understand that States are also concerned about potential systems needs to address the transition to the MDS 3.0 and the RUG–IV case-mix system. Although our systems analysis showed that the transition to a national CMS data collection system would retain all existing functionality, we have been working closely with the State Agencies (SAs) to verify that the transition will be as seamless as possible. Starting in the Fall of 2008, we initiated monthly conference calls between CMS staff and representatives from the State Survey and Medicaid agencies to make sure that we have taken all State systems needs into account, and to develop strategies to support the SAs. Our progress has been hampered by three factors. First, many States have developed MDS-based applications to support a variety of State functions beyond the typical survey and payment operations. We are developing a comprehensive list of all affected State functions currently using the MDS so we can develop ways for the States to access the data once we adopt the MDS 3.0 format. Second, most States have customized their Medicaid payment systems, which means that potential CMS data solutions cannot utilize a ''one size fits all'' approach.

The third issue is that the majority of the States have not yet reached a final decision on the payment system changes they will implement in October 2010. Some States will maintain their existing RUG–III payment systems and will simply need support to convert MDS 3.0 data into an MDS 2.0 format to continue calculating their Medicaid payments. Other States are considering adopting all or part of the RUG–IV model, and will need more extensive support.

We recently conducted a survey asking each State to identify their likely transition scenarios and system costs and are beginning to analyze the information provided. We will continue to work with individual States and will develop a comprehensive transition plan that will include an analysis of the systems costs likely to be incurred under each transition approach; that is, maintaining a standard RUG–III payment structure, maintaining a customized RUG–III structure, and adopting all or part of RUG–IV.

For those States that will maintain their existing RUG–III based payment models, we have already started work on support systems that will allow States to convert or crosswalk the MDS 3.0 data to the current MDS 2.0 structure. The data specifications for these crosswalks are expected to be released by October 2010. We plan to work closely with the States to ensure a smooth transition.

State Medicaid agencies are not required to adopt the RUG–IV model and will only do so after careful consideration of the cost and benefit of such a change on an individual State-by-State basis. For those States choosing to adopt the RUG–IV model, CMS provides detailed program specifications free of charge, which will mitigate State program design costs associated with converting from RUG–III to RUG–IV. We intend to continue to work closely with State Medicaid agencies during the next year to assist them in evaluating the RUG–IV model for Medicaid use.

C. Alternatives Considered

We have determined that this final rule is an economically significant rule under Executive Order 12866. As described above, we estimate the FY 2010 impact will be a net decrease of $360 million in payments to SNFs, resulting from a $690 million increase from the update to the payment rates and a $1.05 billion reduction from the recalibration of the case-mix adjustment. In view of the potential economic impact, we considered the alternatives described below.

Section 1888(e) of the Act establishes the SNF PPS for the payment of Medicare SNF services for cost reporting periods beginning on or after July 1, 1998. This section of the statute prescribes a detailed formula for calculating payment rates under the SNF PPS, and does not provide for the use of any alternative methodology. It specifies that the base year cost data to be used for computing the SNF PPS payment rates must be from FY 1995 (October 1, 1994, through September 30, 1995). In accordance with the statute, we also incorporated a number of elements into the SNF PPS (for example, case-mix classification methodology, the MDS assessment schedule, a market basket index, a wage index, and the urban and rural distinction used in the development or adjustment of the Federal rates). Furthermore, section 1888(e)(4)(H) of the Act specifically requires us to disseminate the payment rates for each new FY through the **Federal Register**, and to do so before the August 1 that precedes the start of the new FY. Accordingly, we are not pursuing alternatives with respect to the payment methodology as discussed above. However, in view of the potential economic impact on small entities, we have voluntarily considered alternative approaches to the recalibration of the case-mix adjustments.

Using our authority to establish an appropriate adjustment for case mix under section 1888(e)(4)(G)(i) of the Act, this final rule recalibrates the adjustment to the nursing case-mix indexes based on actual CY 2006 data instead of FY 2001 data. In the SNF PPS final rule for FY 2006 (70 FR 45031, August 4, 2005), we committed to monitoring the accuracy and effectiveness of the case-mix indexes used in the 53-group model. We believe that using the CY 2006 actual claims data to perform the recalibration analysis results in case-mix weights that reflect the resources used, produces more accurate payment, and represents an appropriate case-mix adjustment. Using the CY 2006 data is consistent with our intent to make the change from the 44-group RUG model to the refined 53-group model in a budget-neutral manner, as described in section III.B.2.b of this final rule and in the SNF PPS

final rule for FY 2006 (70 FR 45031, August 4, 2005).

We investigated using alternative time periods in calculating the case-mix adjustments. One possibility was to use CY 2005 rather than CY 2006 data. However, using CY 2005 data still requires us to use a projection of the distributional shift to the nine new groups in the RUG–53 group model. We also looked at a second alternative, which involved comparing quarterly data periods directly before and after implementation of the RUG–53 model; for example, October through December 2005 for the RUG–44 model and January through March 2006 for the RUG–53 model. This approach uses a combination of projected and actual data for only a 6-month time period. However, we believe that using actual utilization data for the entire CY 2006 is more accurate, as actual case mix during the calibration year is the basis for computing the case-mix adjustment. Accordingly, we have determined that performing the recalibration using the CY 2006 data is the most appropriate methodology.

We considered various options for implementing the recalibrated case-mix adjustment. For example, we considered implementing partial adjustments to the case-mix indexes over multiple years until parity was achieved. However, we believe that these options would continue to reimburse in amounts that significantly exceed our intended policy. Moreover, as we move forward with programs designed to enhance and restructure our post-acute care payment systems, we believe that payments under the SNF PPS should be established at their intended and most appropriate levels. Stabilizing the baseline is a necessary first step toward implementing the RUG–IV classification methodology. As discussed in section III.C.2 of this final rule, RUG–IV will more accurately identify differences in patient acuity and will more closely tie reimbursement to the relative cost of goods and services needed to provide high quality care.

We believe the introduction of the RUG–IV classification system better targets payments for beneficiaries with greater care needs, improving the accuracy of Medicare payment. In addition, RUG–IV changes such as eliminating the ''look-back'' period for preadmission services correct for existing vulnerabilities in the RUG–53 system. Therefore, we believe it would be prudent to move to RUG–IV as quickly as possible. However, we also recognize the need to allow sufficient lead time to ensure an orderly and successful transition. Accordingly, while we initially considered implementing the RUG–IV model for FY 2010, we are instead implementing the system for FY 2011. Many of the refinements of the RUG–IV model are integrated into the MDS 3.0 resident assessment instrument. The transition to both the MDS 3.0 and the RUG–IV case-mix system requires careful planning, as it will affect multiple Medicare and Medicaid quality monitoring and production systems, including Medicaid PPS systems used by more than half the State agencies. In addition, State agencies, providers, and software vendors would benefit by receiving adequate time to prepare for a smooth transition. Therefore, we plan to implement RUG–IV for FY 2011.

Comment: One commenter expressed concern that hierarchical maximization, instead of index maximization, was used to estimate the distribution of RUG–IV days.

Response: We agree with the commenter that an index maximization approach provides the best estimation of the RUG–IV days of service distribution. The reason for this is that when RUG–IV is implemented for payment, an index maximizing approach will be used. However, use of RUG–IV hierarchical classification rather than index maximizing classification has very little impact on the fiscal estimates and simplified the work that was required to make those estimates.

The final fiscal estimates are based on the distribution of RUG–IV days obtained by applying the STRIVE transition matrix that cross-tabulated RUG–III classifications with RUG–IV classifications for STRIVE Medicare Part A residents. The RUG–III classification used index maximizing, but the RUG–IV classification used a hierarchical approach. Grouper code allowing RUG–IV index maximizing classification has not yet been developed and tested and, therefore, it was not possible to use the index maximizing approach for RUG–IV at this time.

When making fiscal estimates, it is absolutely critical that index maximizing be used for RUG–III. Index maximizing causes major shifts in the days of service for RUG–III. Most importantly, with index maximizing, some residents in RVL and all residents in RHX and RHL shift to either RMX or RML. In contrast, the use of index maximizing RUG–IV classification has very little impact on the fiscal estimates, because fewer residents will shift into other groups after index maximizing. With RUG–IV, index maximizing will only affect rare groups, and not all residents in a group will shift to another group. Analyses indicate that the maximum possible impact of RUG–IV index maximizing would be a 0.23 percent increase in total estimated RUG–IV payments. The actual impact is likely to be much less, probably 0.1 percent or less.

Comment: Several commenters expressed concern that the proposed rule's regulatory impact analysis significantly underestimated the total economic impact of the proposed policy changes, citing secondary effects such as indirect job losses and loss of tax revenue to the States.

Response: As indicated in the impact analysis, the changes due to the recalibration of the CMIs are expected to result in a net decrease in Medicare payments to SNFs of about 3.3 percent. This estimate represents the direct impact on SNFs and does not include any of the ''indirect,'' ''induced,'' or ''ripple'' effects that are raised by the commenters. Such secondary effects are extremely difficult to model and are highly uncertain as a result. Based on this uncertainty and the relatively small percentage of aggregate SNF revenues (from all payers) affected by this reduction, we cannot conclude with confidence that there will be significant impacts beyond those that are already described in the rule. Additionally, because these types of secondary effects are occurring within a dynamic, market-based economy, it is our expectation that the market will properly adjust its economic resources in reaction to the appropriately recalibrated SNF PPS payments. For these reasons, we believe that the regulatory impact analysis adequately estimates the proposed rule's economic impact.

Comment: A few commenters said that they could not fully evaluate the impact of RUG–IV because CMS failed to provide the FY 2011 market basket and wage index.

Response: Although the FY 2011 market basket and wage index are required to set the final FY 2011 payment rates, they are not necessary to evaluate the impact of RUG–IV. As discussed previously in this section, impacts are evaluated by determining the effect on payments of each policy change while holding all other payment-related variables constant. The market basket for FY 2011 will have the same impact for all providers. The FY 2011 wage index will produce the same distributional effect due to changes in wage data, regardless of the classification system. Thus, the market basket and wage index have no effect on the RUG–IV policy.

D. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 19, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. This table provides our best estimate of the change in Medicare payments under the SNF PPS as a result of the policies in this final rule based on the data for 15,307 SNFs in our database. All expenditures are classified as transfers from Medicare providers (that is, SNFs).

TABLE 19—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2009 SNF PPS FISCAL YEAR TO THE 2010 SNF PPS FISCAL YEAR

Category	Transfers
Annualized Monetized Transfers	−$360 million.*
From Whom To Whom?	Federal Government to SNF Medicare Providers.

*The net decrease of $360 million in transfer payments is a result of the decrease of $1.05 billion due to the recalibration of the case-mix adjustment, together with the market basket increase of $690 million.

E. Conclusion

Overall estimated payments for SNFs in FY 2010 are projected to decrease by $360 million, or 1.1 percent, compared with those in FY 2009. We estimate that SNFs in urban areas would experience a 1.1 percent decrease in estimated payments compared with FY 2009. We estimate that SNFs in rural areas would experience a 1.3 percent decrease in estimated payments compared with FY 2009. Providers in the rural New England region would show decreases in payments of 1.8 percent, the highest decreases for any region. This area shows the largest decrease in payments due to the wage index.

Though the FY 2011 aggregate impact due to the introduction of the RUG–IV model shows no change in payments, there are distributional effects for providers due to Medicare utilization. These effects range from a decrease of 1.5 percent for Rural East North Central facilities to an increase of 1.4 percent for Government facilities.

Finally, in accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 483

Grants programs—health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

■ 1. The authority citation for part 483 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Requirements for Long Term Care Facilities

■ 2. Amend § 483.20 by—
■ A. Republishing paragraph (b)(1) introductory text.
■ B. Revising paragraph (b)(1)(xvii).
■ C. Revising paragraph (f)(2).
■ D. Revising paragraph (f)(3) introductory text.

The revisions read as follows:

§ 483.20 Resident assessment.

* * * * *

(b) *Comprehensive assessment*—(1) *Resident assessment instrument.* A facility must make a comprehensive assessment of a resident's needs, using the resident assessment instrument (RAI) specified by the State. The assessment must include at least the following:

* * * * *

(xvii) Documentation of summary information regarding the additional assessment performed on the care areas triggered by the completion of the Minimum Data Set (MDS).

* * * * *

(f) * * *

(2) *Transmitting data.* Within 7 days after a facility completes a resident's assessment, a facility must be capable of transmitting to the CMS System information for each resident contained in the MDS in a format that conforms to standard record layouts and data dictionaries, and that passes standardized edits defined by CMS and the State.

(3) *Transmittal requirements.* Within 14 days after a facility completes a resident's assessment, a facility must electronically transmit encoded, accurate, and complete MDS data to the CMS System, including the following:

* * * * *

■ 3. Amend § 483.75 by revising the heading of paragraph (j) to read as follows:

§ 483.75 Administration.

* * * * *

(j) *Laboratory services.* * * *

* * * * *

Subpart F—Requirements that Must be Met by States and State Agencies, Resident Assessment

■ 4. Amend § 483.315 by—
■ A. Revising paragraph (d)(2).
■ B. Revising paragraph (e).
■ C. Removing and reserving paragraph (f).
■ D. Revising paragraph (h).
■ E. Revising paragraph (i) introductory text.
■ F. Revising paragraph (i)(2).

The revisions read as follows:

§ 483.315 Specification of resident assessment instrument.

* * * * *

(d) * * *

(2) Care area assessment (CAA) guidelines and care area triggers (CATs) that are necessary to accurately assess residents, established by CMS.

* * * * *

(e) *Minimum data set (MDS).* The MDS includes assessment in the areas specified in § 483.20(b)(i) through (xviii) of this chapter, and as defined in the RAI manual published in the State Operations Manual issued by CMS (CMS Pub. 100–07).

* * * * *

(h) *State MDS system and database requirements.* As part of facility agency responsibilities, the State Survey Agency must:

(1) Support and maintain the CMS State system and database.

(2) Specify to a facility the method of transmission of data, and instruct the facility on this method.

(3) Upon receipt of facility data from CMS, ensure that a facility resolves errors.

(4) Analyze data and generate reports, as specified by CMS.

(i) *State identification of agency that receives RAI data.* The State must identify the component agency that receives RAI data, and ensure that this agency restricts access to the data except for the following:

* * * * *

(2) Transmission of reports to CMS.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 23, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: July 29, 2009.

Kathleen Sebelius,

Secretary.

BILLING CODE 4120–01–P

[Note: The following Addendum will not appear in the Code of Federal Regulations]

Addendum:

Tables A & B - FY 2010 CBSA Wage Index Tables

Table C - RUG-III to RUG-IV Comparison

In this Addendum, we provide the wage index tables referred to in the preamble to this final rule. Tables A and B display the CBSA-based wage index values for urban and rural providers.

Table A: FY 2010 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.7946
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3462
10420	Akron, OH Portage County, OH Summit County, OH	0.8850
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.8899
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8777
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9399
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8012
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9611
11020	Altoona, PA Blair County, PA	0.8863
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8689
11180	Ames, IA Story County, IA	0.9493
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.2013
11300	Anderson, IN Madison County, IN	0.9052
11340	Anderson, SC Anderson County, SC	0.9023

CBSA Code	Urban Area (Constituent Counties)	Wage Index
11460	Ann Arbor, MI Washtenaw County, MI	1.0293
11500	Anniston-Oxford, AL Calhoun County, AL	0.7643
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9289
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9057
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9492
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9591
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1554
12220	Auburn-Opelika, AL Lee County, AL	0.8138
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9409

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12420	Austin-Round Rock, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9518
12540	Bakersfield, CA Kern County, CA	1.1232
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0214
12620	Bangor, ME Penobscot County, ME	1.0154
12700	Barnstable Town, MA Barnstable County, MA	1.2618
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8180
12980	Battle Creek, MI Calhoun County, MI	1.0000
13020	Bay City, MI Bay County, MI	0.9267
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8383
13380	Bellingham, WA Whatcom County, WA	1.1395
13460	Bend, OR Deschutes County, OR	1.1446
13644	Bethesda-Frederick-Gaithersburg, MD Frederick County, MD Montgomery County, MD	1.0298
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8781
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8780
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8554
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7637
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8394
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.9043
14060	Bloomington-Normal, IL McLean County, IL	0.9378
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9318
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.2186
14500	Boulder, CO Boulder County, CO	1.0266

CBSA Code	Urban Area (Constituent Counties)	Wage Index
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8469
14600	Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	0.9735
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0755
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2792
15180	Brownsville-Harlingen, TX Cameron County, TX	0.9020
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9178
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9740
15500	Burlington, NC Alamance County, NC	0.8749
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	1.0106
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1278
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0374
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8813
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9076
16020	Cape Girardeau-Jackson, MO-IL Alexander County, IL Bollinger County, MO Cape Girardeau County, MO	0.9047
16180	Carson City, NV Carson City, NV	1.0531

CBSA Code	Urban Area (Constituent Counties)	Wage Index
16220	Casper, WY Natrona County, WY	0.9520
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8984
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	1.0108
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8141
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9279
16740	Charlotte-Gastonia-Concord, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9474
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9372
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.8831
16940	Cheyenne, WY Laramie County, WY	0.9344

CBSA Code	Urban Area (Constituent Counties)	Wage Index
16974	Chicago-Naperville-Joliet, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0471
17020	Chico, CA Butte County, CA	1.1198
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9483
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.7980
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.7564
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.8914
17660	Coeur d'Alene, ID Kootenai County, ID	0.9235
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9498
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9821
17860	Columbia, MO Boone County, MO Howard County, MO	0.8618
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8789
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.8724
18020	Columbus, IN Bartholomew County, IN	0.9536
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	1.0101
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8693
18700	Corvallis, OR Benton County, OR	1.1002
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8045

CBSA Code	Urban Area (Constituent Counties)	Wage Index
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9853
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8666
19180	Danville, IL Vermilion County, IL	0.8738
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8323
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8284
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9211
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7799
19500	Decatur, IL Macon County, IL	0.7995
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8865
19740	Denver-Aurora-Broomfield, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0731
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9649
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9729
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7406
20100	Dover, DE Kent County, DE	0.9931
20220	Dubuque, IA Dubuque County, IA	0.8869
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0448
20500	Durham-Chapel Hill, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9618
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9567

CBSA Code	Urban Area (Constituent Counties)	Wage Index
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1061
20940	El Centro, CA Imperial County, CA	0.8766
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8388
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9489
21300	Elmira, NY Chemung County, NY	0.8341
21340	El Paso, TX El Paso County, TX	0.8541
21500	Erie, PA Erie County, PA	0.8779
21660	Eugene-Springfield, OR Lane County, OR	1.1034
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8522
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1114
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.3790
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8172
22140	Farmington, NM San Juan County, NM	0.7889
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9358
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8775
22380	Flagstaff, AZ Coconino County, AZ	1.2475
22420	Flint, MI Genesee County, MI	1.1234
22500	Florence, SC Darlington County, SC Florence County, SC	0.8114
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.7998
22540	Fond du Lac, WI Fond du Lac County, WI	0.9660
22660	Fort Collins-Loveland, CO Larimer County, CO	1.0175
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0383
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7861
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.8758
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9012
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9499
23420	Fresno, CA Fresno County, CA	1.1267

CBSA Code	Urban Area (Constituent Counties)	Wage Index
23460	Gadsden, AL Etowah County, AL	0.8266
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.8978
23580	Gainesville, GA Hall County, GA	0.9123
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9288
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8456
24140	Goldsboro, NC Wayne County, NC	0.9056
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7775
24300	Grand Junction, CO Mesa County, CO	0.9721
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9178
24500	Great Falls, MT Cascade County, MT	0.8354
24540	Greeley, CO Weld County, CO	0.9578
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9621
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9062
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9401
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9980
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3537
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.8783
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.8965
25260	Hanford-Corcoran, CA Kings County, CA	1.1010
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9286
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.9025
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1194
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7664
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.9000
25980	Hinesville-Fort Stewart, GA[1] Liberty County, GA Long County, GA	0.9028

CBSA Code	Urban Area (Constituent Counties)	Wage Index
26100	Holland-Grand Haven, MI Ottawa County, MI	0.8696
26180	Honolulu, HI Honolulu County, HI	1.1662
26300	Hot Springs, AR Garland County, AR	0.9004
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7875
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9841
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9097
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9064
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9436
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9742

CBSA Code	Urban Area (Constituent Counties)	Wage Index
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9548
27060	Ithaca, NY Tompkins County, NY	1.0112
27100	Jackson, MI Jackson County, MI	0.8720
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8186
27180	Jackson, TN Chester County, TN Madison County, TN	0.8581
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.9105
27340	Jacksonville, NC Onslow County, NC	0.8026
27500	Janesville, WI Rock County, WI	0.9201
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8709
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.7722
27780	Johnstown, PA Cambria County, PA	0.8233
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7722

CBSA Code	Urban Area (Constituent Counties)	Wage Index
27900	Joplin, MO Jasper County, MO Newton County, MO	0.8285
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0264
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0174
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9679
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	1.0448
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8702
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7999
28740	Kingston, NY Ulster County, NY	0.9367
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7881
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9862
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9915
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9181
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8516
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.7985
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0475
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	1.0567
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8390
29540	Lancaster, PA Lancaster County, PA	0.9204
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	0.9770
29700	Laredo, TX Webb County, TX	0.8078
29740	Las Cruces, NM Dona Ana County, NM	0.8939
29820	Las Vegas-Paradise, NV Clark County, NV	1.2130

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29940	Lawrence, KS Douglas County, KS	0.8580
30020	Lawton, OK Comanche County, OK	0.7847
30140	Lebanon, PA Lebanon County, PA	0.8119
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9570
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9085
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.8889
30620	Lima, OH Allen County, OH	0.9379
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9563
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8559
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.8993
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8049
31020	Longview, WA Cowlitz County, WA	1.0707
31084	Los Angeles-Long Beach-Santa Ana, CA Los Angeles County, CA	1.2039

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31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.8964
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8751
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8521
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9826
31460	Madera-Chowchilla, CA Madera County, CA	0.7958
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.1234
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0171
31740	Manhattan, KS Geary County, KS Pottawatomie County, KS Riley County, KS	0.7878

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31860	Mankato-North Mankato, MN Blue Earth County, MN Nicollet County, MN	0.9177
31900	Mansfield, OH Richland County, OH	0.9100
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3704
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.8852
32780	Medford, OR Jackson County, OR	1.0070
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9268
32900	Merced, CA Merced County, CA	1.2123
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	0.9954
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9311
33260	Midland, TX Midland County, TX	0.9546
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0151
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1095
33540	Missoula, MT Missoula County, MT	0.9206
33660	Mobile, AL Mobile County, AL	0.7785
33700	Modesto, CA Stanislaus County, CA	1.2502
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7752
33780	Monroe, MI Monroe County, MI	0.8885
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8304
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8459
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7201
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0452
34620	Muncie, IN Delaware County, IN	0.8386

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34740	Muskegon-Norton Shores, MI Muskegon County, MI	0.9823
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8730
34900	Napa, CA Napa County, CA	1.4453
34940	Naples-Marco Island, FL Collier County, FL	0.9662
34980	Nashville-Davidson--Murfreesboro--Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9689
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2477
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1419
35300	New Haven-Milford, CT New Haven County, CT	1.1545
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9092
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.3005
35660	Niles-Benton Harbor, MI Berrien County, MI	0.8903
35980	Norwich-New London, CT New London County, CT	1.1399
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6404
36100	Ocala, FL Marion County, FL	0.8556
36140	Ocean City, NJ Cape May County, NJ	1.0160
36220	Odessa, TX Ector County, TX	0.9862
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9361
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8900
36500	Olympia, WA Thurston County, WA	1.1531

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36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9608
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.8951
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9152
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8357
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.2301
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9060
37380	Palm Coast, FL Flagler County, FL	0.9603
37460	Panama City-Lynn Haven-Panama City Beach, FL Bay County, FL	0.8324
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7716
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8433
37764	Peabody, MA Essex County, MA	1.0871
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8312

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37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9155
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.0739
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0630
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.7281
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8625
38340	Pittsfield, MA Berkshire County, MA	1.0658
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9239
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4220
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	1.0187

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38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1498
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	0.9896
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.1216
39140	Prescott, AZ Yavapai County, AZ	1.0121
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0782
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9548
39380	Pueblo, CO Pueblo County, CO	0.8570
39460	Punta Gorda, FL Charlotte County, FL	0.8774
39540	Racine, WI Racine County, WI	0.9373
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9663
39660	Rapid City, SD Meade County, SD Pennington County, SD	1.0046
39740	Reading, PA Berks County, PA	0.9263
39820	Redding, CA Shasta County, CA	1.4039
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0285
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9521
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1285
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8671
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1136

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40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8724
40420	Rockford, IL Boone County, IL Winnebago County, IL	1.0152
40484	Rockingham County, NH Rockingham County, NH Strafford County, NH	1.0125
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.8845
40660	Rome, GA Floyd County, GA	0.8915
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.4073
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.9122
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.1107
41100	St. George, UT Washington County, UT	0.9236
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0189

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9102
41420	Salem, OR Marion County, OR Polk County, OR	1.0974
41500	Salinas, CA Monterey County, CA	1.5207
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9110
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9378
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.7914
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8857

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41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1752
41780	Sandusky, OH Erie County, OH	0.8888
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5874
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4740
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6404

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41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.4363

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42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2550
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.1972
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.2213
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6735
42140	Santa Fe, NM Santa Fe County, NM	1.0694
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.5891
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9043
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8375
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1577
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9362
43100	Sheboygan, WI Sheboygan County, WI	0.9166
43300	Sherman-Denison, TX Grayson County, TX	0.8064
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8383
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.9094
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.8983
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9690
43900	Spartanburg, SC Spartanburg County, SC	0.9341
44060	Spokane, WA Spokane County, WA	1.0444
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9545
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0373
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8453
44220	Springfield, OH Clark County, OH	0.9195
44300	State College, PA Centre County, PA	0.9096
44700	Stockton, CA San Joaquin County, CA	1.2331
44940	Sumter, SC Sumter County, SC	0.8152
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9785
45104	Tacoma, WA Pierce County, WA	1.1195

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45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8406
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.8982
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9061
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8113
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9541
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.9026
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0552
46060	Tucson, AZ Pima County, AZ	0.9505
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8662

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46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8698
46340	Tyler, TX Smith County, TX	0.8312
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8460
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.7944
46700	Vallejo-Fairfield, CA Solano County, CA	1.4934
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8054
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0207
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8960
47300	Visalia-Porterville, CA Tulare County, CA	1.0221
47380	Waco, TX McLennan County, TX	0.8377

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47580	Warner Robins, GA Houston County, GA	0.8754
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9806
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0882
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8518
48140	Wausau, WI Marathon County, WI	0.9440
48260	Weirton-Steubenville, WV-OH Jefferson County, OH Brooke County, WV Hancock County, WV	0.7368
48300	Wenatchee-East Wenatchee, WA Chelan County, WA Douglas County, WA	0.9719
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9879
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6869
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.9018
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.9197
48700	Williamsport, PA Lycoming County, PA	0.7877
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0555
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.8986
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	0.9777
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.8953
49340	Worcester, MA Worcester County, MA	1.1089
49420	Yakima, WA Yakima County, WA	0.9949

CBSA Code	Urban Area (Constituent Counties)	Wage Index
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3348
49620	York-Hanover, PA York County, PA	0.9299
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8679
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1265
49740	Yuma, AZ Yuma County, AZ	0.9143

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

Table B: FY 2010 WAGE INDEX BASED ON CBSA LABOR MARKET AREAS FOR RURAL AREAS

State Code	Nonurban Area	Wage Index
1	Alabama	0.7327
2	Alaska	1.1669
3	Arizona	0.8790
4	Arkansas	0.7332
5	California	1.2001
6	Colorado	0.9929
7	Connecticut	1.1093
8	Delaware	0.9910
10	Florida	0.8566
11	Georgia	0.7623
12	Hawaii	1.1113
13	Idaho	0.7733
14	Illinois	0.8312
15	Indiana	0.8529
16	Iowa	0.8624
17	Kansas	0.8167
18	Kentucky	0.7813
19	Louisiana	0.7611
20	Maine	0.8579
21	Maryland	0.9131
22	Massachusetts[1]	1.1700
23	Michigan	0.8778
24	Minnesota	0.9160
25	Mississippi	0.7638
26	Missouri	0.7671
27	Montana	0.8399
28	Nebraska	0.8705
29	Nevada	0.9674
30	New Hampshire	0.9957
31	New Jersey[1]	-----
32	New Mexico	0.8938
33	New York	0.8269
34	North Carolina	0.8535
35	North Dakota	0.7813
36	Ohio	0.8506
37	Oklahoma	0.7654
38	Oregon	1.0236
39	Pennsylvania	0.8306
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	-----
42	South Carolina	0.8394
43	South Dakota	0.8510
44	Tennessee	0.7808
45	Texas	0.7759
46	Utah	0.8363
47	Vermont	0.9763
48	Virgin Islands	0.7416
49	Virginia	0.7869
50	Washington	1.0224
51	West Virginia	0.7396
52	Wisconsin	0.9206
53	Wyoming	0.9535
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2010. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2009.

Table C: RUG-III to RUG-IV COMPARISON

RUG-III and RUG-IV COMPARISON

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
ULTRA HIGH REHABILITATION PLUS EXTENSIVE SERVICES	ULTRA HIGH REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	16-18	RUX	Not used	11-16	RUX	Not used
		7-15	RUL	Not used	2-10	RUL	Not used

VERY HIGH REHABILITATION PLUS EXTENSIVE SERVICES	VERY HIGH REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	16-18	RVX	Not used	11-16	RVX	Not used
		7-15	RVL	Not used	2-10	RVL	Not used

HIGH REHABILITATION PLUS EXTENSIVE SERVICES	HIGH REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	13-18 7-12	RHX RHL	Not used Not used	11-16 2-10	RHX RHL	Not used Not used

MEDIUM REHABILITATION PLUS EXTENSIVE SERVICES	MEDIUM REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines; AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines; AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	15-18 7-14	RMX RML	Not used Not used	11-16 2-10	RMX RML	Not used Not used

LOW REHABILITATION PLUS EXTENSIVE SERVICES	LOW REHABILITATION PLUS EXTENSIVE SERVICES
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 45 minutes/week minimum AND 3 days any combination of 3 rehabilitation disciplines; AND Nursing rehabilitation, 2 or more services, 6 or more days/week (see Reduced Physical Function for nursing rehab services count) AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. AND 3 days any combination of 3 rehabilitation disciplines AND Restorative nursing, 2 or more services, 6 or more days/week (see Reduced Physical Function for restorative nursing services) AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2

ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
7-18	RLX	Not used	2-16	RLX	Not used

RUG-III and RUG-IV COMPARISON

Rehabilitation

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
ULTRA HIGH REHABILITATION	ULTRA HIGH REHABILITATION	ADL	CODES	END SPLITS	ADL	CODES	END
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week	16-18	RUC	Not Used	11-16	RUC	Not Used
		9-15	RUB	Not Used	6-10	RUB	Not Used
		4-8	RUA	Not Used	0-5	RUA	Not Used
VERY HIGH REHABILITATION	VERY HIGH REHABILITATION	ADL	CODES	END	ADL	CODES	END
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	16-18	RVC	Not Used	11-16	RVC	Not Used
		9-15	RVB	Not Used	6-10	RVB	Not Used
		4-8	RVA	Not used	0-5	RVA	Not Used
HIGH REHABILITATION	HIGH REHABILITATION	ADL	CODES	END	ADL	CODES	END
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	13-18	RHC	Not Used	11-16	RHC	Not Used
		8-12	RHB	Not Used	6-10	RHB	Not Used
		4-7	RHA	Not Used	0-5	RHA	Not Used
MEDIUM REHABILITATION	MEDIUM REHABILITATION	ADL	CODES	END	ADL	CODES	END
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines	15-18	RMC	Not Used	11-16	RMC	Not Used
		8-14	RMB	Not Used	6-10	RMB	Not Used
		4-7	RMA	Not Used	0-5	RMA	Not Used
LOW REHABILITATION	LOW REHABILITATION	ADL	CODES	END	ADL	CODES	END
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 45 minutes/week minimum AND 3 days any combination of 3 rehabilitation disciplines AND Nursing rehabilitation, 2 or more services, 6 or more days/week (see Reduced Physical Function for nursing rehab services count)	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 45 minutes/week minimum AND 3 days any combination of 3 rehabilitation disciplines AND Restorative nursing, 2 or more services, 6 or more days/week (see Reduced Physical Function for restorative nursing services)	14-18	RLB	Not Used	11-16	RLB	Not Used
		4-13	RLA	Not Used	0-10	RLA	Not Used

RUG-III and RUG-IV COMPARISON
Extensive Services

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
EXTENSIVE SERVICES	EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents receiving the following complex clinical care: IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more Notes: Comorbidities count for end split	Residents receiving the following complex clinical care: Tracheostomy care while a resident OR Ventilator or respirator while a resident OR Isolation for active infectious disease while a resident AND ADL score >=2 Notes: Qualifiers count for end splits	7-18	SE3	Count of other categories (special care, clinically complex, impaired cognition), plus IV medications, plus IV feeding. Extensive Count of 4 or 5	2-16	ES3	Tracheostomy care (while a resident) **AND** ventilator or respirator (while a resident)
		7-18	SE2	Count of other categories (special care, clinically complex, impaired cognition), plus IV medications, plus IV feeding. Extensive Count of 2 or 3	2-16	ES2	Tracheostomy care (while a resident) **OR** ventilator or respirator (while a resident)
		7-18	SE1	Count of other categories (special care, clinically complex, impaired cognition), plus IV medications, plus IV feeding. Extensive Count of 0 or 1	2-16	ES1	Isolation for active infectious disease (while a resident)

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
SPECIAL CARE	SPECIAL CARE HIGH	ADL	CODES	END	ADL	CODES	END
Extensive Services qualifier	Residents receiving the following complex clinical care or with a following medical condition:	17-18	SSC	Not Used	15-16	HE2	Signs of Depression
AND	Comatose and completely ADL dependent;				15-16	HE1	No Signs of Depression
ADL of 6 or less;	septicemia;	15-16	SSB	Not Used	11-14	HD2	Signs of Depression
OR	diabetes with daily injections requiring physician order changes on 2 or more days;				11-14	HD1	No Signs of Depression
Any one of the following Special Care Qualifiers;	quadriplegia and ADL score >=5;	4-14	SSA	Not Used	6-10	HC2	Signs of Depression
cerebral palsy, multiple sclerosis or quadriplegia with and ADL sum ≥ 10;	chronic obstructive pulmonary disease and shortness of breath when lying flat;				6-10	HC1	No Signs of Depression
respiratory therapy for 7 days;	fever with pneumonia, or vomiting, or weight loss, or feeding tube;				2-5	HB2	Signs of Depression
feeding tube (calories ≥ 51%, or calories = 26-50% and fluid ≥ 501 cc) and aphasia;	parenteral/IV feedings;				2-5	HB1	No Signs of Depression
radiation therapy;	respiratory therapy for 7 days						
receiving therapy for surgical wounds/open lesions or ulcers (2 sites, any stage; or 1 site stage 3 or 4);	AND						
fever with dehydration, pneumonia, vomiting, weight loss, or feeding tube (calories ≥ 51%, or calories = 26-50% and fluid ≥ 501cc)	ADL score >=2						
AND							
ADL score of 7 or more							
	Notes: Signs of depression used for end splits; PHQ score =>9.5						
SPECIAL CARE	SPECIAL CARE LOW	ADL	CODES	END	ADL	CODES	END
Extensive Services qualifier	Residents receiving the following complex clinical care or with a following medical condition:	17-18	SSC	Not Used	15-16	LE2	Signs of Depression
AND	Cerebral palsy and ADL score >=5;				15-16	LE1	No Signs of Depression
ADL of 6 or less;	multiple sclerosis and ADL score >=5;	15-16	SSB	Not Used	11-14	LD2	Signs of Depression
OR	Parkinson's disease and ADL score >=5;				11-14	LD1	No Signs of Depression
Any one of the following Special Care Qualifiers:	respiratory failure and oxygen therapy while a resident;	4-14	SSA	Not Used	6-10	LC2	Signs of Depression
cerebral palsy, multiple sclerosis or quadriplegia with and ADL sum ≥ 10;	feeding tube (calories ≥ 51%, or calories = 26 -50% and fluid ≥ 501 cc);				6-10	LC1	No Signs of Depression
respiratory therapy for 7 days;	ulcers (2 or more stage II or 1 or more stage III or IV pressure ulcers; or 2 or more venous/arterial ulcers; or 1 stage II pressure ulcer and 1 venous/arterial ulcer) with 2 or more skin treatments;				2-5	LB2	Signs of Depression
feeding tube (calories ≥ 51%, or calories = 26-50% and fluid ≥ 501 cc) and aphasia;	foot infection, diabetic foot ulcer, or open lesions on the foot with treatment;				2-5	LB1	No Signs of Depression
radiation therapy;	radiation therapy while a resident;						
receiving therapy for surgical wounds/open lesions or ulcers (2 sites, any stage; or 1 site stage 3 or 4);	dialysis while a resident						
fever with dehydration, pneumonia, vomiting, weight loss, or feeding tube (calories ≥ 51%, or calories = 26%-50% and fluid ≥ 501cc)	AND						
AND	ADL score >=2						
ADL score of 7 or more							
	Notes: Signs of depression used for end splits; PHQ score =>9.5						

RUG-III and RUG-IV COMPARISON

Clinically Complex

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS
CLINICALLY COMPLEX	CLINICALLY COMPLEX
Special Care qualifier	Residents with Extensive Services, Special Care High, or Special Care Low qualifier
AND	AND
ADL score of 6 or less	ADL score = 0 or 1
OR	OR
Any one of the following clinically complex qualifiers:	Residents with any one of the following clinically complex qualifiers:
Burns;	Pneumonia;
coma and not awake and completely ADL dependent;	hemiplegia and ADL score >=5;
septicemia;	surgical wounds or open lesions with treatment;
pneumonia,	burns;
foot infection/wound with treatment;	chemotherapy while a resident;
internal bleeding;	oxygen therapy while a resident;
dehydration;	IV medications while a resident;
tube feeding (calories ≥ 51%, or calories = 26%-50% and fluid ≥ 501 cc);	transfusions while a resident
oxygen therapy;	
transfusions;	
hemiplegia with ADL score > 10;	
chemotherapy;	
dialysis;	
physician visits 1 or more days and order changes 2 or more days (last 14 days);	
diabetes with injection 7 days/week requiring order change 2 days or more days (last 14 days);	
AND	
ADL of 7 or more	
	Notes: Signs of depression used for end splits; PHQ score =>9.5
Notes: Signs of depression used for end splits: three or more of any of the following mood items exhibited in the last 30 days negative statements, repetitive questions, repetitive verbalizations, persistent anger, self deprecation, unrealistic fears, rec	

RUG-III			RUG-IV		
ADL	CODES	END	ADL	CODES	END
17-18	CC2	Signs of Depression	15-16	CE2	Signs of Depression
17-18	CC1	No Signs of Depression	15-16	CE1	No Signs of Depression
12-16	CB2	Signs of Depression	11-14	CD2	Signs of Depression
12-16	CB1	No Signs of Depression	11-14	CD1	No Signs of Depression
4-11	CA2	Signs of Depression	6-10	CC2	Signs of Depression
4-11	CA1	No Signs of Depression	6-10	CC1	No Signs of Depression
			2-5	CB2	Signs of Depression
			2-5	CB1	No Signs of Depression
			0-1	CA2	Signs of Depression
			0-1	CA1	No Signs of Depression

RUG-III and RUG-IV COMPARISON

Behavioral Symptoms and Cognitive Performance

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS
IMPAIRED COGNITION	BEHAVIORAL SYMPTOMS and COGNITIVE PERFORMANCE
Score on MDS 2.0 Cognitive Performance Scale (CPS) ≥ 3 AND ADL score of 10 or less NOTES: No clinical variables used; CPS Score of "6" will be assigned Clinically Complex or PE2-PD1 See Reduced Physical Function for nursing rehab services count	Residents having cognitive impairment BIMS score <=9 or CPS >= 3 OR hallucinations or delusions OR Residents displaying any of the following on 4 or more days over last 7 days: physical or verbal behavioral symptoms toward others, other behavioral symptoms, rejection of care, or wandering AND ADL score <=5
BEHAVIOR PROBLEMS	
Wandering, physical abuse, verbal abuse, inappropriate behavior or resisted care on 4+ days/week OR hallucination or delusions AND ADL score of 10 or less Notes: Nursing rehab used for end splits See Reduced Physical Function for nursing rehab services count	Notes: Restorative nursing used for end splits See Reduced Physical Function for restorative nursing services count

RUG-III			RUG-IV		
ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
6-10	IB2	2 or more nursing rehab services on 6+ days/wk	2-5	BB2	2 or more restorative nursing, 6 or more days/wk
6-10	IB1	Less nursing rehab	2-5	BB1	Less restorative nursing
4-5	IA2	2 or more nursing rehab services on 6+ days/wk	0-1	BA2	2 or more restorative nursing, 6 or more days/wk
4-5	IA1	Less nursing rehab	0-1	BA1	Less restorative nursing
ADL	CODES	END SPLITS			
6-10	BB2	2 or more nursing rehab services on 6+ days/wk			
6-10	BB1	Less nursing rehab			
4-5	BA2	2 or more nursing rehab services on 6+ days/wk			
4-5	BA1	Less nursing rehab			

RUG-III and RUG-IV COMPARISON
Reduced Physical Function

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
REDUCED PHYSICAL FUNCTION	REDUCED PHYSICAL FUNCTION	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents whose needs are primarily for activities of daily living and general supervision.	Residents whose needs are primarily for activities of daily living and general supervision.	16-18	PE2	2 or more nursing rehab services on 6+ days/wk	15-16	PE2	2 or more restorative nursing, 6 or more days/wk
	Residents not qualifying for other categories	16-18	PE1	Less nursing rehab	15-16	PE1	Less restorative nursing
Nursing Rehab service count:	Restorative Nursing services:						
passive and/or active ROM	urinary and/or bowel training program;	11-15	PD2	2 or more nursing rehab services on 6+ days/wk	11-14	PD2	2 or more restorative nursing, 6 or more days/wk
amputation/prosthesis care training	passive and/or active ROM;	11-15	PD1	Less nursing rehab	11-14	PD1	Less restorative nursing
splint or brace assistance	splint and/or brace assistance;						
dressing or grooming training	bed mobility and/or walking training;	9-10	PC2	2 or more nursing rehab services on 6+ days/wk	6-10	PC2	2 or more restorative nursing, 6 or more days/wk
eating or swallowing training	transfer training;	9-10	PC1	Less nursing rehab	6-10	PC1	Less restorative nursing
transfer training	dressing and/or grooming training;						
bed mobility and/or walking training	eating and/or swallowing training;	6-8	PB2	2 or more nursing rehab services on 6+ days/wk	2-5	PB2	2 or more restorative nursing, 6 or more days/wk
communication training	amputation/prosthesis care training;	6-8	PB1	Less nursing rehab	2-5	PB1	Less restorative nursing
scheduled toileting plan and/or bladder retraining program	communication training						
		4-5	PA2	2 or more nursing rehab services on 6+ days/wk	0-1	PA2	2 or more restorative nursing, 6 or more days/wk
Notes: No clinical variables used	Notes: No clinical variables used	4-5	PA1	Less nursing rehab	0-1	PA1	Less restorative nursing

RUG-III and RUG-IV COMPARISON

ADL Index

RUG-III	RUG-IV
Sum scores for 4 ADLs: Toileting, bed mobility, and transfer scores: 1 for independent or supervision 3 for limited assistance 4 for extensive assistance or total dependence or activity did not occur AND at most 1 person physical assist 5 for extensive assistance or total dependence or activity did not occur AND 2+ person physical assist	Sum scores for 4 ADLs: Toileting, bed mobility, and transfer scores: 0 for Independent, supervision, or activity did not occur 1 for limited assistance 2 for extensive assistance with less than 2+ person assist 3 for total dependence with less than 2+ person assist 4 for extensive assistance or total dependence AND 2+ person assist
Eating scores: 1 for independent or supervision 2 for limited assistance 3 for extensive assistance OR parenteral or IV feeding OR tube feeding with calorie and fluid minimums Total ranges: 4-18	Eating scores: 0 for independent, supervision, limited assistance, or activity did not occur AND at most set-up help only 2 for independent, supervision, limited assistance, or activity did not occur AND 1+ person physical assist; 2 for extensive assistance or total dependence AND at most set-up help only 3 for extensive assistance AND 1+ person physical assist 4 for total dependence AND 1+ person physical assist Total ranges: 0-16

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Federal Register

Tuesday,
August 11, 2009

Part III

Securities and Exchange Commission

17 CFR Part 248

Regulation S–AM: Limitations on Affiliate Marketing; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 248

[Release Nos. 34–60423, IC–28842, IA–2911; File No. S7–29–04]

RIN 3235–AJ24

Regulation S–AM: Limitations on Affiliate Marketing

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting Regulation S–AM to implement Section 624 of the Fair Credit Reporting Act as amended by Section 214 of the Fair and Accurate Credit Transactions Act of 2003, which required the Commission and other Federal agencies to adopt rules implementing limitations on a person's use of certain information received from an affiliate to solicit a consumer for marketing purposes, unless the consumer has been given notice and a reasonable opportunity and a reasonable and simple method to opt out of such solicitations. The final rules implement the requirements of Section 624 with respect to investment advisers and transfer agents registered with the Commission, as well as brokers, dealers and investment companies.

DATES: *Effective Date:* September 10, 2009.

Compliance Date: Compliance will be mandatory as of January 1, 2010.

FOR FURTHER INFORMATION CONTACT: For information regarding the regulation as it relates to brokers, dealers, or transfer agents, contact Brice Prince, Special Counsel, or Ignacio Sandoval, Attorney, Office of Chief Counsel, Division of Trading and Markets, (202) 551–5550, or regarding the regulation as it relates to investment companies or investment advisers, contact Penelope Saltzman, Assistant Director, Office of Regulatory Policy, Division of Investment Management, (202) 551–6792, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission today is adopting Regulation S–AM, 17 CFR 248.101 through 248.128, under the Fair and Accurate Credit Transactions Act of 2003 (''FACT Act''),[1] the Securities Exchange Act of 1934 (the ''Exchange Act''),[2] the Investment Company Act of 1940 (the ''Investment Company Act''),[3] and the Investment Advisers Act (the ''Advisers Act'').[4]

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I. Background

Section 214 of the FACT Act added Section 624 to the Fair Credit Reporting Act (''FCRA'').[5] This new section of the FCRA gives consumers the right to restrict a person from making marketing solicitations to them using certain information about them obtained from the person's affiliate. Section 214 also required the Office of the Comptroller of the Currency (''OCC''), the Board of Governors of the Federal Reserve System (''Board''), the Federal Deposit Insurance Corporation (''FDIC''), the Office of Thrift Supervision, the National Credit Union Administration (''NCUA'') (collectively, the ''Banking Agencies'') and the Federal Trade Commission (''FTC'') (collectively with the Banking Agencies, the ''Agencies''), and the Commission, in consultation and coordination with one another, to issue rules implementing Section 624 of the FCRA.

Commission staff consulted and coordinated with staff of the Agencies in drafting rules to implement Section 624. As required by Section 214 of the FACT Act, Regulation S–AM is, to the extent possible, consistent with and comparable to the implementing regulations adopted by the Agencies.[6]

[1] Public Law 108–159, Section 214, 117 Stat. 1952, 1980 (2003).

[2] 15 U.S.C. 78q, 78w, and 78mm.

[3] 15 U.S.C. 80a–30 and 80a–37.

[4] 15 U.S.C. 80b–4 and 80b–11.

[5] *See* Public Law 108–159, Section 214, 117 Stat. 1952, 1980 (2003); 15 U.S.C. 1681s–3 and note. The FCRA sets standards for the collection, communication, and use of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

A portion of Section 214 of the FACT Act amended the FCRA to add a new Section 624, while other provisions of Section 214 were not incorporated into the FCRA. Throughout this release, references to ''Section 214'' or ''Section 624 of the FCRA'' are used depending on whether the reference is to Section 624 or to a portion of Section 214 not incorporated into the FCRA.

[6] *See* Banking Agencies, *Fair Credit Reporting Affiliate Marketing Regulations*, 72 FR 62910 (Nov. 7, 2007) (''Joint Rules''). Citations to particular

Regulation S–AM contains rules of general applicability that are substantially similar to the rules that have been adopted by the Agencies. Regulation S–AM also contains examples that illustrate the application of the general rules. These examples differ from those used by the Agencies in order to provide more meaningful guidance to financial institutions subject to the Commission's jurisdiction.

II. Overview of Comments Received and Explanation of Regulation S–AM

A. Overview of Comments Received

On July 8, 2004, the Commission proposed Regulation S–AM (the ''proposal'' or ''proposed rules'').[7] The Commission received 15 comments on the proposed rules from financial institutions and their representatives.[8] While a number of commenters generally supported the Commission's proposals,[9] others expressed concerns regarding particular provisions of the proposed rules. The most significant areas of concern raised by the commenters related to: (1) Proposed restrictions on ''constructive sharing''; (2) which affiliate would be responsible for providing the notice; (3) the proposed definitions for terms such as ''affiliate,'' ''eligibility information,'' ''clear and conspicuous,'' ''pre-existing business relationship,'' and ''marketing solicitation''; and (4) the scope of certain proposed exceptions to the proposed rules' notice and opt out requirements.[10] A more detailed discussion of the comments is contained in the Section-by-Section analysis below.

B. Explanation of Regulation S–AM

Regulation S–AM will allow a consumer, in certain limited situations, to block affiliates of a person subject to Regulation S–AM that the consumer does business with from soliciting the consumer based on certain ''eligibility information'' (*i.e.*, certain financial information, such as information regarding the consumer's transactions or experiences with the person) received from the person. Unlike Regulation S–P, the Commission's privacy rule,[11] Regulation S–AM does not prohibit the *sharing* of information with another entity. Instead, Regulation S–AM prohibits a company from *using* eligibility information received from an affiliate to make marketing solicitations to consumers, unless: (1) The potential marketing use of the information has been clearly, conspicuously, and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the marketing solicitation; and (3) the consumer has not opted out. Regulation S–AM also provides that a notice and opt out required under Regulation S–AM can be combined with other disclosures required by law, such as the initial and annual privacy notices required by Regulation S–P. Regulation S–AM also contains a number of exceptions to its notice and opt out requirements, such as when an affiliate making a marketing solicitation has a pre-existing business relationship with the consumer, or provides marketing material in response to an affirmative request by the consumer or in response to a communication initiated by the consumer. In addition, the Appendix to Regulation S–AM provides model forms that, when used properly, satisfy Regulation S–AM's requirement that an affiliate marketing notice be clear, conspicuous, and concise. Regulation S–AM also includes examples illustrating the applicability of the final rules to certain situations. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with the final rules.

As adopted, Regulation S–AM differs from the proposed rules in several significant ways. First, an affiliate communicating eligibility information is not responsible for providing an affiliate marketing notice. Instead, the notice may be provided by any affiliate identified in the notice that has, or has previously had, a pre-existing business relationship with the consumer to whom the notice is provided. Second, the final rules do not apply to ''constructive sharing'' scenarios, as considered in the Proposing Release. Third, the Commission requested and received comment on the use of oral notices, and after careful consideration of the comments, the final rules provide that notices cannot be delivered orally, but instead, must be delivered electronically or in writing. While consumers can elect to opt out orally after receipt of the notice, they may not orally revoke their opt out. Fourth, unlike the proposal which referred to ''making or sending'' marketing solicitations, the final rules eliminate the reference to ''send'' because we concluded, based on comments, that ''sending'' and ''making'' marketing solicitations are different activities. Fifth, the final rules clarify that an opt

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provisions of the ''Joint Rules'' refer to the numbering system used in the Board's final rules. *See* 12 CFR 222.1 to 222.28. *See also* FTC, *Affiliate Marketing Rule*, 72 FR 61424 (Oct. 30, 2007) (''FTC Rule'').

[7] *Limitations on Affiliate Marketing (Regulation S–AM)*, Exchange Act Release No. 49985 (July 8, 2004), 69 FR 42302 (July 14, 2004) (''Proposing Release'').

[8] The Securities Industries Association, n/k/a the Securities Industry and Financial Markets Association (''SIFMA'') submitted two comment letters. We consider these letters to be one comment. *See* Letters from Alan E. Sorcher, Vice President and Associate General Counsel, SIFMA to Jonathan G. Katz, Secretary, Commission (Aug. 13, 2004) (''SIFMA Letter I'') and from Alan E. Sorcher, Vice President and Associate General Counsel, SIFMA to Jonathan G. Katz, Secretary, Commission (Aug. 18, 2004) (''SIFMA Letter II'') (together ''SIFMA Letters''). Unless otherwise noted, all letters referred to below were addressed to the Secretary of the Commission.

See Letter from Michael E. Bleier, General Counsel, Mellon Financial Corporation (July 26, 2004) (''Mellon Letter''); Letter from Ira Friedman, Senior Vice President, Chief Privacy Officer and Special Counsel, Metropolitan Life Insurance Company (Aug. 3, 2004) (''MetLife Letter''); Letter from Larkin Fields, Senior Vice President and Chief Privacy Officer, United Services Automobile Association (Aug. 11, 2004) (''USAA Letter''); Letter from Jeffrey A. Tassey, Executive Director, Coalition to Implement the FACT Act (Aug. 12, 2004) (''Coalition Letter''); Letter from Monique S. Botkin, Counsel, Investment Counsel Association of America, Inc., n/k/a Investment Adviser Association (Aug. 12, 2004) (''IAA Letter''); Letter from Robert G. Rowe, III, Regulatory Counsel, Independent Community Bankers of America (Aug. 12, 2004) (''ICBA Letter''); Letter from Peter L. McCorkell, Senior Counsel, Wells Fargo & Company (Aug. 12, 2004) (''Wells Fargo Letter''); Letter from Roberta B. Meyer, Senior Counsel, Risk Classification, American Council of Life Insurers (''ACLI'') (Aug. 13, 2004) (''ACLI Letter''); Letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute (''ICI'') (Aug. 13, 2006) (''ICI Letter''); Letter from Henry H. Hopkins, Chief Legal Counsel, and Karen Nash-Goetz, Associate Legal Counsel, T. Rowe Price Associates, Inc. (Aug. 13, 2004) (''T. Rowe Price Letter''); Letter from J. Stephen Zielezienski, Vice President & Associate General Counsel, American Insurance Association (''AIA'') (Aug. 15, 2004) (''AIA Letter''); Letter from Beth L. Climo, Executive Director, American Bankers Association Securities Association (''ABASA'') (Aug. 16, 2004) (''ABASA Letter''); Letter from Robert C. Drozdowski, Vice President, Payments and Technology Policy, America's Community Bankers (''ACB'') (Aug. 16, 2004) (''ACB Letter''); Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable (''FSR'') (Aug. 16, 2004) (''FSR Letter''). Each of these letters is available at *http://www.sec.gov/rules/proposed/s72904.shtml*.

[9] *See, e.g.*, IAA Letter; ICI Letter; Mellon Letter; MetLife Letter.

[10] *See infra* Part III.D.

[11] Currently, Regulation S–P is codified at 17 CFR Part 248. With the adoption of Regulation S–AM, we are redesignating Regulation S–P as Subpart A of Part 248, and adopting Regulation S–AM as Subpart B of Part 248. We are also adopting technical and conforming amendments to Regulation S–P to reflect this change as detailed *infra* Part X. In particular, we are changing the current subpart designations within Regulation S–P to undesignated center headings, revising all references in Regulation S–P to ''this part'' to read ''this subpart,'' and for consistency with the term used in Regulation S–AM, revising all references to ''G–L–B Act'' to read ''GLBA.'' We are consolidating Regulation S–P and Regulation S–AM in Part 248 because both regulations address information sharing and safekeeping.

out notice may apply to eligibility information obtained in connection with one or more continuing relationships the consumer establishes with an entity or its affiliates, as long as the notice adequately describes the relationships covered by the notice. Sixth, the final rules include a new section describing the conditions under which a service provider for both an entity that has a pre-existing business relationship with a consumer and the entity's affiliate would be acting for the entity rather than its affiliate whose products or services are being marketed. Finally, the definition of ''affiliate,'' ''control,'' ''marketing solicitation,'' and ''pre-existing business relationship'' have been revised to reflect comments we received.[12]

III. Section-by-Section Analysis

While the Proposing Release placed Regulation S–AM in 17 CFR 247.1–247.28, the final rules are located in 17 CFR 248.101 through 248.128.[13]

A. Section 248.101 Purpose and Scope

We received no comments on proposed § 247.1, which identifies the purposes and scope of the rules, and we are adopting it as proposed, redesignated as § 248.101. Paragraph (a) of § 248.101 of Regulation S–AM provides that the purpose of Regulation S–AM is to implement the affiliate marketing provisions of Section 624 of the FCRA. Paragraph (b) of § 248.101 lists the entities to which the final rules apply. Although the FACT Act does not specifically identify the entities that are to be subject to the rules prescribed by the Commission,[14] Congress's inclusion of the Commission as one of the agencies required to adopt implementing regulations suggests that Congress intended that our rules apply to those entities that the Commission regulates, *i.e.*, brokers, dealers, and investment companies, as well as to investment advisers and transfer agents that are registered with the Commission (respectively, ''registered investment advisers'' and ''registered transfer agents,'' and, collectively, with brokers, dealers, and investment companies, ''Covered Persons'').[15] These entities are referred to as ''you'' throughout Regulation S–AM. We have excluded from the scope of the regulation broker-dealers registered by notice with the Commission under Section 15(b)(11) of the Exchange Act for the purpose of conducting business in security futures products (''notice-registered broker-dealers'').[16]

B. Section 248.102 Examples

We are adopting as proposed § 247.2, which clarifies the effect of the examples used in the rules and model forms, redesignated as § 248.102. Given the wide range of possible situations covered by Section 624 of the FCRA, Regulation S–AM includes general rules, provides more specific examples, and includes model opt out notice forms. The examples, which are not exclusive, provide guidance concerning the rules' application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with this subpart.[17] Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise under this subpart. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations. We received no comment on this section.

C. Section 248.120 Definitions

As noted, for consistency and ease of reference, Regulation S–AM generally follows the section numbering used in the Joint Rules and the FTC Rule. Therefore, the defined terms proposed under § 247.3 are now located in § 248.120. In addition, the examples corresponding to the definition of ''pre-existing business relationship,'' in proposed § 247.20(d)(1), are now included in the definition of ''pre-existing business relationship,'' which is redesignated as § 248.120(q)(2) in the final rules.[18]

1. Affiliate

We are revising the proposed definition of ''affiliate'' in response to issues raised by commenters. The proposal defined ''affiliate'' of a Covered Person as any person that is related by common ownership or common corporate control with the Covered Person. The proposed rule also provided that a Covered Person is considered an affiliate of another person for purposes of Regulation S–AM if: (1) The other person is regulated under Section 214 of the FACT Act by one of the Agencies; and (2) the rules adopted by that Agency treat the Covered Person as an affiliate of the other person.[19] The proposed

[12] These and other changes are discussed in greater detail *infra* Part III.

[13] *See supra* note 11. This numbering system differs slightly from the one used by the Agencies, but is still consistent with the Joint Rules—Regulation S–AM uses section numbers that are higher by 100 than those used in the Joint Rules. For example, references to § 22 of the Joint Rules would correspond to § 122 of Regulation S–AM. In addition, the Commission believes that placing Regulation S–AM in the same part of the CFR as the Commission's privacy rules (*i.e.*, Regulation S–P) will provide persons subject to the rules with an easier point of reference, especially since we expect that these persons would consolidate the notice and opt out requirements of the affiliate marketing rules together with those of the privacy rules.

[14] Section 214(b) of the FACT Act directed that regulations implementing Section 624 of the FCRA be prescribed by the ''Federal banking agencies, the National Credit Union Administration, and the [Federal Trade] Commission, with respect to the entities that are subject to their respective enforcement authority under Section 621 of the Fair Credit Reporting Act [15 U.S.C. 1681s] and the Securities and Exchange Commission * * *.'' *See* 15 U.S.C. 1681s–3 note. Section 621(a)(1) of the FCRA grants enforcement authority to the FTC for all persons subject to the FCRA ''except to the extent that enforcement * * * is specifically committed to some other government agency under subsection (b)'' of Section 621. 15 U.S.C. 1681s(a)(1). The Commission is not one of the agencies included under subsection (b). The Commission was added to the list of Federal agencies required by Section 214(b) to adopt regulations implementing Section 624 of the FCRA in conference committee. There is no legislative history on this issue.

[15] The term ''Covered Persons'' is used for the purposes of this release and is not a defined term in Regulation S–AM. The application of Regulation S–AM to investment companies, brokers, dealers (other than notice-registered broker-dealers), and registered transfer agents and investment advisers is consistent with Regulation S–P. Not all transfer agents, investment companies or investment advisers are required to register with the Commission. Section 17A(c) of the Exchange Act requires that transfer agents register with the appropriate regulatory agency, which can be the Commission, the Board, the OCC or the FDIC. 15 U.S.C. 78c(a)(34) (defining ''appropriate regulatory agency''); 15 U.S.C.78q–1(c) (describing the registration requirements for transfer agents). Section 6(f) of the Investment Company Act (15 U.S.C. 80a–6(f)) provides an exemption from registration for a closed-end investment company that elects to be regulated as a business development company pursuant to Section 54 of the Act (15 U.S.C. 80a–53). Sections 203 and 203A of the Advisers Act govern the registration of investment advisers with the Commission. *See* 15 U.S.C. 80b–3 and 80b–3a.

[16] *See* discussion of definitions of ''broker'' and ''dealer'' *infra* Parts III.C.2 and III.C.9. Notice-registered broker-dealers are subject to primary oversight by the Commodity Futures Trading Commission (''CFTC'') and are exempted from all but the core provisions of the laws administered by the Commission. We interpret Congress's exclusion of the CFTC from the list of financial regulators required by Section 214(b) of the FACT Act to prescribe regulations implementing Section 624 of the FCRA to mean that Congress did not intend for the Commission's rules under the FACT Act to apply to entities subject to primary oversight by the CFTC.

[17] The Joint Rules and the FTC Rule provide that, to the extent applicable, compliance with an example constitutes compliance with the Joint Rules and the FTC Rule, respectively. *See, e.g.*, 12 CFR 222.2. The examples in our final rules, however, do not provide the same safe harbor. The examples in Regulation S–AM are intended to describe the broad outlines of situations illustrating compliance with the applicable rule. However, the specific facts and circumstances relating to a particular situation will determine whether compliance with an example constitutes compliance with the rules.

[18] *See supra* note 13.

[19] Proposed § 247.3(a)(1)–(2). This provision was designed to prevent the disparate treatment of

definition followed the definition of ''affiliates'' in Section 2 of the FACT Act, which encompasses ''persons that are related by common ownership or affiliated by corporate control.'' [20]

Commenters noted with approval the proposed definition's general consistency with the definition of ''affiliate'' in the GLBA and Regulation S–P, but some suggested the definitions should be made more consistent.[21] Two commenters suggested that we eliminate the term ''corporate'' in the Regulation S–AM definition.[22] In addition, two commenters suggested that the Commission adopt the approach to the definition of affiliate taken under California's Financial Information Privacy Act (''California Privacy Law'').[23]

After considering the comments, we are revising the definition of ''affiliate'' to eliminate the term ''corporate'' from the definition.[24] The final definition harmonizes the various FCRA and FACT Act formulations, and the GLBA definition, by defining ''affiliate'' to mean ''any person that is related by common ownership or common control with'' another person. While Section 2 of the FACT Act contains the term ''corporate,'' we did not include it in the final rule in recognition of other types of control relationships that may give rise to affiliation under the rule.[25] In contrast to the other regulators, we did not replace the term ''person'' with ''company'' in the definition because certain of our Covered Persons are natural persons. For example, some brokers-dealers and some investment advisers registered with the Commission are sole proprietors. In contrast, banking charters are held by entities other than natural persons. This change to the definition of ''affiliate'' is intended to promote consistency in the Commission's rules and to prevent gaps in the coverage of Regulation S–AM. We do not believe that there is a substantive difference between the definitions of ''affiliate'' in the FACT Act and in Section 509 of the GLBA.[26] We are not, however, incorporating elements of the California Privacy Law into the definition. To do so would be beyond our congressional mandate, especially given that Congress itself could have incorporated those elements when amending the FCRA.

2. Broker

We received no comments on the proposed definition of ''broker'' and are adopting it as proposed.[27] The definition incorporates the definition of ''broker'' in the Exchange Act and excludes notice-registered brokers.[28]

3. Clear and Conspicuous

We are adopting the definition of ''clear and conspicuous'' as proposed to mean reasonably understandable and designed to call attention to the nature and significance of the information presented.[29] Persons may wish to consider a number of methods to make their notices clear and conspicuous, including those described below. Institutions are not required to implement any particular method or combination of methods to make their disclosures clear and conspicuous. Rather, the particular facts and circumstances will determine whether a disclosure is clear and conspicuous. Consistent with the Proposing Release, a notice or disclosure may be made reasonably understandable through various methods that include:

- Using clear and concise sentences, paragraphs, and sections;
- Using short explanatory sentences;
- Using bullet lists;
- Using definite, concrete, everyday words;
- Using active voice;
- Avoiding multiple negatives;
- Avoiding legal and highly technical business terminology; and
- Avoiding explanations that are imprecise and readily subject to different interpretations.[30]

A notice or disclosure could also use various design methods to call attention to the nature and significance of the information in it, including but not limited to:

- Using a plain-language heading;
- Using a typeface and type size that are easy to read;
- Using wide margins and ample line spacing; and
- Using boldface or italics for key words.[31]

Persons who choose to provide the notice or disclosure by using an Internet Web site may use text or visual cues to encourage the reader to scroll down the page, if necessary, to view the entire document. Persons may also take steps to ensure that other elements on the Web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice or disclosure.

If a notice or disclosure required under Regulation S–AM is combined with other information, methods for designing the notice or disclosure to call attention to the nature and significance of the information in it may include distinctive type sizes, styles, fonts, paragraphs, headings, graphic devices, and appropriate groupings of information. However, there is no need to use distinctive features, such as distinctive type sizes, styles, or fonts, to differentiate an affiliate marketing opt out notice from other components of a required disclosure. For example, the notice could be included in a GLBA privacy notice that combines several opt out disclosures in a single notice. Moreover, nothing in the clear and conspicuous standard requires segregation of the affiliate marketing opt out notice when it is combined with a GLBA privacy notice or other required disclosures.

We recognize that it will not be feasible or appropriate to incorporate all of the methods described above with respect to every affiliate marketing notice. We recommend, but do not require, that institutions consider the methods described above in designing their notices. We also encourage the use of consumer or other readability testing to devise notices that are understandable to consumers.

Five commenters addressed the proposed definition of ''clear and

affiliates within a holding company structure that are regulated by different Federal regulators and to make this provision of Regulation S–AM consistent with comparable provisions of the Agencies.

[20] Several FCRA provisions apply to information sharing with persons ''related by common ownership or affiliated by corporate control,'' ''related by common ownership or affiliated by common corporate control,'' or ''affiliated by common ownership or common corporate control.'' *See, e.g.*, FCRA Sections 603(d)(2), 615(b)(2), and 625(b)(2). Each of these provisions was enacted as part of the 1996 amendments to the FCRA. Similarly, Section 2(4) of the FACT Act defines the term ''affiliate'' to mean ''persons that are related by common ownership or affiliated by corporate control.'' In contrast, the Gramm-Leach-Bliley Act (''GLBA'') defines ''affiliate'' to mean ''any company that controls, is controlled by, or is under common control with another company.'' *See* 15 U.S.C. 6809(6).

[21] *See* ACB Letter; FSR Letter; IAA Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[22] *See* ICI Letter; T. Rowe Price Letter.

[23] *See* FSR Letter; Mellon Letter. These commenters noted that the California law places no restriction on information sharing among affiliates if they: (1) Are regulated by the same or similar functional regulators; (2) are involved in the same broad line of business, such as banking, insurance, or securities; and (3) share a common brand identity. *See* Cal. Financial Code Section 4053(c).

[24] Section 248.120(a).

[25] As discussed below, ''control'' is defined in Regulation S–AM to include control relationships that go beyond those based on corporate control. *See infra* Part III.C.8.

[26] This approach is also consistent with the Agencies' final rules. *See* Joint Rules at 72 FR 62912; FTC Rule at 72 FR 61426.

[27] *See* § 248.120(b), which was proposed as § 247.3(b).

[28] *See supra* note 16.

[29] *See* § 248.120(c), proposed as § 247.3(c).

[30] *See* Proposing Release at 69 FR 42305.

[31] *Id.*

conspicuous.'' [32] One commenter expressed approval of the proposed definition because of its similarity to the definition of the term found in Regulation S–P.[33] However, other commenters suggested that the definition could give rise to an increased risk of litigation and civil liability for financial institutions.[34] While these commenters recognized that the proposed definition was derived from the GLBA privacy regulations, they noted that compliance with the GLBA privacy regulations is enforced exclusively through administrative actions and not through private litigation. One commenter suggested the definition was unnecessary to ensure that consumers receive a clear and conspicuous notice as required by Section 624 of the FCRA, noting that other affiliate sharing notice and opt out requirements have operated in the FCRA for several years without a regulatory definition.[35] Commenters also pointed to the Board's withdrawal of a similar definition in other regulations as support for not including the definition.[36] In the alternative, one commenter suggested that the Commission and the Agencies issue questions and answers or non-exclusive examples indicating that compliance with one of these examples would satisfy the rule's requirements.[37] Another commenter suggested outlining reasonable expectations for what would be considered ''clear and conspicuous'' and suggested including reasonable protections against liability and administrative penalties when unintentional errors occur.[38]

Because the FACT Act requires that we provide specific guidance on how to comply with the clear and conspicuous standard,[39] we believe that it is important to both define ''clear and conspicuous'' in the final rules and provide specific guidance for how to satisfy that standard.[40] The Commission notes that an affiliate sharing opt out notice required under the FCRA, which may be enforced through private rights of action, must be included in a GLBA privacy notice.[41] Therefore, the affiliate sharing opt out notices generally are provided in a manner consistent with the clear and conspicuous standard set forth in the GLBA privacy regulations.[42] We believe that Covered Persons' experience in providing clear and conspicuous affiliate sharing notices should help them provide clear and conspicuous affiliate marketing notices under Regulation S–AM.

Accordingly, we are adopting the definition of ''clear and conspicuous'' as proposed.[43] We urge Covered Persons to consider the guidance discussed above regarding practices and methods for making notices clear and conspicuous. Moreover, like the Agencies, we are adopting model forms that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements.[44] The requirement that a notice be clear and conspicuous would be satisfied by the appropriate use of one of the model forms. Accordingly, use of the model forms, although optional, should help alleviate risks from litigation related to the requirement that notices be clear and conspicuous, about which some commenters expressed concern.[45]

4. Commission

We received no comment on the definition of ''Commission'' to mean the Securities and Exchange Commission and are adopting it as proposed.[46]

5. Company

We received no comment on the definition of ''company'' and are adopting the term as proposed.[47]

6. Concise

We received no comment on the definition of ''concise'' and are adopting it as proposed.[48] Section 248.120(f)(1) defines the term ''concise'' to mean a reasonably brief expression or statement. Paragraph (f)(2) provides that a notice required by Regulation S–AM may be concise even if it is combined with other disclosures required or authorized by Federal or State law.[49]

7. Consumer

Proposed paragraph (f) of § 247.3 defined ''consumer'' to mean an individual, including an individual acting through a legal representative.[50] Some commenters suggested that the definition of ''consumer'' used in Regulation S–AM should track the definition in Regulation S–P.[51] Some also asked that the Commission include in the definition the examples that accompany the definition of ''consumer'' in Regulation S–P.[52]

The Commission is aware of the narrower definition of ''consumer'' in the privacy regulations enacted under Title V of the GLBA.[53] However, we believe that the use of distinct definitions of ''consumer'' reflects differences in the scope and objectives of the two statutes. Accordingly, we are adopting the definition of ''consumer'' as proposed.[54] For purposes of this definition, an individual acting through

[32] *See* ACB Letter; Coalition Letter; IAA Letter; ICBA Letter; Wells Fargo Letter.

[33] *See* IAA Letter. *See also* 17 CFR 248.3(c)(1) (defining ''clear and conspicuous'' for purposes of Regulation S–P).

[34] *See* ACB Letter; ICBA Letter; Wells Fargo Letter.

[35] *See* Coalition Letter. The FCRA contains ''affiliate *sharing''* notice and opt out provisions that are distinct from the ''affiliate *marketing''* provisions of Regulation S–AM. Section 603(d)(2)(A)(iii) of the FCRA provides that a person may communicate information that is not transaction or experience information among its affiliates without that information becoming a consumer report if the sharing is clearly and conspicuously disclosed to the consumer and the consumer is given an opportunity to opt out of the sharing. In contrast, Regulation S–AM limits the *use* of information by affiliates for marketing purposes, not the *sharing* of information among affiliates.

[36] *See* Coalition Letter; Wells Fargo Letter. These commenters cited the Board's decision to withdraw a similar proposal to define ''clear and conspicuous'' for purposes of Regulations B, E, M, Z, and DD, in part because of concerns over civil liability.

[37] *See* ICBA Letter. One commenter urged us to make clear that a person does not have to use specific terms for opt out and that this should be included as part of the account opening process. *See* SIFMA Letter I.

[38] *See* ACB Letter; *see also* 12 U.S.C. 4301, *et seq.*

[39] *See* 15 U.S.C. 1681s–3(a)(2)(B) (''Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise * * *. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.'').

[40] The Commission is providing two types of specific guidance on satisfying the requirement to provide a clear and conspicuous affiliate marketing opt out notice. First, this release and § 248.121(a) describe certain techniques that may be used to make notices clear and conspicuous. Second, the Commission is adopting as part of Regulation S–AM the model forms set forth in the Appendix to Subpart B—Model Forms (''Appendix'') that may, but are not required to, be used to facilitate compliance with the affiliate marketing notice requirements.

[41] *See* 15 U.S.C. 6803(b)(4).

[42] *See, e.g.*, the definition and examples in Regulation S–P at 17 CFR 248.3(c).

[43] *See* § 248.120(c), which was proposed as § 247.3(c).

[44] *See* Appendix to Regulation S–AM.

[45] *See* ACB Letter; ICBA Letter; Wells Fargo Letter.

[46] *See* § 248.120(d), which was proposed as § 247.3(d).

[47] *See* § 248.120(e), which was proposed as § 247.3(e).

[48] *See* § 248.120(f), which was proposed as § 247.21(b)(3). The Appendix provides that the requirement for a concise notice would be satisfied by the appropriate use of one of the model forms contained in the Appendix, although use of the model forms is not required. *See supra* note 40.

[49] Such disclosures include, but are not limited to, a GLBA privacy notice, an affiliate-sharing notice under Section 603(d)(2)(A)(iii) of the FCRA, and other consumer disclosures.

[50] The proposed definition follows the statutory definition of Section 603(c) of the FCRA. *See* 15 U.S.C. 1681a(c).

[51] *See* ACB Letter; IAA Letter; T. Rowe Price Letter.

[52] *See* IAA Letter; T. Rowe Price Letter.

[53] *See* Proposing Release at 69 FR 42305.

[54] *See* § 248.120(g).

a legal representative would qualify as a consumer.

8. Control

We are adopting the definition of ''control'' as proposed.[55] Two commenters supported the proposed definition, indicating it was consistent with the one found in Regulation S–P and the GLBA.[56] For purposes of Covered Persons, ''control'' 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.[57] Ownership of more than 25 percent of a company's voting securities would create a presumption of control of the company.[58] As the Proposing Release explained, this definition would be used to determine when companies are affiliated [59] and would result in financial institutions being considered affiliates regardless of whether the control is exercised by a company or an individual.[60]

9. Dealer

We received no comments on the definition of ''dealer'' and are adopting it as proposed.[61] Section 248.120(i) defines ''dealer'' to have the same meaning as in Section 3(a)(5) of the Exchange Act,[62] regardless of whether the dealer is registered under Section 15(b) of the Exchange Act.[63] The term includes a municipal securities dealer as defined in Section 3(a)(30) of the Exchange Act,[64] other than a bank (as defined in Section 3(a)(6) of the Exchange Act),[65] regardless of whether it is registered under Section 15(b) or 15B(a)(2) of the Exchange Act.[66] In addition, the term includes a government securities dealer as defined in Section 3(a)(44) of the Exchange Act,[67] regardless of whether it is registered under Section 15(b) or 15C(a)(2) of the Exchange Act.[68] The definition specifically excludes notice-registered broker-dealers.[69]

10. Eligibility Information

We are adopting the proposed definition of ''eligibility information'' to mean any information, the communication of which would be a consumer report, if the statutory exclusions from the definition of ''consumer report'' in Section 603(d)(2)(A) of the FCRA, for transaction or experience information and for ''other'' information that is subject to the affiliate-sharing opt out, did not apply.[70] As under the proposal, eligibility information would include a Covered Person's own transaction or experience information, such as information about a consumer's account history with that Covered Person, and ''other'' information under Section 603(d)(2)(A)(iii), such as information from consumer reports or applications.[71]

We have revised the definition of ''eligibility information'' to clarify that the term does not apply to aggregate or blind data that does not contain personal identifiers.[72] Examples of personal identifiers listed in the definition include account numbers, names or addresses, and also could include Social Security numbers, driver's license numbers, telephone numbers, or other types of information that, depending on the circumstances or when used in combination, could identify the individual or individuals to whom the data relates. Other types of personal identifiers could include passwords, screen names, user names, e-mail addresses, or Internet Protocol addresses.

We recognized in the Proposing Release that it might be burdensome for Covered Persons to determine and track whether consumer report information is (1) ''eligibility information'' and thus subject to the notice and opt out provisions of Section 624 or (2) information that might be shared with affiliates under other exceptions to the FCRA (to which the notice and opt out provisions of Section 624 do *not* apply). We invited comment on whether the proposed definition of ''eligibility information'' appropriately reflected the scope of coverage of the FACT Act and provided meaningful guidance to Covered Persons.

Some commenters indicated that the proposed definition did not provide enough meaningful guidance as to what sort of information is covered.[73] Others suggested that the Commission should provide examples to illustrate the common types of information that would and would not constitute eligibility information.[74] One commenter requested examples specifically relevant to the securities industry.[75] Another commenter offered an alternative definition, stating that the proposed definition was unnecessarily complex and difficult to apply.[76] Another commenter noted that, unlike the Agencies, the Commission did not provide in the Proposing Release that the term was designed to ''facilitate discussion, and not change the scope of the information covered by Section 624(a)(1)'' of the FCRA.[77] The commenter expressed concern that the divergence may signal some other

[55] *See* § 248.120(h), which was proposed as § 247.3(g).

[56] *See* IAA Letter; T. Rowe Price Letter.

[57] Section 248.120(h). This definition is consistent with definitions of control found elsewhere under the securities laws. *See, e.g.,* 17 CFR 240.19g2–1(b)(2); 17 CFR 248.3(i); 15 U.S.C. 80a–2(a)(9); 15 U.S.C. 80b–2(a)(12).

[58] This presumption may be rebutted by evidence, but in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in Section 2(a)(9) of the Investment Company Act. 15 U.S.C. 80a–2(a)(9).

[59] *See supra* Part III.C.1; Proposing Release at 69 FR 42305.

[60] In § 222.3(i) of their Joint Proposal, the Banking Agencies and the NCUA defined ''control'' as ownership of 25 percent of a company's voting securities, control over the election of a majority of the directors, trustees or general partners of the company, or the power to exercise a controlling influence over management or policies of a company, as determined by the particular agency. *See* Banking Agencies and NCUA, *Fair Credit Reporting Affiliate Marketing Regulation; Proposed Rules,* 69 FR 42502 (July 15, 2004) (''Joint Proposal''). However, as we emphasized in the Proposing Release, the definition of ''control'' in the proposed rules differed from the Agencies' definition in the Joint Proposal. *See* Proposing Release at 69 FR 42305. The Joint Rules incorporate the definition of ''control'' to mean ''common ownership or common corporate control'' as in the Agencies' final FCRA medical information rules. *See* Joint Rules at 72 FR 62913 (citing 70 FR 70664 (Nov. 22, 2005)).

[61] *See* § 248.120(i), proposed as § 247.3(h).

[62] 15 U.S.C. 78c(a)(5).

[63] 15 U.S.C. 78*o*(b).

[64] 15 U.S.C. 78c(a)(30).

[65] 15 U.S.C. 78c(a)(6).

[66] 15 U.S.C. 78*o*(b), 78*o*–4(a)(2).

[67] 15 U.S.C. 78c(a)(44).

[68] 15 U.S.C. 78*o*(b), 78*o*-5(a)(2).

[69] *See* discussion of the inapplicability of Regulation S–AM to notice-registered broker-dealers *supra* note 16 and accompanying text.

[70] *See* § 248.120(j). *See also* 15 U.S.C. 1681a(d)(2)(A)(iii). Under the FCRA, the term ''consumer report'' is defined to include any communication of information from a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family or household purposes, employment purposes, or other purposes authorized elsewhere in the FCRA. 15 U.S.C. 1681a(d)(1).

[71] *See* § 248.120(j).

[72] *Id.*

[73] *See* FSR Letter; SIFMA Letter I.

[74] *See* ICI Letter; T. Rowe Price Letter.

[75] *See* ICI Letter.

[76] *See* ICBA Letter. The commenter proposed to define eligibility information as ''any information that bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to market products and services for personal, family or household purposes to that person.''

[77] *See* Coalition Letter.

interpretation, but did not provide an example of a secondary interpretation.

The Commission believes that further clarification of, or exclusions from, the term ''eligibility information'' would implicate the definitions of ''consumer report'' and ''consumer reporting agency'' in Sections 603(d) and (f), respectively, of the FCRA. The Commission does not define the terms ''consumer report'' and ''consumer reporting agency'' in this rulemaking or construe terms therein, such as ''transaction or experience'' information. We note that financial institutions have relied on these statutory definitions for many years. Providing examples of information that would or would not be eligibility information would not necessarily reduce the complexity of the definition, and could create greater uncertainty with regard to information that is not covered by an example. The definition of ''eligibility information'' in Regulation S–AM is the same as the one found in the Joint Rules adopted by the Banking Agencies.[78]

11. FCRA

We received no comment on the term ''FCRA'' and are adopting it as proposed to mean the Fair Credit Reporting Act.[79]

12. GLBA

The proposed rule defined ''GLB Act'' to mean the Gramm-Leach-Bliley Act. We received no comment on this definition but are changing the term to ''GLBA'' to be more consistent with the way the Agencies refer to the Gramm-Leach-Bliley Act.[80]

13. Investment Adviser

We received no comment on the definition of ''investment adviser'' and are adopting it as proposed.[81] This definition incorporates the definition of ''investment adviser'' in the Investment Advisers Act.

14. Investment Company

We received no comment on the definition of ''investment company'' and are adopting it as proposed.[82] This definition incorporates the definition of ''investment company'' in the Investment Company Act.

15. Marketing Solicitation

We are adopting the definition of ''marketing solicitation,'' with modifications discussed below.[83] The proposed rule defined ''marketing solicitation'' to mean marketing initiated by a Covered Person to a particular consumer that is based on eligibility information communicated to that Covered Person by its affiliate, and that is intended to encourage the consumer to purchase or obtain a product or service. The definition included any form of communication, such as a telemarketing call, direct mail, or electronic mail that is directed to a specific consumer based on that consumer's eligibility information. It did not include communications that are directed at the general public without regard to eligibility information, even if those communications are intended to encourage consumers to purchase products and services. We noted in the Proposing Release that the definition tracked the definition in Section 624 of the FCRA but did not follow the statute exactly to prevent confusion with the term ''solicitation'' in the context of the Federal securities laws.[84] Although Section 624 also authorizes the Commission to exclude other communications from the definition of ''marketing solicitation,'' we did not propose to do so, but rather, sought comment on whether any other communications should be excluded from the statutory definition of ''solicitation.''[85] We also requested comment on whether, and to what extent, various tools used in Internet-based marketing, such as pop-up ads, could constitute marketing solicitations as opposed to communications directed at the general public.

Seven commenters addressed the definition of ''marketing solicitation.''[86] Some expressed concern that the proposed definition was not the same as the definition in Section 214 of the FCRA[87] and suggested including the phrase ''of a product or service'' in the introductory language to be consistent.[88] Other commenters favored the exclusion from the definition of marketing solicitation, solicitations made to the general public.[89] However, one commenter believed that the phrase ''distributed without the use of eligibility information communicated by an affiliate'' inadvertently misstated the types of general marketing that would not be marketing solicitations.[90] Another commenter asked the Commission to clarify that any communications directed at the general public are not marketing solicitations regardless of whether they were developed using specific eligibility information.[91]

Several commenters also addressed Internet-based marketing and generally opposed including it in this rulemaking.[92] Some expressed the view that discussion of a particular delivery mechanism would be counterproductive and contrary to congressional intent, noting that the Internet was not specifically addressed in this legislation.[93] Another suggested that Internet issues should be addressed in a separate process to ensure that notice and opportunity to be heard are given to the parties affected.[94]

The commenter also opined that pop-up ads that appear automatically without the use of eligibility information or information from other affiliates are communications directed at the general public, and that a consumer visiting an Internet Web site is effectively making an inquiry which is tantamount to an affirmative request for information. In addition, the commenter asked for clarification that pre-recorded messages played while consumers are on hold when calling a call center should be construed as general marketing solicitations. Another commenter asked for a similar clarification for advertisements that appear on password-protected Web sites.[95]

The revised definition tracks the statutory language more closely by encompassing the marketing ''of a product or service.''[96] To ensure consistency with the definition of ''pre-existing business relationship,'' the definition applies to marketing intended to encourage the consumer to purchase

[78] In adopting their final rules, the Banking Agencies stated that they anticipate addressing the definitions of ''consumer report'' and ''consumer reporting agency'' in a separate rulemaking after the required FACT Act rules have been completed. *See* Joint Rules at 72 FR 62915.

[79] *See* § 248.120(k), which was proposed as § 247.3(j).

[80] *See* § 248.120(*l*), proposed as § 247.3(k).

[81] *See* § 248.120(m), proposed as § 247.3(*l*).

[82] *See* § 248.120(n), proposed as § 247.3(m).

[83] *See* § 248.120(*o*), proposed as § 247.3(n).

[84] *See* Proposing Release at 69 FR 42306. In particular, Regulation S–AM uses the term ''marketing solicitation'' rather than ''solicitation.'' Although ''solicitation'' is a defined term in Section 624 of the FACT Act, the operative phrase in Section 624(a) is ''solicitation for marketing purposes.'' *See* 15 U.S.C. 1681s–3(a).

[85] 15 U.S.C. 1681s–3(d)(2).

[86] *See* Coalition Letter; FSR Letter; ICBA Letter; ICI Letter; MetLife Letter; SIFMA Letter I; Wells Fargo Letter.

[87] *See* FSR Letter; SIFMA Letter I.

[88] *Id.* One commenter indicated that the lack of this phrase raised the possibility that the definition could be misinterpreted. *See* FSR Letter.

[89] *See* Coalition Letter; ICBA Letter; Wells Fargo Letter.

[90] *See* Coalition Letter.

[91] *See* Wells Fargo Letter.

[92] *See* Coalition Letter; FSR Letter; MetLife Letter.

[93] *See* Coalition Letter; MetLife Letter.

[94] *See* MetLife Letter.

[95] *See* ICI Letter.

[96] For purposes of this release and the final rule, we interpret and use the term ''products and services'' to include shareholder investments in investment companies.

''or obtain'' a product or service. In this way, the definition includes marketing for the rental or lease of goods or services, financial transactions, and financial contracts. The Commission is not adopting the reference to communications ''distributed without the use of eligibility information communicated by an affiliate'' in the exclusion for marketing directed at the general public because we do not believe it is necessary. Marketing that is undertaken without the use of eligibility information received from an affiliate is not covered by the affiliate marketing rules. Moreover, there is no restriction on using eligibility information received from an affiliate in marketing directed at the general public, such as radio, television, general circulation magazine, billboard advertisements, or publicly available Web sites that are not directed to particular consumers.[97]

The definition of ''marketing solicitation'' does not distinguish among different delivery methods or media. A determination of whether a marketing communication in any medium constitutes a marketing solicitation depends upon the facts and circumstances. The Commission declines to exclude categorically from the definition of ''marketing solicitation,'' pre-recorded messages played while a consumer is on hold with a call center, or advertisements that appear solely on password-protected Web sites. Marketing delivered by such media may constitute a marketing solicitation if it is targeted to a particular consumer based on eligibility information received from an affiliate. For example, a pre-recorded message played while a consumer is on hold with a call center would be a marketing solicitation if it is targeted to a particular consumer based on eligibility information received from an affiliate, but would not be a marketing solicitation if it is played for all consumers who are on hold with the call center.

We note that the Agencies declined to exclude educational seminars, customer appreciation events, focus group invitations, and similar forms of communication from the definition of ''solicitation'' in their final rules.[98] While we received no comments on these types of activities, like the Agencies, we believe that such activities must be evaluated according to the facts and circumstances, and that some of these activities may be coupled with, or a prelude to, a marketing solicitation. For example, an invitation to a financial educational seminar when the invitees are selected based on eligibility information received from an affiliate may be a marketing solicitation if the seminar is used to solicit the consumer to purchase or obtain investment products or services.

16. Person

We received no comment on the definition of ''person,'' and we are adopting it as proposed.[99] The proposed rule defined ''person'' to mean any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. A person could act through an agent, such as a licensed agent (in the case of an insurance company), a trustee (in the case of a trust), or any other agent. For purposes of Regulation S–AM, actions taken by an agent on behalf of a person that are within the scope of the agency relationship will be treated as actions of that person.

17. Pre-Existing Business Relationship

a. Definition

We are adopting the definition of ''pre-existing business relationship'' substantially as proposed,[100] with the modifications discussed below. The proposed rule contained a three-part definition of ''pre-existing business relationship.'' Under the first part, a ''pre-existing business relationship'' would exist when there is a financial contract in force between a Covered Person and a consumer.[101] Under the second part, a ''pre-existing business relationship'' would exist when a consumer purchased, rented, or leased a Covered Person's goods or services, or entered into a financial transaction (including holding an active account or a policy in force or having another continuing relationship) with a Covered Person during the 18-month period immediately preceding the date on which a marketing solicitation is made.[102] Under the third part, a ''pre-existing business relationship'' would exist when, in certain circumstances, a consumer inquired about, or applied for, a product or service offered by a Covered Person during the three-month period immediately preceding the date on which a marketing solicitation is made to the consumer.[103] In the Proposing Release, we noted that the proposed definition tracked the definition in Section 624 of the FCRA but did not follow the statute exactly.[104] We also noted that while Section 624 authorizes the Commission to recognize any other circumstances that would constitute a pre-existing business relationship, we did not propose to exercise this authority.[105]

Ten commenters addressed the definition of ''pre-existing business relationship.''[106] Several commenters noted that the statutory reference to ''a person's licensed agent'' was not in the rule.[107] One commenter expressed the view that Congress intended the phrase to be included in any implementing rule because it is in the statute.[108] Two commenters noted the importance of licensed agents in the insurance industry, and stated that independent, licensed agents frequently act as the main point of contact between a consumer and an insurance company.[109] In light of these comments and to more closely track the statute, we have added the phrase ''or a person's licensed agent'' in the final definition of ''pre-existing business relationship.'' For example, a person who is both a licensed agent for an insurance company and a registered representative for a broker-dealer may sell to a consumer a variable annuity issued by the insurance company. The licensed agent may use eligibility information that it obtains in connection with selling the variable annuity to the consumer to market the insurance company's life insurance policies to the consumer for the duration of the pre-existing business relationship without offering an opt out opportunity.

Some commenters questioned the requirement in the first part of the definition that a financial contract be in force ''on the date on which the consumer is sent a marketing

[97] *See supra* text accompanying note 90. Similarly, visiting a publicly available Web site should not, by itself, constitute an ''inquiry'' for purposes of the pre-existing business relationship exception.

[98] *See* Joint Rules at 72 FR 62919; FTC Rule at 72 FR 61432.

[99] *See* § 248.120(p), proposed as § 247.3(*o*).

[100] *See* § 248.120(q)(1), proposed as § 247.3(p).

[101] *See* Proposed § 247.3(p)(1).

[102] *See* Proposed § 247.3(p)(2).

[103] *See* Proposed § 247.3(p)(3).

[104] *See* Proposing Release at 42306 (citing 15 U.S.C. 1681s–3(d)(1)).

[105] *Id.* (citing 15 U.S.C. 1681s–3(d)(1)(D)).

[106] *See* ABASA Letter; ACB Letter; ACLI Letter; AIA Letter; Coalition Letter; FSR Letter; ICBA Letter; MetLife Letter; Wells Fargo Letter; SIFMA Letter I.

[107] *See* ACB Letter; ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter; MetLife Letter; SIFMA Letter I.

[108] *See* Coalition Letter.

[109] *See* ACLI Letter; MetLife Letter. The ACLI Letter also noted that this type of role played by licensed agents would have implications for not only life insurers who issue variable life insurance and variable annuity contracts but also the broker-dealers who sell these products.

solicitation.'' [110] In their view, delays between the time when information is processed and prepared for a marketing solicitation and the time a marketing solicitation is made or sent would create an undue burden of having to synchronize the sending of the marketing solicitation with a contract that is in force. They recommended that a contract should only have to be in force when the information is prepared for a marketing solicitation and not when the marketing solicitation is made. We do not agree with these comments and are adopting the second part of the definition as proposed. This approach is consistent with the approach used in the other two parts of the statutory definition.[111] We also note that the second part of the definition alleviates these synchronization problems since a pre-existing business relationship would continue to exist for another 18 months after a financial contract ceases to be in force.

Some commenters addressed various parts of the second part of the definition.[112] One commenter suggested that ''any account with outstanding contractual responsibilities on either side of an account relationship should be considered an active account, regardless of whether the individual transactions occur or do not occur under the account.'' [113] We decline to interpret an ''active account'' in this way. Section 603(r) of the FCRA defines an ''account'' to have the same meaning as in Section 903 of the Electronic Fund Transfer Act (''EFTA'').[114] Section 903 of the EFTA defines the term ''account'' to mean a demand deposit, savings deposit, or other asset account established primarily for personal, family, or household purposes.[115] In addition, our view regarding the term ''account'' is analogous to the views expressed by the Agencies.

One commenter stated that when consumers pay in advance for future services, the 18-month exemption under the second part of the definition should not begin until after the last payment or shipment of the product.[116] Another commenter suggested that the 18-month period should begin at the time that all contractual responsibilities expire.[117] The Commission declines to adopt these suggestions because they could lead to consumers receiving marketing solicitations long after closing or transferring an account. For purposes of the final rule, a pre-existing business relationship terminates when an investor redeems or sells investment company shares or closes or transfers an account, and not when the investor receives the last statement relating to the account or when an obligation assumed by a Covered Person in an account opening document expires. The final rule includes examples to help clarify the scope of this part of the definition of a pre-existing business relationship.[118]

Two commenters discussed the third part of the definition of ''pre-existing business relationship''—an inquiry or application by the consumer regarding a product or service offered by the person during the preceding three months.[119] These commenters generally stated that the exception should not depend on consumers providing contact information or on a consumer's expectations. One commenter indicated that an e-mail inquiry, a return address on an envelope, or the captured phone number of a consumer requesting information about products or services should qualify as a ''pre-existing business relationship.'' [120]

Certain elements of the definition of ''pre-existing business relationship'' are substantially similar to the definition of ''established business relationship'' under the FTC's Telemarketing Sales Rule (''TSR'').[121] The TSR definition was informed by Congress's intent that the ''established business relationship'' exemption to the ''do not call'' provisions of the Telephone Consumer Protection Act [122] should be grounded on the reasonable expectations of the consumer.[123] Congress's incorporation of similar language in the definition of ''pre-existing business relationship'' [124] suggests that it is appropriate to consider the reasonable expectations of the consumer in determining the scope of this exception. For purposes of Regulation S–AM, an inquiry would include any affirmative request by a consumer for information after which the consumer would reasonably expect to receive information from the affiliate about its products or services.[125] A consumer would not reasonably expect to receive information from an affiliate if the consumer did not request information from or provide contact information to the affiliate. For this reason, the Commission does not believe that an automatically captured telephone number of a consumer is sufficient to create an inquiry, particularly when the financial institution could easily ask the consumer for contact information during the telephone call that captured the consumer's telephone number. Similarly, we do not believe that information such as an Internet Protocol address or data contained in an Internet ''cookie'' that is automatically collected about a consumer visiting a Covered Person's Web site is, by itself, sufficient to create an inquiry. We understand that industry practice in the case of telephone calls is to ask the consumer to provide or confirm his or her contact information.[126] To provide additional guidance to industry, we have provided additional examples in the definition that deal with consumer calls and e-mails.[127] These examples, along with other examples, are discussed below. One commenter urged the Commission to clarify that all three parts of the definition of ''pre-existing business relationship'' include a transaction-based relationship between a consumer and a securities affiliate regardless of the issuer of the security purchased by the consumer.[128] This commenter

[110] *See* ACLI Letter; SIFMA Letter I; Wells Fargo Letter.

[111] *See* 15 U.S.C. 1681s(d)(1)(A)–(C). As noted earlier, the definition of ''pre-existing business relationship'' in Regulation S–AM tracks the statutory definition. Although the statutory definition does not contain the term ''sent'' for the provision dealing with a contract that is in force (15 U.S.C.1681s(d)(1)(A)), the other two parts of the statutory definition do contain the term ''sent'' (15 U.S.C. 1681s(d)(1)(B)–(C)). Accordingly, we believe that the statutory definition is best implemented by including this concept in all three parts of the definition in Regulation S–AM.

[112] *See* Coalition Letter; Wells Fargo Letter.

[113] *See* Wells Fargo Letter.

[114] *See* 15 U.S.C. 1681a(r)(4).

[115] *See* 15 U.S.C. 1693(a)(2).

[116] *See* Coalition Letter.

[117] *See* Wells Fargo Letter.

[118] *See* §§ 248.120(q)(2) and 248.120(q)(3).

[119] *See* Coalition Letter; Wells Fargo Letter.

[120] *See* Wells Fargo Letter.

[121] *See* 16 CFR 310.2(n).

[122] 47 U.S.C. 227, *et seq.*

[123] H.R. Rep. No. 102–317, at 14–15 (1991). *See also* FTC, Telemarketing Sales Rule, 68 FR 4580, 4591–94 (Jan. 29, 2003) (''TSR Adopting Release'').

[124] 149 Cong. Rec. S13,980 (daily ed. Nov. 5, 2003) (statement of Senator Feinstein) (noting that the ''pre-existing business relationship'' definition ''is the same definition developed by the Federal Trade Commission in creating a national 'Do Not Call' registry for telemarketers.'').

[125] *See* TSR Adopting Release at 68 FR 4594.

[126] Similarly, the Commission does not believe that a return address on an envelope is sufficient to constitute an affirmative request by a consumer for information about a person's products or services. A consumer would not have a reasonable expectation of being contacted about products and services simply by providing a return address on an envelope. In our view, a consumer provides a return address on an envelope to ensure that if a piece of mail is undeliverable, it is returned to the consumer and not because they are seeking to establish a business relationship. Accordingly, we consider a return address on an envelope analogous to an automatically captured telephone number.

[127] *See* §§ 248.120(q)(2)(v)–(vii) and (q)(3).

[128] *See* ABASA Letter (stating that the proposed rule supports the conclusion that a pre-existing business relationship exists between a securities affiliate and a consumer when the consumer purchases a proprietary securities product like a bank's own mutual fund and expressing concern that the purchase of non-proprietary securities products from the securities affiliate could be

asserted that a consumer whose securities and investment transactions are managed through a bank-owned securities affiliate would not be surprised, and may later expect, to receive marketing solicitations for other securities products based on eligibility information the securities affiliate has received from the affiliated bank. Another commenter urged the Commission to expand the definition to include relationships arising out of the ownership of servicing rights, a participation interest in lending or other similar relationships.[129] Another commenter suggested that the definition should apply to manufacturers that make sales through dealers, such as an automobile manufacturer that sells vehicles not directly to consumers, but through franchised dealers.[130] The commenter urged the Commission to consider the relationship between a manufacturer and a consumer as a pre-existing business relationship based on the purchase, rental, or lease of the manufacturer's goods.

Like the Agencies, the Commission believes it is not necessary to add any additional bases for a pre-existing business relationship. Paragraph (q)(2)(i) of § 248.120 provides an example of a brokerage firm with a pre-existing business relationship using eligibility information from an affiliate to make marketing solicitations about products or services. This example should provide Covered Persons with sufficient guidance regarding a securities affiliate's use of eligibility information.

b. Examples

Paragraph (d)(1) of proposed § 247.20 provided four examples to illustrate the pre-existing business relationship exception. Proposed paragraphs (d)(1)(i) through (iii) contained examples illustrating each of the three parts of the definition.[131] Proposed paragraph (d)(1)(iv) provided an example of a consumer calling a centralized call center for a group of affiliated companies to inquire about the consumer's existing securities account with a broker-dealer, and indicated that such a call would not establish a pre-existing business relationship between the consumer and the broker-dealer's affiliates. We requested comment on these examples.

One commenter generally expressed approval of the examples we provided, other than the example in proposed § 247.20(d)(1)(iii).[132] Another commenter requested that the Commission provide further examples dealing with consumer calls to call centers to clarify what would and would not be considered subject to Regulation S–AM's opt out notice requirement.[133]

We are adopting seven examples of a pre-existing business relationship set out in § 248.120(q)(2).[134] In § 248.120(q)(3) we have provided three examples of the absence of a pre-existing relationship.[135]

18. Transfer Agent

We received no comment on the definition of ''transfer agent'' and are adopting it as proposed.[136] The rule defines ''transfer agent'' to have the same meaning as in Section 3(a)(25) of the Exchange Act.[137]

19. You

We received no comment on the definition of ''you'' and are adopting it substantially as proposed.[138] The one difference is that the final definition does not include notice-registered broker-dealers.[139]

D. Section 248.121 Affiliate Marketing Opt Out and Exceptions

Proposed § 247.20 set forth the requirement that a consumer be provided with notice and a reasonable opportunity to opt out before a receiving affiliate uses eligibility information to make marketing solicitations to the consumer. Proposed paragraphs (a) and (b) bifurcated duties between the ''communicating affiliate'' and ''receiving affiliate'' to resolve what we perceived as an ambiguity in the FCRA with regard to which affiliate was to provide the opt out notice to the consumer.[140] Proposed paragraph (c)

considered to be outside of the first two provisions of the definition of a pre-existing business relationship).

[129] *See* Wells Fargo Letter.

[130] *See* FSR Letter. The commenter further indicated that vehicle financing may be arranged through a manufacturer's captive finance company or independent sources of financing, and noted that manufacturers often provide consumers with information about warranty coverage, recall notices, and other product information. This commenter stated that manufacturers also send solicitations to consumers about their products and services, drawing in part on transaction or experience information from the captive finance company.

[131] *See* Proposed §§ 247.20(d)(1)(i) (illustrating the first part), (d)(1)(ii) (illustrating the second part) and (d)(1)(iii) (illustrating the third part).

[132] The example in proposed § 247.20(d)(1)(iii) illustrated that a pre-existing business relationship would exist with a Covered Person's affiliate when a consumer made an inquiry about, or applied for, a product or service offered by the affiliate during the three-month period immediately preceding the date on which a marketing solicitation is made to the consumer based on eligibility information received from the Covered Person. The Coalition Letter stated that a consumer should not be required to provide contact information as part of an inquiry in order to establish a pre-existing business relationship. As stated above, however, we do not believe that a consumer would reasonably expect to have established a pre-existing business relationship in the absence of providing contact information. *See also supra* text accompanying notes 125 and 126.

[133] *See* MetLife Letter.

[134] Section 248.120(q)(2)(i) provides an example of a pre-existing business relationship based on a consumer's open account with a brokerage firm. Section 248.120(q)(2)(ii) provides a similar example of a pre-existing business relationship with a registered investment adviser. Section 248.120(q)(2)(iii) provides an example in which a pre-existing business relationship is established for 18 months after the date a consumer who was the record owner of investment company securities redeems all of those securities. Section 248.120(q)(2)(iv) provides an example in which a consumer applies for a product or service, but does not obtain the product or service for which she applied, and a pre-existing business relationship is established for three months after the date of the application. Contact information is not mentioned in this example because the consumer presumably would have supplied it on the application. Section 248.120(q)(2)(v) provides an example in which a consumer makes a telephone inquiry about a product or service offered by a brokerage firm and provides contact information to the institution, but does not obtain a product or service from or enter into a financial transaction with the institution. As noted earlier, we do not believe that, by itself, an institution's capture of a consumer's telephone number during a telephone conversation with the consumer about the institution's products or services is sufficient to create an inquiry. In these circumstances, to ensure that an inquiry has been made, the institution should ask the consumer to provide his or her contact information. Section 248.120(q)(2)(vi) provides an example in which pre-existing business relationships are established for three months after the date a consumer makes an e-mail inquiry to a broker-dealer about one of its affiliated investment company's products or services without providing any contact information other than the consumer's e-mail address. Unlike telephone communications, e-mail communications do not provide institutions with an opportunity to ask for additional contact information at the time of a consumer's initial request for information. Section 248.120(q)(2)(vii) provides an example in which a pre-existing business relationship between a consumer and a broker-dealer is established for three months by a consumer's telephone call to a centralized call center for the broker-dealer and an affiliated investment company with which the consumer has an existing relationship, and the consumer provides contact information to the call center and inquires about products and services offered by the broker-dealer, but does not obtain any products or services.

[135] Section 248.120(q)(3)(i) is similar to § 248.120(q)(2)(vii) except that the consumer does not inquire about an affiliate's products or services but about an existing account with the broker-dealer. In this situation, a pre-existing business relationship with an affiliate of the broker-dealer is not established. Section 248.120(q)(3)(ii) is substantively similar to the example in proposed § 247.20(d)(2)(iii), whereby a pre-existing business relationship is not created by simply requesting information about retail hours and locations. Section 248.120(q)(3)(iii) illustrates that a call in response to an advertisement for a free promotional item is not an inquiry about a product or service that would establish a pre-existing business relationship.

[136] *See* § 248.120(r), proposed as § 247.3(q).

[137] 15 U.S.C. 78c(a)(25).

[138] *See* § 248.120(s), proposed as § 247.3(r).

[139] *See supra* note 16.

[140] In the proposed rules, we differentiated between affiliates by referring to an affiliate that communicated eligibility information to an affiliate

Continued

contained exceptions to the requirements of Regulation S–AM and incorporated each of the statutory exceptions to the affiliate marketing notice and opt out requirements that are set forth in Section 624(a)(4) of the FCRA, and paragraph (d) illustrated those exceptions with examples. Proposed paragraph (e) provided that Regulation S–AM would not be applicable to marketing solicitations that were based on information received by an affiliate prior to the proposed mandatory compliance date.[141] Proposed paragraph (f) clarified the relationship between sharing information and becoming a credit reporting agency. The final rules modify many of these proposed provisions as discussed below.

1. Section 248.121(a)

Under proposed § 247.20(a)(1), before a receiving affiliate could use eligibility information to make or send marketing solicitations to a consumer, the communicating affiliate would have had to provide a notice to the consumer stating that the information may be communicated to and used by the receiving affiliate for marketing purposes. The consumer also would have had to have a reasonable opportunity to opt out through some simple method before the receiving affiliate could make a marketing solicitation. The notice and opt out requirements would have applied only if a receiving affiliate would use eligibility information for marketing purposes.[142] Proposed paragraph (a)(2) included two ''rules of construction'' to give further guidance regarding how affiliate marketing notices might be provided to consumers.[143]

Proposed § 247.20(b) set forth the general duties of a receiving affiliate. In particular, a receiving affiliate could not have used the eligibility information it received from its affiliate to make marketing solicitations to a consumer unless, prior to such use the consumer had: (1) Been provided an opt out notice (as described in proposed paragraph (a) of § 247.20) that applied to that affiliate's use of eligibility information; (2) received a reasonable opportunity to opt out of that use through one or more simple methods; and (3) not opted out. The Commission solicited comment on these provisions. In addition, the Commission also solicited comment on whether there were situations where oral notices and opt outs should be allowed and, if so, how the statute's clear and conspicuous standard could be satisfied.[144]

Five commenters addressed the duties of the communicating affiliate and the receiving affiliate.[145] Some commenters supported having the communicating affiliate provide the notice and opt out, indicating that consumers may be more likely to expect a notice from the communicating affiliate and could unknowingly miss the opportunity to opt out if they do not have a pre-existing relationship with the company that is sending the notice and opt out.[146] Other commenters disagreed with the provision in the proposal that would have required the communicating affiliate provide the notice and opt out.[147] One commenter viewed the statute's lack of direction regarding which entity must provide the notice and opt out as evidence of Congressional intent to permit companies to structure the notice and opt out in a manner that meets their unique needs and situations.[148] Another commenter stated that the FCRA contemplates that the receiving affiliate would provide the notice, and that to require the communicating affiliate to provide it would create a basis for civil liability if a communicating affiliate does not provide notice and an opportunity to opt out before a receiving affiliate uses eligibility information to make a marketing solicitation.[149]

Six commenters addressed oral notices and supported permitting their use.[150] One commenter indicated that the use of oral notices would be an easier method by which consumers could exercise their rights under the proposed rules.[151] This commenter indicated that this was especially so for consumers who primarily conduct business over the telephone, suggesting that when information is provided over the phone, a consumer is less likely to disregard a privacy notice.[152] Another commenter generally noted the changing technological landscape and stated that limiting delivery of the notice to written form could create a barrier to improved customer service.[153] Another commenter asserted that the FTC, in its TSR, has permitted clear and conspicuous oral notices without any enforcement difficulties.[154] One commenter also stated that the clear and conspicuous standard could be more easily met with oral notices through the use of scripts or lists of frequently asked questions.[155]

After considering these comments regarding proposed paragraphs (a) and (b), the Commission is adopting these paragraphs, redesignated as § 248.121(a), with modifications. Section 248.121(a)(1) sets forth the general rule and contains the three conditions that must be met before a Covered Person may use eligibility information about a consumer that it

as the ''communicating affiliate'' and to the affiliate receiving the eligibility information as the ''receiving affiliate.''

[141] This section, redesignated as § 248.128(c), is discussed below. *See infra* Part III.K.2.

[142] Proposed paragraph (a)(1) would not have applied if no eligibility information was communicated to affiliates, or if no receiving affiliate would use eligibility information to make marketing solicitations. In the proposal, we provided an example in which paragraph (a) was inapplicable. In the example, a financing company affiliated with a broker-dealer asked the broker-dealer to include financing-company marketing materials in periodic statements sent to consumers by the broker-dealer without regard to eligibility information.

[143] The first rule of construction would have permitted the notice to be provided either in the name of a person with which the consumer currently did or previously had done business, or by using one or more common corporate names shared by members of an affiliated group of companies that included the common corporate name used by that person. This rule of construction also would have provided three alternatives regarding the manner in which the notice could have been given. First, a communicating affiliate could have provided the notice to the consumer directly. Second, a communicating affiliate could have used an agent to provide the notice, so long as the agent provided the notice in the name of the communicating affiliate or by using a common corporate name. When using an agent however, the communicating affiliate would have remained responsible for any failure of the agent to fulfill the affiliate's notice obligations. Third, a communicating affiliate could have provided a joint notice with one or more of its affiliates. Of course, if the agent was an affiliate of the person that provides the notice, that affiliate could not have included any marketing solicitations of its own on or with the notice, unless one of the exceptions in paragraph (c) of proposed § 247.20 applied. Even if the agent sending the notice were not an affiliate, the agent would have been permitted to use the information only for limited purposes under Regulation S–P. *See* 17 CFR 248.11. The second rule of construction would have discussed how to avoid issuing duplicate notices when Affiliate A communicated information to Affiliate B, who in turn communicated information to Affiliate C.

[144] The proposal also contemplated that the opt out notice would be provided to the consumer in writing or, if the consumer agreed, electronically. *See* Proposing Release at 69 FR 42308.

[145] *See* ACLI Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[146] *See* ICI Letter; T. Rowe Price Letter.

[147] *See* ACLI Letter; ICBA Letter; Wells Fargo Letter.

[148] *See* ACLI Letter. One commenter also suggested allowing companies to decide the best method of providing the notice. *See* ICBA Letter.

[149] *See* Wells Fargo Letter.

[150] *See* Coalition Letter; IAA Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[151] *See* ICI Letter.

[152] *See* ICI Letter. One commenter suggested that the regulation permit the notice to be given by an affiliate while the consumer is being called with a marketing solicitation. *See* Wells Fargo Letter. Another commenter suggested that delivery of the notice would be better effectuated if the affiliate representative and consumer engaged in a dialogue. *See* IAA Letter.

[153] *See* ICBA Letter.

[154] *See* Coalition Letter.

[155] *See* IAA Letter.

receives from an affiliate to make a marketing solicitation to the consumer. First, it must be clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that the Covered Person may use shared eligibility information to make marketing solicitations to the consumer. Second, the consumer must be provided a reasonable opportunity and a reasonable and simple method to opt out of the use of that eligibility information to make marketing solicitations to the consumer. Third, the consumer must not have opted out. Section 248.121(a)(2) provides an example of the general rule.

The Commission has eliminated as unnecessary the rules of construction in proposed paragraph (a)(2) as well as the provisions in the proposal relating to notice provided by an agent. General agency principles, however, continue to apply. An affiliate that has a pre-existing business relationship with the consumer may direct its agent to provide the opt out notice on its behalf. In light of one commenter's concern about civil liability, the final rules do not impose duties on any affiliate other than the affiliate that intends to use shared eligibility information to make solicitations to the consumer. Although an opt out notice must be provided by or on behalf of an affiliate that has a pre-existing business relationship with the consumer (or as part of a joint notice), that affiliate has no duty to provide such a notice. Instead, the final rules provide that absent such a notice, an affiliate must not use shared eligibility information to make solicitations to the consumer.

Proposed paragraph (b) of § 247.20 has been deleted and replaced with paragraph (a)(3) in § 248.121. Section 248.121(a)(3) provides that the initial opt out notice must be provided either by an affiliate that has a pre-existing business relationship with the consumer, or as part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has a pre-existing business relationship with the consumer. This follows the general approach taken in the proposal to ensure that the notice would be provided by an entity known to the consumer. While we used the terms ''communicating affiliate'' and ''receiving affiliate'' in the proposal and continue to use these terms in this release, the final rule text does not include these terms in order to avoid potential confusion.[156] The Commission has considered the comments regarding oral notices and opt outs and concluded that the opt out notice may not be provided orally. The Commission is required, under the FACT Act, to consider the affiliate-sharing notification practices employed on the date of enactment and to ensure that notices and disclosures may be coordinated and consolidated in promulgating regulations. Any affiliate-sharing notice required under Section 603(d)(2)(A)(iii) of the FCRA generally must be included in a GLBA privacy notice, which must be provided in writing, or if the consumer agrees, electronically. We find it consistent with existing affiliate-sharing notification practices to require the affiliate marketing opt out notice to be provided in writing, or if the consumer agrees, electronically. The Commission believes that this will promote coordination and consolidation of the FCRA affiliate marketing and sharing notice with the GLBA privacy notices. We are not persuaded that there are any circumstances in which an oral opt out notice would be necessary. While oral opt out *notices* are not permitted, a number of key *exceptions* to the initial notice and opt out requirement may be triggered by an oral communication with the customer. These include the: (1) Pre-existing business relationship exception; (2) consumer-initiated communication exception; and (3) consumer authorization or request exception. We understand that some Covered Persons currently require consumers to provide their Social Security numbers when exercising their existing GLBA or FCRA opt out rights. To combat identity theft and prevent ''phishing,'' however, consumers have been advised *not* to provide sensitive personal information such as Social Security numbers to unknown entities. Furthermore, as one of the Federal agencies participating in the President's Identity Theft Task Force, the Commission has made a commitment to examine and recommend ways to limit the private sector's use of Social Security numbers. The approach recommended by some industry commenters would allow an entity unknown to the consumer to not only provide the affiliate marketing opt out notice, but also to require the consumer to reveal his or her Social Security number to that unknown entity in order to exercise the opt out. The Commission notes that requiring that a consumer reveal his or her Social Security number to an unknown entity in order to exercise his or her opt out right would send conflicting messages to consumers about providing Social Security numbers to unknown entities. This approach would be inconsistent with the Commission's current joint efforts with the Agencies to develop a comprehensive record on the uses of the Social Security number in the private sector and evaluate their necessity, as recommended by the President's Identity Theft Task Force.[157]

2. Section 248.121(b)

a. Making Marketing Solicitations

The proposed rules referred to ''making or sending'' marketing solicitations. One commenter urged us not to address ''sending'' marketing solicitations.[158] The commenter indicated that by making a reference to ''sending'' marketing solicitations, it appears that the rule encompasses entities that send a marketing solicitation on behalf of another entity. The general rule in Section 624(a)(1) of the FCRA, along with the duration provisions in Section 624(a)(3) and the pre-existing business relationship exception in Section 624(a)(4)(A), refer to ''making'' or ''to make'' a marketing solicitation. Other provisions of the FCRA, such as the consumer choice provision in Section 624(a)(2)(A), the service provider exception in Section 624(a)(4)(C), the non-retroactivity provision in Section 624(a)(5), and the definition of ''pre-existing business relationship'' in Section 624(d)(1), refer to ''sending'' or ''to send'' a marketing solicitation. The verb ''to send,'' as used in the statute, refers to a ministerial act that a service provider, such as a mail house, performs for the person making

[156] The Commission continues to believe that the statute's silence with regard to which affiliates may provide the opt out notice makes the statute ambiguous on this point. We agree with the commenters who indicated that consumers are less likely to disregard a notice provided by a person known to the consumer. We are concerned that a notice provided by an entity unknown to the consumer may not provide meaningful or effective notice because consumers are more likely to ignore or discard these notices. However, we note that while an agent unknown to the consumer may provide a notice, the notice itself would have to clearly indicate that it is on behalf of either the company the consumer has or had a pre-existing relationship with or be a joint notice from two or more members of an affiliated group of companies so long as one of the companies on the joint notice has or had a pre-existing relationship with the consumer. *See* § 248.121(a)(3).

[157] *See Combating Identity Theft: A Strategic Plan* at 26–27 (April 2007) (available at *http://www.idtheft.gov*). *See also* Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Personal Information, Exchange Act Release No. 57427 (Mar. 4, 2008); 73 FR 13692 (Mar. 13, 2008).

[158] *See* Wells Fargo Letter.

the marketing solicitation,[159] or indicates the time after which marketing solicitations are no longer permitted.[160]

The Commission concludes that ''making'' and ''sending'' marketing solicitations are different activities and that the focus of the FCRA is primarily on the ''making'' of marketing solicitations.[161] Accordingly, the final rules refer to ''making'' a marketing solicitation, except where the FCRA specifically refers to ''sending'' a marketing solicitation. The FCRA, however, does not describe what a person must do in order ''to make'' a marketing solicitation. The legislative history is silent on this point. Nevertheless, the Commission believes it is important to provide clear guidance regarding what activities constitute making a marketing solicitation.

The Commission has added new § 248.121(b) in the final rules to clarify what constitutes ''making'' a marketing solicitation for purposes of Regulation S–AM. Section 248.121(b)(1) provides that a Covered Person makes a marketing solicitation to a consumer if: (1) It receives eligibility information from an affiliate; (2) it uses that eligibility information to identify the consumer or type of consumer to receive a marketing solicitation, establish the criteria used to select the consumer to receive a marketing solicitation, or decide which of its products or services to market to the consumer or tailor its marketing solicitation to that consumer; and (3) as a result of its use of the eligibility information, the consumer is provided a marketing solicitation.

The Commission understands that several common business practices may complicate application of this provision. Affiliated groups sometimes use a common database as the repository for eligibility information obtained by various affiliates, and information in that database may be accessible to multiple affiliates. In addition, affiliated companies sometimes use the same service providers to perform marketing activities, and some of those service providers may provide services for a number of different affiliates. Moreover, an affiliate may use its own eligibility information to market the products or services of another affiliate. Paragraphs (b)(2)–(5) of § 248.121 address these issues.

Section 248.121(b)(2) clarifies that a Covered Person may receive eligibility information from an affiliate in various ways, including by the affiliate placing that information into a common database that a Covered Person may access. Of course, receipt of eligibility information from an affiliate is only one element of making a marketing solicitation. In the case of a common database, *use* of the eligibility information will be important in determining whether a person has made a marketing solicitation.

To clarify the application of the concept of ''making'' a marketing solicitation in the context of a Covered Person using a service provider, § 248.121(b)(3) generally provides that a person receives or uses an affiliate's eligibility information if a service provider acting on behalf of the Covered Person receives or uses that information on the Covered Person's behalf.[162] Section 248.121(b)(3) also provides that all relevant facts and circumstances will determine whether a service provider is acting on behalf of a Covered Person when it receives or uses an affiliate's eligibility information in connection with marketing the Covered Person's products or services.

b. Constructive Sharing and Service Providers

In § 248.121(b)(4), we address the concept of ''constructive sharing.'' In the proposing release, we illustrated the constructive sharing concept with an example in which a consumer has a pre-existing business relationship with a broker-dealer that is affiliated with a financing company. In the example, the financing company would provide the broker-dealer with specific eligibility criteria, such as consumers who have a margin loan balance in excess of $10,000, for the purpose of having the broker-dealer make marketing solicitations on behalf of the financing company to consumers that meet those criteria. A consumer who meets the eligibility criteria would contact the financing company after receiving the financing company marketing materials in the manner specified in those materials. We contemplated that the consumers' responses would provide the financing company with discernable eligibility information, such as through a coded response form that would identify a consumer as an individual who meets the specific eligibility criteria.[163]

We solicited comment on whether, given the policy objectives of Section 214 of the FACT Act, the notice and opt out requirements of these rules should apply to circumstances that involve a constructive sharing of eligibility information to make marketing solicitations.

Commenters consistently opposed inclusion of the concept of constructive sharing in the final rules.[164] One commenter argued that inclusion of the proposed example of constructive sharing would restrict the ability of financial institutions to market products to their own customers.[165] Others stated that including the example was inconsistent with many of the exceptions provided in the proposed rules.[166] In general, commenters argued that constructive sharing was outside the scope of Regulation S–AM because the rules should address the making of marketing solicitations and not the sharing of information.[167]

After carefully considering the comments, we conclude that the FCRA only covers situations in which a person *uses* eligibility information that it received from an affiliate to make a marketing solicitation to the consumer about its products or services. In a constructive sharing scenario like that described in the proposal and above,[168] a pre-existing business relationship is established between the consumer and the financing company when the consumer contacts the financing company to inquire about or apply for products or services as a result of the consumer's receipt of the financing company's marketing materials from the broker-dealer. Thus, a pre-existing business relationship is established before the financing company uses any shared eligibility information to make marketing solicitations to the consumer. Because the financing company does not use shared eligibility information to make marketing solicitations to the consumer before it establishes a pre-existing business relationship with the

[159] *See* 15 U.S.C. 1681s–3(a)(4)(C).

[160] *See* 15 U.S.C. 1681s–3(d)(1)(B) and (C).

[161] For example, a service provider may send a marketing solicitation to a consumer on behalf of another entity, but it is the entity on whose behalf the marketing solicitation is sent that is making the marketing solicitation and thus, is subject to the general prohibition on making a marketing solicitation without first giving the consumer an affiliated marketing notice and an opportunity to opt out.

[162] The service provider's activities would be those described in §§ 248.121(b)(1)(i) and (b)(1)(ii), discussed above. Section 248.121(b)(5), as discussed below, provides an exception to this general rule.

[163] *See* Proposing Release at 69 FR 42307.

[164] *See* ABASA Letter; ACB Letter; Coalition Letter; FSR Letter; ICBA Letter; ICI Letter; MetLife Letter; SIFMA Letter I; T. Rowe Price Letter; Wells Fargo Letter.

[165] *See* T. Rowe Price Letter.

[166] *See* Coalition Letter; FSR Letter; ICBA Letter; Wells Fargo Letter; SIFMA Letter I.

[167] *See* Coalition Letter; ICBA Letter; SIFMA Letter I; Wells Fargo Letter. Although the Commission did not receive comment from consumer groups, consumer groups argued to the Agencies that constructive sharing would contravene the intent of Congress and would amount to a loophole that should be fixed.

[168] *See supra* note 163 and accompanying text.

consumer, the FCRA's affiliate marketing notice and opt out requirement does not apply.

The Commission acknowledges that the FCRA's affiliate marketing provisions only limit the use of eligibility information received from an affiliate to make marketing solicitations to a consumer. Separately, the affiliate sharing notice and opt out provisions of the FCRA (Section 603(d)(2)(A)(iii)) regulate the sharing of eligibility information other than transaction or experience information among affiliates and prohibit the sharing of such information among affiliates, unless the consumer is given notice and an opportunity to opt out.[169] The FCRA does not restrict the sharing of transaction or experience information (other than medical information) among affiliates.[170]

Section 248.121(b)(4) describes two situations in which a Covered Person has *not* made a solicitation subject to Regulation S–AM. Both situations assume that the Covered Person has not used eligibility information received from an affiliate in the manner described in § 248.121(b)(1)(ii). In the first situation, the affiliate uses its own eligibility information that it obtained in connection with a pre-existing business relationship that it has or had with the consumer to market the Covered Person's products or services to the affiliate's consumers.[171] In the second situation, which builds on the first, a Covered Person's affiliate directs its service provider to use the affiliate's own eligibility information to market the Covered Person's products or services to the affiliate's consumer, and the Covered Person does not communicate directly with the service provider regarding that use of the eligibility information.

The core concept is that the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer controls the actions of the service provider using that information. Therefore, the service provider's use of the eligibility information should not be attributed to the Covered Person whose products or services will be marketed to consumers. In such circumstances, the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer, and not on behalf of the Covered Person whose products or services will be marketed to that affiliate's consumers.

In addition, the Commission recognizes that there may be situations in which the Covered Person whose products or services are being marketed *does* communicate with the affiliate's service provider.[172] To address these situations, the Commission has added § 248.121(b)(5) which describes the conditions under which a service provider would be deemed to be acting on behalf of the affiliate with the pre-existing business relationship, rather than the Covered Person whose products or services are being marketed, notwithstanding direct communications between the Covered Person and the service provider.[173]

Section 248.121(b)(5) provides that a Covered Person does not make a marketing solicitation subject to Regulation S–AM if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that the Covered Person may access) receives and uses eligibility information from the Covered Person's affiliate to market the Covered Person's products or services to the affiliate's consumer, so long as five conditions are met.

First, the Covered Person's affiliate must control access to and use of its eligibility information by the service provider (including the right to establish specific terms and conditions under which the service provider may use such information to market the Covered Person's products or services). This requirement must be set forth in a written agreement between the Covered Person's affiliate and the service provider. The Covered Person's affiliate may demonstrate control by, for example, establishing and implementing reasonable policies and procedures applicable to the service provider's access to and use of its eligibility information.[174]

Second, the Covered Person's affiliate must establish specific terms and conditions under which the service provider may access and use that eligibility information to market the Covered Person's products or services (or those of affiliates generally) to the affiliate's consumers, and periodically evaluates the service provider's compliance with those terms and conditions. These terms and conditions may include the identity of the affiliated companies whose products or services may be marketed to the affiliate's consumers by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the affiliate's consumers may receive marketing materials. While the specific terms and conditions established by the Covered Person's affiliate must be set forth in writing, they are not required to be set forth in a written agreement between the affiliate and the service provider. If a periodic evaluation by the Covered Person's affiliate reveals that the service provider is not complying with those terms and conditions, the Commission expects the Covered Person's affiliate to take appropriate corrective action.[175]

Third, the Covered Person's affiliate must require the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of the Covered Person's products or services. This requirement must be set forth in a written agreement between the Covered Person's affiliate and the service provider.[176]

[169] Section 603(d)(2)(A)(iii) of the FCRA operates independently of FCRA's affiliate marketing provisions. Thus, the existence of a pre-existing business relationship between a consumer and an affiliate that seeks to use shared eligibility information, such as credit scores or income, to market to that consumer (or the applicability of another exception to these affiliate marketing rules) does not relieve the entity sharing the eligibility information from the requirement to comply with the affiliate sharing notice and opt out provisions of Section 603(d)(2)(A)(iii) of the FCRA before it shares with its affiliate eligibility information other than transaction or experience information. *See* 15 U.S.C. 1681a(d)(2)(A)(iii).

[170] Information sharing occurs if a reference code included in marketing materials reveals one affiliate's information about a consumer to another affiliate upon receipt of a consumer's response.

[171] As an example, a broker-dealer that sells investment company shares to a consumer has a pre-existing business relationship with the consumer (as does the investment company if the consumer is the record owner of its shares). The broker-dealer may make a marketing solicitation for an investment in an affiliated investment company based on eligibility information the broker-dealer obtained in connection with its pre-existing business relationship with the consumer.

[172] For example, a service provider may perform services for various affiliates relying on information maintained in and accessed from a common database. In certain circumstances, the person whose products or services are being marketed may communicate with the service provider of the affiliate with the pre-existing business relationship, yet the service provider is still acting on behalf of the affiliate when it uses the affiliate's eligibility information in connection with marketing the person's products or services.

[173] This section builds upon the concept of control of a service provider and thus is a natural outgrowth of § 248.121(b)(4). Under the conditions set forth in § 248.121(b)(5), the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, among other things, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of eligibility information.

[174] *See* § 248.121(b)(5)(i)(A).

[175] *See* § 248.121(b)(5)(i)(B).

[176] *See* § 248.121(b)(5)(i)(C).

Fourth, the Covered Person's affiliate must be identified on or with the marketing materials provided to the consumer. This requirement will be construed flexibly. For example, the affiliate may be identified directly on the marketing materials, on an introductory cover letter, on other documents included with the marketing materials such as a periodic statement, or on the envelope that contains the marketing materials.[177]

Fifth, the Covered Person must not directly use the affiliate's eligibility information in the manner described in § 248.121(b)(1)(ii).[178]

Under these conditions, the service provider is acting on behalf of an affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because, among other things, the affiliate controls the actions of the service provider in connection with the service provider's receipt and use of the eligibility information.[179] The five conditions together are intended to ensure that the service provider is acting on behalf of the affiliate that obtained the eligibility information in connection with a pre-existing business relationship with the consumer because that affiliate controls the service provider's receipt and use of that affiliate's eligibility information.

To provide additional guidance to Covered Persons, § 248.121(b)(6) provides six illustrative examples of the rules relating to making marketing solicitations.

3. Sections 248.121(c) and (d)

Proposed § 247.20(c) contained exceptions to the requirements of Regulation S–AM and incorporated each of the statutory exceptions to the affiliate marketing notice and opt out requirements that are set forth in Section 624(a)(4) of the FCRA. The Commission has revised the preface to the exceptions for clarity to provide that Regulation S–AM does not apply to ''you'' if a Covered Person uses eligibility information that it receives from an affiliate in certain circumstances. In addition, each of the exceptions has been moved to § 248.121(c) in the final rules and is discussed below.[180]

a. Pre-Existing Business Relationship Exception

Proposed paragraph (c)(1) of § 247.20 clarified that the notice and opt out requirements of proposed Regulation S–AM would not apply when the receiving affiliate has a pre-existing business relationship with the consumer. We are adopting § 247.20(c)(1) substantially as proposed,[181] deleting the word ''send'' for the reasons discussed above and eliminating, as unnecessary, the cross-reference to the location of the definition of ''pre-existing business relationship.'' [182] Commenters' views, and the scope of this exception, have been addressed above.[183] However, to help clarify the scope of the ''pre-existing business relationship'' exception, § 248.121(d)(1) provides an example to illustrate a situation in which the pre-existing business relationship exception would apply.[184]

b. Employee Benefit Plan Exception

Proposed § 247.20(c)(2) provided that Regulation S–AM would not apply to an affiliate using the information to facilitate communications to an individual for whose benefit the affiliate provided employee benefit or other services under a contract with an employer related to and arising out of a current employment relationship or an individual's status as a participant or beneficiary of an employee benefit plan. One commenter stated that the exception should be revised to permit communications ''to an affiliate about an individual for whose benefit an entity provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan.'' [185] This commenter also suggested deleting the phrase ''you receive from an affiliate'' in the introduction to proposed § 247.20(c). In this commenter's view, the proposed exception should have permitted an employer or plan sponsor to share information with its affiliates in order to offer other financial services, such as brokerage accounts or IRAs, to its employees. This commenter also requested clarification on whether the exception applies only if related to products offered as an employee benefit.

We decline to adopt the changes suggested by this commenter and adopt the employee benefit exception, redesignated as § 248.121(c)(2), as proposed. The focus of the rule is on facilitating communications ''to an individual for whose benefit the [Covered Person] provides employee benefit or other services,'' which more closely tracks the statutory language than the alternative language proposed by the commenter.

Moreover, we note that the only type of Covered Person to whom Section 624 of the FCRA might apply is one that receives eligibility information from an affiliate.[186] The FCRA thus makes clear that the exceptions in Section 624(a)(4) were meant to apply to persons that otherwise would be subject to Section 624. In the case of the employee benefit exception, the person using the information is also ''the person provid[ing] employee benefit or other services pursuant to a contract with an employer.'' [187] Therefore, this exception, like the other provisions of Regulation S–AM, should apply only to a Covered Person that uses eligibility information it receives from an affiliate to make marketing solicitations to consumers about its products or services.[188]

c. Service Provider Exception

Proposed § 247.20(c)(3) provided that the notice and opt out requirements of Regulation S–AM would not apply when the eligibility information is used to perform services for another affiliate. The exception would not have applied if the other affiliate was not permitted to make or send marketing solicitations on its own behalf, for example as a result of the consumer's prior decision to opt out. Thus, under the proposal, when the notice has been provided to a consumer and the consumer has opted out, a receiving affiliate subject to the

[177] *See* § 248.121(b)(5)(i)(D).

[178] *See* § 248.121(b)(5)(i)(E).

[179] This provision is designed to minimize uncertainty that may arise from the application of the facts and circumstances test in § 248.121(b)(3) to situations that involve direct communications between a service provider and a Covered Person whose products and services will be marketed to consumers.

[180] One commenter requested that the Commission delete the phrase ''if you use eligibility information you receive from an affiliate'' in the introductory words to Proposed § 247.20(c). The Commenter stated that this could inadvertently and mistakenly expose companies that share information with affiliates to potential liability. *See* SIFMA Letter II. That concern was addressed in the constructive sharing discussion above. *See supra* Part III.D.2.b.

[181] Proposed § 247.20 (d)(1) provided examples of the pre-existing business relationship exception. As explained above, we have revised the examples from proposed § 247.20(d)(1) in the final rule and included them as examples of the definition of ''pre-existing business relationship'' rather than as examples of exceptions from the application of the rule. *See* § 248.120(q)(2); *See also* discussion of ''pre-existing business relationship'' and corresponding examples *supra* Part III.C.17.

[182] *See* § 248.121(c)(1).

[183] *See supra* Part III.C.17.

[184] *See* §§ 248.120(q)(2)–(3) for examples illustrating situations in which a pre-existing business relationship exists and situations in which a pre-existing business relationship does not exist.

[185] *See* FSR Letter.

[186] The statutory preface to the exceptions provides that ''[t]his section shall not apply to a person'' using information to do certain enumerated things. *See* 15 U.S.C. 1681s–3(a)(4).

[187] 15 U.S.C. 1681s–3(a)(4)(B).

[188] There is no corresponding example for this provision.

consumer's opt out election could not circumvent the opt out by instructing the communicating affiliate or another affiliate to make or send marketing solicitations to the consumer on its behalf.[189]

One commenter urged the Commission to adopt this exception.[190] Others suggested conforming it to the statutory provision by deleting the references to marketing solicitations on behalf of service providers.[191] One of these commenters maintained that these references would impose additional burdens and costs on companies that use a single affiliate to provide various administrative services to other affiliates and would make it more difficult to provide general educational materials to consumers.[192] One commenter also asked the Commission to clarify that the limitation in FCRA Section 624(a)(4)(C) only applies to the service provider exception.[193]

We are adopting the service provider exception, redesignated as § 248.121(c)(3), substantially as proposed. We have eliminated the references to marketing solicitations made by a service provider on its own behalf. The general rule in § 248.121(a)(1) prohibits a service provider from using eligibility information it received from an affiliate to make marketing solicitations to a consumer about its own products or services unless the consumer is given notice and an opportunity to opt out and has not opted out, or unless one of the other exceptions applies. The service provider exception simply allows a service provider to do what the affiliate on whose behalf it is acting may do, such as using shared eligibility information to make marketing solicitations to consumers to whom the affiliate is permitted to make such marketing solicitations.[194] Nothing in the service provider and pre-existing business relationship exceptions will prevent an affiliate that has a pre-existing business relationship with the consumer from relying upon the service provider exception, as long as the arrangement satisfies the requirements of the rule and applicable exceptions. To help clarify the scope of the service provider exception, § 248.121(d)(2) provides two examples.[195]

d. Consumer-Initiated Communication Exception

Proposed paragraph (c)(4) of § 247.20 provided that the notice and opt out requirements would not have applied when eligibility information was used in response to a communication initiated by the consumer. This exception could have been triggered by an oral, electronic, or written communication initiated by the consumer. To be covered by the proposed exception, any use of eligibility information would need to be responsive to the communication initiated by the consumer. Paragraph (d)(2) of the proposed rule provided three examples of situations that would and would not meet the exception.[196]

Five commenters addressed this exception.[197] One commenter suggested that the Commission delete the phrase ''orally, electronically, or in writing,'' [198] while another suggested modifying it to read ''whether orally, electronically, or in writing.'' [199] Other commenters objected to requiring the use of eligibility information to be ''responsive'' to the communication initiated by the consumer.[200] In their view, the concept of ''responsiveness'' would create a vague standard and encourage a narrow reading of the exception. Another commenter stated that the Commission did not and could not provide a clear definition of what would be ''responsive'' and opined that this standard would cause a Covered Person to be uncertain as to their compliance.[201] One commenter asserted that consumers may not be familiar with the various types of products or services available to them and the different affiliates that offer those products or services and may rely on the institution to inform them about available options.[202] For this reason, the commenter maintained that the exception should not limit an affiliate from responding with solicitations about any product or service. This commenter also stated that the Senate bill that preceded the FACT Act used more restrictive language in this exception than the final legislation passed by Congress.

Some commenters objected to the example in proposed § 247.20(d)(2)(ii), stating that a consumer responding to a call-back message should qualify as a consumer-initiated communication and noting that the consumer has the option of not returning the call.[203] One commenter expressed concern about the example in proposed paragraph (d)(2)(iii) regarding the consumer who calls to ask for retail locations and hours, and stated that this would create a vague standard that would be difficult to apply and subject to differing interpretations.[204]

After considering the comments, we are adopting paragraphs (c)(4) and (d)(2) of proposed § 247.20 with some modifications, redesignated as §§ 248.121(c)(4) and (d)(3), respectively. The final rule eliminates the reference to oral, electronic, or written communications. Any form of communication may come within the exception as long as the consumer initiates the communication, whether in-person or by mail, e-mail, telephone, facsimile, or through other means.

Section 248.121(c)(4) provides that the communications covered by the exception must be consumer-initiated and must concern a Covered Person's products or services. The FCRA requires a person relying on the exception to use eligibility information only ''in response to'' a communication initiated by a consumer.[205] The Commission believes that the exceptions should be construed narrowly to avoid undermining the general rule requiring notice and opt out. Thus, consistent with the purposes of the FCRA, the Commission does not believe that a consumer-initiated

[189] Similarly, this exception would not permit a service provider to make marketing solicitations on its own behalf if eligibility information is communicated and the FCRA's affiliate marketing notice and opt out provisions otherwise would apply.

[190] *See* ICBA Letter.

[191] *See* FSR Letter; MetLife Letter.

[192] *See* FSR Letter.

[193] *See* MetLife Letter.

[194] As discussed above, the final rule does not include the word ''make'' because ''making'' and ''sending'' solicitations are distinct activities and this provision of the statute uses the verb ''to send.'' *See supra* Part II.B.

[195] Sections 248.121(b)(4) and 248.121(b)(5) are consistent with comparable provisions of the Joint Rules and the FTC Rule, 72 FR 62922–24 and 72 FR 61435–37, respectively.

[196] Proposed § 247.20(d)(2)(i) provided that the exception would apply when a consumer holding an account with an institution calls the institution's affiliate for information about the affiliate's products and services, leaving contact information with the affiliate. Proposed § 247.20(d)(2)(ii) provided that the exception would not apply when a consumer did not initiate a communication but rather called an affiliate back after the affiliate made an initial marketing call and left a message for a consumer. Proposed § 247.20(d)(2)(iii) provided that the exception would not apply when a consumer called an affiliate asking for retail locations without asking about the affiliate's products and services.

[197] *See* Coalition Letter; ICBA Letter; SIFMA Letter I; Wells Fargo Letter; USAA Letter.

[198] *See* Coalition Letter.

[199] *See* ICBA Letter.

[200] *See* Wells Fargo Letter; USAA Letter.

[201] *See* Coalition Letter.

[202] *See* Wells Fargo Letter.

[203] *See* SIFMA Letter I; Wells Fargo Letter; Coalition Letter.

[204] *See* ICBA Letter. The commenter, however, did not explain why it thought the example was vague.

[205] *See* 15 U.S.C. 1681s–3(a)(4)(D). The Commission believes this statutory language contemplates that the consumer-initiated communications will relate to a Covered Person's products or services, and that the marketing solicitations covered by the exception will be those made in response to that communication.

communication unrelated to a Covered Person's products or services should trigger the exception. A rule that allowed any consumer-initiated communication, no matter how unrelated to a Covered Person's products or services, to trigger the exception would not give meaning to the phrase ''in response to'' and could produce incongruous results. For example, if a consumer calls a broker-dealer to ask about retail locations and hours, but does not request information about its products or services, the broker-dealer may not use eligibility information it receives from an affiliate to make marketing solicitations to the consumer because the consumer-initiated communication does not relate to the broker-dealer's products or services. The use of eligibility information received from an affiliate would not be responsive to the communication, and the exception would not apply.

However, the Commission recognizes that if a consumer-initiated conversation turns to a discussion of products or services the consumer may need, marketing solicitations may be responsive if the consumer agrees to receive marketing materials and provides or confirms contact information by which he or she can receive those materials. For example, if a consumer calls a broker-dealer to ask about retail locations and hours, the broker-dealer's customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information, the consumer responds affirmatively and expresses an interest in mutual funds offered by the broker-dealer, the customer service representative offers to provide that information by telephone and mail additional information to the consumer, and the consumer agrees and provides or confirms contact information for receipt of the materials to be mailed, the broker-dealer may use eligibility information it receives from an affiliate to make marketing solicitations to the consumer about mutual funds because such marketing solicitations would respond to the consumer-initiated communication about mutual funds.

Likewise, if a consumer who has opted out of an affiliate's use of eligibility information to make marketing solicitations calls the affiliate for information about a particular product or service, (*i.e.,* life insurance), marketing solicitations regarding that specific product or service could be made in response to that call, but marketing solicitations regarding other products or services could not. Because marketing solicitations will likely be made quickly, we do not believe it is appropriate to adopt a specific time limit for making solicitations following a consumer-initiated communication about products or services.

We are adopting the example in proposed § 247.20(d)(2)(i), redesignated as § 248.121(d)(3)(i), and modified to delete the references to a telephone call as the specific form of communication and the reference to providing contact information. As discussed above and illustrated in the examples in §§ 248.120(q)(2)(v) and (vi), the need to provide contact information may vary depending on the form of communication used by the consumer. A new example in § 248.121(d)(3)(ii) illustrates a situation involving a consumer-initiated communication in which a consumer does not know exactly what products, services, or investments he or she wants, but initiates a communication to obtain information about investing for a child's college education. We are adopting the call-back example in proposed § 247.20(d)(2)(ii), redesignated as § 248.121(d)(3)(iii) and modified to illustrate that when a Covered Person makes an initial marketing call without using eligibility information received from an affiliate and leaves a message that invites the consumer to receive information about the Covered Person's products and services by calling a toll-free number, the consumer's response qualifies as a consumer-initiated communication about a product or service. The modified example is intended to avoid requiring Covered Persons to track which calls are call-backs.[206]

We are adopting the retail hours example in proposed § 247.20(d)(2)(iii) substantially as proposed and redesignated as § 248.121(d)(3)(iv). We are also adopting a new example in § 248.121(d)(3)(v) to address the situation where a consumer calls to ask about retail locations and hours and a call center representative, after eliciting information about the reason the consumer wants to visit a retail location, offers to provide information about products of interest to the consumer by telephone and mail, and the consumer agrees and provides or confirms contact information. This example demonstrates how a conversation may develop to the point where making marketing solicitations would be responsive to the consumer's call.

[206] Although the Commission received no specific comment regarding tracking call-backs, we have revised § 248.121(d)(3)(iii) in order to be consistent with the changes made by the Agencies in response to comments they received.

e. Consumer Authorization or Request Exception

Proposed § 247.20(c)(5) provided that the notice and opt out requirements would not apply when the information is used to make marketing solicitations that have been affirmatively authorized or requested by the consumer.[207] We contemplated that this provision could be triggered by an oral, electronic, or written authorization or request by the consumer but indicated that a pre-selected check box would not constitute an affirmative authorization or request.[208] In addition, we noted that boilerplate language in a disclosure or contract would not have constituted an affirmative authorization.[209] The exception in proposed paragraph (c)(5) could have been triggered, for example, if a consumer opens a securities account with a broker-dealer and authorizes or requests marketing solicitations about insurance from an insurance affiliate of the broker-dealer. Under the proposed exception, the consumer could have provided the authorization or made the request either through the Covered Person with whom he or she has a business relationship or directly to the affiliate that would make the marketing solicitation.[210] The duration of the authorization or request would have depended on the facts and circumstances. Proposed § 247.20(d)(3) provided an example of the affirmative authorization or request exception.

Some commenters noted that the proposed exception would have required an ''affirmative'' authorization or request but that the FCRA did not.[211] One commenter indicated that the proposal did not indicate how the authorization would be affirmative.[212] Another commenter indicated that inclusion of the term ''affirmative'' in the exception would have introduced uncertainty as to what would constitute an authorization or request by the consumer, and stated that the term should be deleted.[213] Other commenters asserted that a pre-selected check box should be sufficient to evidence a consumer's authorization or request for

[207] *See* Proposing Release at 69 FR 42309.

[208] *Id.*

[209] *Id.*

[210] Nothing in this exception supersedes the restrictions on telemarketing contained in rules of self-regulatory organizations, the Federal Communications Commission, or in the TSR, including the operation of the ''Do-Not-Call List'' established by the FTC and the Federal Communications Commission.

[211] *See* ACLI Letter; SIFMA Letter I; Wells Fargo Letter. *See also* 15 U.S.C. 1681s–3(a)(4)(E).

[212] *See* Wells Fargo Letter.

[213] *See* SIFMA Letter I. However, the commenter did not provide an example of how this would create uncertainty.

marketing solicitations.[214] In their view, a consumer's decision not to deselect a pre-selected check box should constitute a knowing act of the consumer to authorize or request marketing solicitations if the boxes are properly used.[215] Other commenters stated that preprinted language in a disclosure or contract should be sufficient to evidence a consumer's authorization or request for marketing solicitations.[216] Another commenter requested that the Commission clarify that a consumer's authorization or request does not have to refer to a specific product or service or to a specific provider of products or services in order for the exception to apply.[217]

We are adopting § 247.20(c)(5), redesignated as § 248.121(c)(5), substantially as proposed but without the word ''affirmative.'' This change does not affect the meaning of the exception and the consumer still must take steps to ''authorize'' or ''request'' marketing solicitations. The GLBA and the implementing privacy rules include an exception to permit the disclosure of nonpublic personal information ''with the consent or at the direction of the consumer.'' [218] Section 624 of the FCRA creates an exception to permit the use of shared eligibility information ''in response to solicitations authorized or requested by the consumer.'' The Commission interprets the ''authorized or requested'' provision in the FCRA exception to require the consumer to take affirmative steps in order to trigger the exception despite deletion of the term from the rule. The Commission construes this exception, like the other exceptions, narrowly and in a manner that does not undermine Regulation S–AM's general notice and opt out requirement. In this regard, affiliated companies cannot avoid use of the FCRA's notice and opt out requirement by including preprinted boilerplate language in the disclosures or contracts they provide to consumers, such as a sentence (or a pre-selected box next to a sentence) stating that by applying to open an account, the consumer authorizes or requests to receive marketing solicitations from affiliates. Such an interpretation would permit the exception to swallow the rule, a result that cannot be squared with the intent of Congress to give consumers notice and an opportunity to opt out of marketing solicitations. We are adopting the consumer authorization or request example in proposed § 247.20(d)(3), redesignated as § 248.121(d)(4)(i), with conforming changes in light of the changes made to § 248.121(c)(5). In addition, to provide more guidance, we are adopting three additional examples. The example in § 248.121(d)(4)(ii) illustrates how a consumer can authorize or request solicitations by checking a blank check box. The examples in §§ 248.121(d)(4)(iii) and (iv) illustrate that preprinted boilerplate language and a pre-selected check box would not meet the authorization or request requirement. The Commission does not believe it is appropriate to set a fixed time period for an authorization or request. As noted in the proposal, the duration of the authorization or request depends on what is reasonable under the facts and circumstances.[219] Of course, an authorization to make marketing solicitations to the consumer terminates if the consumer revokes the authorization.

For the reasons discussed in connection with the consumer-initiated communication exception, we omitted the reference to oral, electronic, or written communications from this exception. We do not believe it is necessary to clarify the elements of an authorization or request. Section 624(a)(4)(E) of the FACT Act clearly refers to ''solicitations authorized or requested by the consumer.'' The facts and circumstances will determine what marketing solicitations have been authorized or requested by the consumer.

f. Compliance With Applicable Laws Exception

Proposed § 247.20(c)(6) clarified that the provisions of Regulation S–AM would not apply to an affiliate if compliance with the requirements of Section 624 by the affiliate would prevent that affiliate from complying with any provision of State insurance law pertaining to unfair discrimination in a State where the affiliate is lawfully doing business.[220] The Commission received no comments on this provision and is adopting it as proposed, redesignated as § 248.121(c)(6). There is no corresponding example for this exception.

4. Relation to Affiliate-Sharing Notice and Opt Out

Proposed paragraph (f) of § 247.20 clarified the relationship between the affiliate-sharing notice and opt out opportunity required under Section 603(d)(2)(A)(iii) of the FCRA and the affiliate marketing notice and opt out opportunity required by new Section 624 of the FCRA.[221] Specifically, proposed paragraph (f) provided that nothing in proposed Regulation S–AM would have limited the responsibility of a company to comply with the notice and opt out provisions of Section 603(d)(2)(A)(iii) of the FCRA before it shares information other than transaction and experience information with affiliates if it wishes to avoid becoming a consumer reporting agency.

One commenter urged the Commission to delete this provision as unnecessary.[222] In the alternative, this commenter asked the Commission to confirm that Section 603(d)(2)(A)(iii) of the FCRA applies to the sharing of information that would otherwise meet the definition of a ''consumer report,'' and that the sharing affiliate does not automatically become a consumer reporting agency, but risks becoming a consumer reporting agency.[223] In response, the Commission is clarifying that the FCRA, not Regulation S–AM,

[214] *See* ICBA Letter; USAA Letter; Wells Fargo Letter.

[215] *See* USAA Letter; Wells Fargo Letter.

[216] *See* Coalition Letter. This commenter cited case law and FTC informal staff opinion letters relating to a consumer's written instructions to obtain a consumer report pursuant to Section 604(a)(2) of the FCRA as support for allowing boilerplate language to constitute authorization or request.

[217] *See* Wells Fargo Letter.

[218] *See* 15 U.S.C. 6802 (e)(1)(A); 17 CFR 248.14(a)(1).

[219] *See* Proposing Release at 69 FR 42310.

[220] *See* FCRA Section 624(a)(4).

[221] In general, Section 603(d)(2)(A) of the FCRA governs the sharing of creditworthiness and similar information among affiliates. As discussed in note 5 above, the FCRA sets standards for the collection, communication, and use of information bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The FCRA provides that a person who communicates these forms of information to others could become a ''consumer reporting agency,'' which is subject to substantial statutory obligations. However, a person may communicate information about its own ''transactions or experiences'' with a consumer without becoming a consumer reporting agency. This transaction and experience information may be communicated among affiliated persons without any of them becoming a consumer reporting agency. *See* FCRA Sections 603(d)(2)(A)(i) and (ii); 15 U.S.C. 1681a(d)(2)(A)(i) and (ii).

The FCRA provides that a person may communicate to its affiliates information other than transaction and experience information without becoming a consumer reporting agency if the person first gives the consumer a clear and conspicuous notice that such information may be communicated to its affiliates and an opportunity to ''opt out,'' or block the person from sharing the information. *See* FCRA Section 603(d)(2)(A)(iii); 15 U.S.C. 1681a(d)(2)(A)(iii). There is some overlap between this ''affiliate sharing'' provision of the FCRA and the ''affiliate marketing'' rules that we are adopting. The two provisions are distinct, however, and they serve different purposes. Nothing in these rules regarding the limitations on affiliate marketing under Section 624 of the FCRA supersedes or replaces the affiliate sharing notice and opt out requirement contained in Section 603(d)(2)(A)(iii) of the FCRA.

[222] *See* Coalition Letter.

[223] *Id.*

establishes the standard for defining a person as a consumer reporting agency. Accordingly, we are adopting proposed § 247.20(f), redesignated as § 248.121(e) and modified to replace the reference to becoming a consumer reporting agency with the phrase ''where applicable,'' in order to highlight this clarification.

E. Section 248.122 Scope and Duration of Opt Out

1. Section 248.122(a)

The scope of the opt out was addressed in various sections of the proposal. Proposed § 247.21(c) provided that the notice could have allowed a consumer to choose from a menu of alternatives when opting out, such as opting out of receiving marketing solicitations from certain types of affiliates, or from receiving marketing solicitations that use certain types of information or are delivered using certain methods of communication. If a Covered Person provided a menu of alternatives, one of the alternatives would have had to allow the consumer to opt out with respect to all affiliates, all eligibility information, and all methods of delivering marketing solicitations. Proposed § 247.25(d) described how the termination of a consumer relationship would have affected the consumer's opt out. Under the proposal, if a consumer's relationship with a Covered Person terminated for any reason when the consumer's opt out election was in force, the opt out would have continued to apply indefinitely unless revoked by the consumer. The Proposing Release indicated that the opt out would have been tied to the consumer, rather than to the information used for the marketing solicitations.[224]

Some commenters were critical of the provision requiring Covered Persons that provide a menu of alternatives, to provide the consumer with the ability to opt out with respect to all affiliates, all eligibility information, and all methods of delivery.[225] One commenter stated that this requirement should be eliminated, arguing that this requirement does not appear in the FCRA.[226] Another commenter indicated that the reference to ''all eligibility information'' made the provision confusing because it implied that there were various forms of eligibility information.[227] One commenter opined that this universal opt out was not Congress's intent and stated that a notice should allow opt outs on an account basis rather than an individual basis.[228] Several commenters generally opposed the indefinite opt out requirement for consumers that terminate a relationship with a person.[229]

After considering the comments, we are adopting the provision relating to the scope of the opt out, with modifications, as § 248.122(a) of Regulation S–AM. Under this section, which is modeled on Section 624(a)(2)(A) of the FCRA, the scope of the opt out depends upon the content of the opt out notice. Under § 248.122(a)(1), except as otherwise provided in that section, a consumer's election to opt out prohibits any affiliate covered by the opt out notice from using the eligibility information received from another affiliate as described in the notice to make marketing solicitations to the consumer.

Section 248.122(a)(2)(i) clarifies that, in the context of a continuing relationship, an opt out notice may apply to eligibility information obtained in connection with a single continuing relationship, multiple continuing relationships, continuing relationships established subsequent to delivery of the opt out notice, or any other transaction with the consumer. Section 248.122(a)(2)(ii) provides examples of continuing relationships. These examples are substantially similar to the examples used in the GLBA privacy rules, with added references to relationships between consumers and affiliates.[230]

Section 248.122(a)(3)(i) limits the scope of an opt out notice that is not connected with a continuing relationship. This section provides that if there is no continuing relationship between a consumer and a Covered Person or its affiliate, and if the Covered Person or its affiliate provides an opt out notice to a consumer that relates to eligibility information obtained in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, the opt out notice only applies to eligibility information obtained in connection with that transaction. The notice cannot apply to eligibility information that may be obtained in connection with subsequent transactions or a continuing relationship that may be subsequently established by the consumer with the Covered Person or its affiliate. Section 248.122(a)(3)(ii) provides examples of isolated transactions.

Section 248.122(a)(4) provides that a consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit marketing solicitations. An opt out notice may give the consumer the opportunity to elect to prohibit marketing solicitations from certain types of affiliates covered by the opt out notice but not other types of affiliates covered by the notice, marketing solicitations based on certain types of eligibility information but not other types of eligibility information, or marketing solicitations by certain methods of delivery but not other methods of delivery, so long as one of the alternatives is the opportunity to prohibit all marketing solicitations from all of the affiliates that are covered by the notice. We continue to believe that Section 624(a)(2)(A) of the FCRA requires the opt out notice to contain a single opt out option for all marketing solicitations within the scope of the notice. The Commission recognizes that consumers could receive a number of different opt out notices, even from the same affiliate. Accordingly, we anticipate monitoring industry notice practices and evaluating whether further action is needed.

Section 248.122(a)(5)(i) contains a special rule that explains the obligations with respect to notice following the termination of a continuing relationship. Under this rule, a consumer must be given a new opt out notice if, after all continuing relationships with a person or its affiliate have been terminated, the consumer subsequently establishes a new continuing relationship with that person or the same or a different affiliate and the consumer's eligibility information is to be used to make a marketing solicitation.[231] This will afford the consumer and the Covered Person a fresh start following termination of all continuing relationships by requiring a new opt out notice if a new continuing relationship is subsequently established. The new opt out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. The new opt out notice may apply more broadly to information obtained in connection

[224] *See* Proposing Release at 69 FR 42311.

[225] *See* ACLI Letter; Coalition Letter; FSR Letter.

[226] *See* ACLI Letter. *See also* 15 U.S.C. 1681s–3(a)(2).

[227] *See* FSR Letter. Another commenter also indicated that the ''option for all eligibility information'' could be interpreted to mean all eligibility information pertaining to the consumer in perpetuity. This commenter sought clarification. *See* Coalition Letter.

[228] *See* Coalition Letter.

[229] *See* ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter; SIFMA Letter I.

[230] *See, e.g.*, 17 CFR 248.4(c)(3).

[231] This provision was designed to address comments regarding consumers that terminate a continuing relationship with a Covered Person. *See* supra note 229.

with a terminated relationship and give the consumer the opportunity to opt out with respect to eligibility information obtained in connection with both the terminated and the new continuing relationships. A consumer's failure to opt out does not override a prior, but still in-effect, opt out election made by the consumer and applicable to eligibility information obtained in connection with a terminated relationship. The prior opt out would still be in effect regardless of whether the new opt out notice provided to the consumer applies to eligibility information that was obtained in connection with the terminated relationship.[232] Section 248.122(a)(5)(ii) contains an example of this special rule. The Commission notes, however, that when a consumer was not given an opt out notice in connection with the initial continuing relationship because eligibility information obtained in connection with that continuing relationship was not shared with affiliates for use in making marketing solicitations, an opt out notice provided in connection with a new continuing relationship would have to apply to any eligibility information obtained in connection with the terminated relationship that is to be shared with affiliates for use in making future marketing solicitations.

2. Section 248.122(b) Duration and Timing of Opt Out

Proposed § 247.25 addressed the duration and effect of a consumer's opt out election. Section 247.25(a) provided that a consumer's election to opt out is effective for the opt out period, which is a period of at least five years beginning as soon as reasonably practicable after the consumer's opt out election is received. Nothing in the paragraph limited the ability of Covered Persons to set an opt out period of longer than five years, including an opt out period that does not expire unless revoked by the consumer. We also stated that if for some reason, a consumer elects to opt out again while the opt out period remains in effect, a new opt out period of at least five years would begin upon receipt of each successive opt out election.

Proposed § 247.25(b) provided that a receiving affiliate could not make or send marketing solicitations to a consumer during the opt out period based on eligibility information it receives from an affiliate, except as provided in the exceptions in proposed § 247.20(c) or if the consumer had revoked his or her opt out.[233] The proposal would have tied the opt out to the consumer, not to the information.[234] Proposed § 247.25(c) clarified that a consumer could opt out at any time. Thus, even if the consumer did not opt out in response to the initial opt out notice or if the consumer's election to opt out was not prompted by an opt out notice, the consumer could still have opted out. Regardless of when the consumer opted out, the opt out would be effective for at least five years.

Commenters generally favored the five-year opt out provisions.[235] As discussed above, most commenters were concerned with the indefinite opt out provision when a consumer terminates a relationship with a person.[236] One commenter suggested that consumers should be allowed to revoke their opt outs orally, stating this would be consistent with the FCRA's flexible approach.[237] Another commenter stated that the opt out should not be broadly tied to a consumer but should be done on an account basis.[238] This commenter also asked for clarification on the implementation date, suggesting that the ''reasonably practicable'' language in the provision should be clarified to mean the opt out would begin on the date the opt out is received.

We are adopting the provisions addressing the duration of the opt out as redesignated § 248.122(b), with some modifications. The final rule clarifies that the opt out period expires if the consumer revokes his or her opt out in writing, or, if the consumer agrees, electronically. This is consistent with the approach taken in the GLBA privacy rules. We do not believe it is necessary or appropriate to permit oral revocations. Many of the exceptions to Regulation S–AM's notice and opt out provisions may be triggered by oral communications, as discussed above, which would permit the use of shared eligibility information to make marketing solicitations pending receipt of a written or electronic revocation. Also, as noted in the proposal, nothing prohibits setting an opt out period longer than five years, including an opt out period that does not expire unless revoked by the consumer.[239]

The Commission does not agree that the opt out period should begin on the date the consumer's election to opt out is received. We interpret the FACT Act requirement to mean that the consumer's opt out election must be honored for a period of at least five years from the date the election is implemented. We believe that Congress did not intend for the opt out period to be shortened to a period of less than the five years specified in the statute to reflect the time between the date the consumer's opt out election is received and the date the consumer's opt out election is implemented.

The Commission also believes that it is neither necessary nor appropriate to set a mandatory deadline for implementing the consumer's opt out election. A general standard better reflects that the time it will reasonably take to implement a consumer's opt out election may vary depending on the facts and circumstances of the situation.

Consistent with the special rule for a notice following termination of a continuing relationship, the duration of the opt out is not affected by the termination of a continuing relationship. When a consumer opts out in the course of a continuing relationship and that relationship is terminated during the opt out period, the opt out remains in effect for the remainder of the opt out period. If the consumer subsequently establishes a new continuing relationship while the

[232] The Agencies received comment that it was inappropriate to tie the opt out to the consumer, rather than to the information used for making marketing solicitations. Upon further examination, we conclude that tying the opt out to the consumer could have had unintended consequences. For example, if the opt out were tied to the consumer, a Covered Person would have to track the consumer indefinitely, even if the consumer's relationship with the Covered Person terminated and a new relationship with that Covered Person was not established until years later. We do not believe that Covered Persons should be required to track consumers indefinitely following termination of a relationship.

[233] As discussed above, proposed § 247.20(c) provided exceptions from Regulation S–AM's notice and opt out requirements in several situations, including when the receiving affiliate has a pre-existing business relationship with the consumer or receives an affirmative request for marketing solicitations from the consumer or when the receiving affiliate provides employee benefits to the consumer or performs certain services on behalf of another affiliate. *See supra* Part III.D.3.

[234] Thus, under the proposed rules, if a consumer initially elected to opt out but did not extend the opt out upon expiration of the opt out period, the receiving affiliate could use all of the eligibility information it had received about the consumer from its affiliate, including eligibility information that it received during the opt out period. However, if the consumer subsequently opted out again some time after the initial opt out period has lapsed, the receiving affiliate could not use any eligibility information about the consumer it received from an affiliate on or after the mandatory compliance date, including any information it received during the period in which no opt out election was in effect. *See* Proposing Release at 69 FR 42311.

Section 624(a)(5) of the FCRA contains a non-retroactivity provision, which provides that nothing shall prohibit the use of information that was received prior to the date on which persons are required to comply with the regulations implementing Section 624. 15 U.S.C. 1681s–3(a)(5).

[235] *See* ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter; SIFMA Letter I.

[236] *See supra* Part III.E.1.

[237] *See* ACLI Letter.

[238] *See* Coalition Letter.

[239] *See* Proposing Release at 69 FR 42322.

opt out period remains in effect, the opt out period may not be shortened with respect to information obtained in connection with the terminated relationship by sending a new opt out notice to the consumer when the new continuing relationship is established, even if the consumer does not opt out upon receipt of the new opt out notice. A person may track the eligibility information obtained in connection with the terminated relationship and provide a renewal notice to the consumer, or may choose not to use eligibility information obtained in connection with the terminated relationship to make marketing solicitations to the consumer.

3. Section 248.122(c)

Proposed § 247.25(c) clarified that a consumer could opt out at any time.[240] As explained in the proposal, even if the consumer did not opt out in response to the initial opt out notice or if the consumer's election to opt out was not prompted by an opt out notice, a consumer could still opt out. Regardless of when the consumer opted out, the opt out would have had to be effective for a period of at least five years. We received no comment on this provision and are adopting it as proposed, redesignated as § 248.122(c).

F. Section 248.123 Contents of Opt Out Notice; Consolidated and Equivalent Notices

1. Section 248.123(a)

a. Joint Notice

Proposed § 247.21 addressed the contents of the affiliate marketing opt out notice, and proposed § 247.24(c) permitted joint notices with affiliates identified in the notice with respect to which the notice was accurate. Proposed § 247.21(a) would have required the opt out notice to be clear, conspicuous, and concise, and to accurately disclose: (1) That the consumer may elect to limit a person's affiliate from using eligibility information about the consumer that the affiliate obtains from the person to make marketing solicitations to the consumer; and (2) if applicable, that the consumer's election will apply for a specified period of time and that the consumer will be allowed to extend the election once that period expires. The notice also would have had to provide the consumer with a reasonable and simple method to opt out.[241] Under the proposal, use of the proposed model forms in the proposed Appendix A, while not required, would have complied with proposed § 247.21(a) in appropriate circumstances. We received one comment on this section that urged the Commission to clarify that a Covered Person would not have to send an additional notice if the Covered Person initially provided an opt out of limited duration and then determined to increase the length of time of the duration or make the opt out permanent.[242]

We are adopting proposed § 247.21(a), redesignated as § 248.123(a) with some modifications to enhance the clarity and usability of the model notices. We are also incorporating provisions of proposed § 247.24(c), pertaining to joint notices.[243] Paragraph (a)(1)(i) provides that all opt out notices must provide the name of the affiliate or affiliates providing the notice, and allows for a joint notice by a group of affiliates. If affiliates share a common name, such as ''ABC,'' then the notice may indicate that it is being provided by the family or group of companies with the ''ABC'' name. The notice may identify the companies by stating that it is being provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. A representation that the notice is provided by ''the ABC banking, credit card, insurance, and securities companies'' applies to all companies in those categories and not just to some of those companies. If the affiliates providing the notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates. For example, if the affiliates providing the notice do business under both the ABC name and the XYZ name, then the notice could list each affiliate by name or indicate that the notice is being provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and securities companies and the XYZ insurance companies.'' Section 248.123(a)(1)(ii) provides that an opt out notice must contain a list of the affiliates or types of affiliates covered by the notice. The notice may apply to multiple affiliates and to companies that become affiliates after the notice is provided to the consumer. The rules for identifying the affiliates covered by the notice are substantially similar to the rules for identifying the affiliates providing the notice in § 248.123(a)(1)(i) described above.

Sections 248.123(a)(1)(iii)–(vii) require the opt out notice to include: (1) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer; (2) a statement that the consumer may elect to limit the use of eligibility information to make marketing solicitations to the consumer; (3) a statement that the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires; (4) if the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, a statement that the consumer who has chosen to limit marketing offers does not need to act again until the consumer receives a renewal notice; and (5) a reasonable and simple method for the consumer to opt out. The requirement in § 248.123(a)(1)(vi) to include a statement regarding consumers who may have previously opted out would be satisfied by appropriate use of the model forms in the Appendix.[244] These forms, unlike the model forms in the proposed Appendix, include a statement that can be used in a notice given to a consumer who may have previously opted out to advise the consumer that he or she does not need to act again until he or she receives a renewal notice. The Commission continues to believe that the opt out notice must specify the length of the opt out period, if one is provided. However, an institution that subsequently chooses to increase the duration of the opt out period that it previously disclosed or honor the opt out in perpetuity has no obligation to provide a revised notice to the consumer. In that situation, the

[240] *See* Proposing Release at 69 FR 42311.

[241] Proposed § 247.21(a) reflected the intent of Congress, as expressed in Section 624(a)(2)(B) of the FCRA, that a notice required by Section 624(a)(2)(B) must be ''clear, conspicuous, and concise,'' and the method for opting out be ''simple.''

[242] *See* T. Rowe Price Letter.

[243] Proposed § 247.24(c)(1) permitted a person to provide a joint opt out notice with one or more of its affiliates, so long as the notice is accurate with respect to each affiliate that issues the joint notice. Section 248.123(a)(1)(i) incorporates the substance of proposed § 247.24(c)(1) and clarifies ways in which affiliates that share a name may be identified. Proposed § 247.24(c)(2) would have permitted affiliates to provide a joint notice if the affiliates shared a common name. One commenter suggested that the rule make clear that if in a joint notice some affiliates share a common name and other affiliates do not, the notice may identify those affiliates with a common name as a group. *See* T. Rowe Price Letter.

[244] The Commission, the Agencies, and the CFTC have proposed a model privacy form in a joint rulemaking. *See Interagency Proposal for Model Privacy Form Under the Gramm-Leach-Bliley Act,* Exchange Act Release No. 55497 (Mar. 20, 2007); 72 FR 14940 (Mar. 29, 2007). This model privacy form is intended to meet the notice content requirements of Regulation S–AM.

result is the same as if the institution established a five-year opt out period and then did not send a renewal notice at the end of that period. A person receiving eligibility information from an affiliate would be prohibited from using that information to make marketing solicitations to a consumer unless a renewal notice is first provided to the consumer and the consumer does not renew the opt out. So long as no marketing solicitations are made using eligibility information received from an affiliate, there would be no violation of the FCRA or Regulation S–AM for failing to send a renewal notice in this situation.

b. Joint Relationships

Proposed § 247.24(d)(1) set out rules that would have applied when two or more consumers (referred to in the proposed regulation as ''joint consumers'') jointly obtained a product or service, such as a joint securities account.[245] It also provided several examples. Under the proposed rules, a Covered Person could have provided a single opt out notice to joint accountholders that would have had to indicate whether the Covered Person would treat an opt out election by one joint accountholder as applying to all of the associated accountholders, or whether each accountholder would have to opt out separately. The Covered Person could not have required all accountholders to opt out before honoring an opt out direction by one of the joint accountholders. In addition, we provided an example in proposed paragraph (d)(2) to explain how the rules would operate and noted that while the example was patterned after similar provisions in the GLBA privacy rules as promulgated in Regulation S–P,[246] they differed from the GLBA privacy rules in that Section 624 of the FCRA deals with the *use* of information for marketing by affiliates, rather than the *sharing* of information among affiliates.

In the proposal, we requested specific comment on proposed paragraph (d)(1)(vii) and the example in paragraph (d)(2)(iii) that addressed the situation in which only one of two joint consumers had opted out. Under those paragraphs, in a joint consumer situation, if A had opted out only for A, and B did not opt out, we indicated that a Covered Person's affiliate could use eligibility information about B to send marketing solicitations to B as long as the eligibility information was not based on A and B's joint consumer relationship. One commenter argued that this approach would be overly restrictive and challenging to implement because exclusion of joint account information could block information about both a customer who had decided to opt out and one that had not.[247] According to this commenter, Covered Persons should be able to use information about joint accounts to make marketing solicitations to the consumer who had decided not to opt out.

We are adopting proposed paragraphs (d)(1) and (d)(2) of § 247.24 with modifications, redesignated as § 248.123(a)(2). However, in light of the comment received, we are not adopting the example of joint relationships in proposed § 247.24(d)(2) because it addressed, in part, the sharing of information rather than the use of information to make marketing solicitations, and thus would be beyond the scope of this rulemaking. In addition, we have also made some technical changes to improve readability and promote consistency with the GLBA privacy rules.[248]

c. Alternative Contents

Proposed § 247.21(d) provided that if a person chose to give consumers a broader opt out right than required by law, the person could modify the contents of the opt out notice to reflect accurately the scope of the opt out right it had provided. Proposed Model Form A–3 of Appendix A provided guidance for Covered Persons wishing to allow consumers to prevent all marketing from that person and its affiliates. We received no comments on this provision and are adopting it as proposed, redesignated as § 248.122(a)(3). We are adopting proposed Model Form A–3, redesignated as Model Form A–5 with slight modifications for clarity.

d. Model Notices

Section 248.123(a)(4) provides that model notices are in the Appendix. The Commission has provided model notices to facilitate compliance with the rule, although the final rules do not require their use.

2. Coordinated, Consolidated, and Equivalent Notices

Proposed § 247.27 provided that a notice required by proposed Regulation S–AM could be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law.[249] We indicated that these notices could include but were not limited to the affiliate sharing and opt out notices described in Section 603(d)(2)(A)(iii) of the FCRA[250] and the privacy notices required by Title V of the GLBA. We further noted that a notice or other disclosure that was equivalent to the notice required by the proposal, and that was provided to a consumer together with disclosures required by any other provision of law, would satisfy the requirements of the proposed rule.

We requested comment on whether persons subject to the proposed rules would plan to consolidate their affiliate marketing notices with GLBA privacy notices or affiliate sharing opt out notices, whether we provided sufficient guidance on consolidated notices, and whether consolidation would be helpful or confusing to consumers. While one commenter expressed general support for the provision,[251] another stated that, while financial institutions may consider consolidating the affiliate marketing notice with the GLBA privacy notice, the decision to consolidate would be affected by the five-year duration of the affiliate marketing opt out.[252] However, the commenter did not specify whether this would make a firm more or less likely to consolidate notices. However, because Covered Persons are only encouraged to consolidate affiliate marketing notices with other notices they are required to provide, the Commission is, with the exception of technical changes made for clarity, adopting the consolidated and equivalent notice provisions as proposed, redesignated as §§ 248.123(b) and (c).

We encourage Covered Persons to consolidate their affiliate marketing opt out notice with GLBA privacy notices, including any affiliate sharing opt out notice under Section 603(d)(2)(A)(iii) of the FCRA, so that consumers receive a single notice they can use to review and exercise all applicable opt outs. We recognize, however, that special issues arise when these notices are

[245] *See* Proposing Release at 69 FR 42321.

[246] *See* 17 CFR 248.7(d).

[247] *See* T. Rowe Price Letter.

[248] Some implementation issues may arise from providing a single opt out notice to joint consumers in the context of this rule (which focuses on the *use* of information) and in the context of other privacy rules (which focus on the *sharing* of information). For example, a consumer may opt out with respect to affiliate marketing in connection with an individually-held account, but not opt out with respect to affiliate marketing in connection with a joint consumer account. In that situation, it could be challenging to identify which consumer information may and may not be used by affiliates to make marketing solicitations to the consumer.

[249] This is consistent with Section 624(b) of the FCRA. *See also* 15 U.S.C. 1681s–3 note.

[250] *See* discussion of FCRA Section 603(d)(2)(A)(iii) *supra* note 221.

[251] *See* Coalition Letter.

[252] *See* FSR Letter.

consolidated. For example, the affiliate marketing opt out may be limited to a period of at least five years, subject to renewal, while the GLBA privacy and affiliate sharing opt out notices are not time-limited. This difference, if applicable, must be made clear to the consumer. Thus, if a Covered Person uses a consolidated notice and the affiliate marketing opt out is limited in duration, the notice must inform consumers that if they previously opted out, they do not need to opt out again until they receive a renewal notice when the opt out expires or is about to expire. In addition, as discussed more fully below, the Commission and the Agencies, in a joint rulemaking, have proposed a model privacy form that includes an affiliate marketing opt out.[253] The proposed model privacy form is designed to satisfy the requirement to provide an affiliate marketing opt out notice.

G. Section 248.124 Reasonable Opportunity To Opt Out

1. Section 248.124(a)

Proposed § 247.22(a) provided that the communicating affiliate would have to provide a consumer a ''reasonable opportunity to opt out'' after delivery of the opt out notice but before a marketing solicitation based on eligibility information is sent. We noted that because of the various circumstances in which opt out rights are provided, a ''reasonable opportunity to opt out'' should be generally construed to avoid setting a mandatory waiting period. A general standard would provide flexibility to allow receiving affiliates to use eligibility information to make marketing solicitations at an appropriate point in time, while assuring that the consumer is given a realistic opportunity to prevent such use of the information. We received no comments on proposed § 247.22(a) and are adopting it substantially as proposed, redesignated as § 248.124(a) with technical changes for clarity.

2. Section 248.124(b)

Proposed §§ 247.22(b)(1) through (5) provided examples of what might constitute a reasonable opportunity to opt out in different situations. Proposed §§ 247.22(b)(1) and (2) provided examples of reasonable opportunities to opt out by mail or by electronic means consistent with the examples used in the GLBA privacy rules.[254] Both examples illustrated that giving consumers 30 days in which to decide whether to opt out would be reasonable in most cases. Proposed § 247.22(b)(3) provided an example of a reasonable opportunity to opt out when the consumer was required to decide as a necessary part of proceeding with an electronic transaction, whether to opt out before completing the transaction.[255] Proposed paragraph (b)(4) of § 247.22 provided that including the affiliate marketing opt out notice in a notice under the GLBA privacy rules could satisfy the reasonable opportunity standard.[256] Proposed paragraph (b)(5) provided that an ''opt-in'' would satisfy the reasonable opportunity to opt out requirement, as long as a consumer's affirmative consent is documented.[257] We sought comment on whether additional guidance or examples were needed regarding the reasonable opportunity to opt out.

A number of commenters addressed the 30-day safe harbor.[258] Some commenters stated that it would provide consumers with a reasonable opportunity to opt out.[259] Others were concerned that the time period would be viewed as a de facto minimum even though we had stated it would not.[260] Most commenters however, objected to informing the consumer that he or she has a specific period of time by which to respond,[261] citing a lack of Congressional intent,[262] customer confusion,[263] and unnecessary compliance burdens if Covered Persons decided to consolidate the GLBA notices with the Regulation S–AM notice.[264] While we received no specific comment on the opportunity to opt out by mail provision, one commenter stated that requiring consumers to acknowledge receipt of notices sent electronically, as in proposed § 247.22(b)(2), would violate the Electronic Signatures in Global and National Commerce Act (''E–Sign Act'').[265] In addition, one commenter suggested broadening the scope of proposed § 247.22(b)(3) to include all transactions.[266] This commenter also opined that proposed paragraphs (b)(4) and (b)(5) were inconsistent, appearing to equate an opt in with obtaining an opt out for the purposes of the proposal, and urged the Commission to omit the opt-in example. Another commenter did not agree that pre-selected boxes would be an unacceptable method for obtaining customer authorization, if used properly.[267]

We are adopting §§ 247.22(b)(1) and (b)(3) substantially as proposed, redesignated as §§ 248.124(b)(1) and (3). We are retaining the 30-day safe harbor because it helps afford certainty to entities that choose to follow the 30-day waiting period. We understand, however, that shorter waiting periods may be adequate under certain facts and circumstances in accordance with the general test for a reasonable opportunity to opt out.

The final rule divides proposed § 247.22(b)(2) into two subparts, redesignated as §§ 248.124(b)(2)(i) and (ii), to illustrate the different means of delivering an electronic notice. The example illustrates that for notices provided electronically, such as at an Internet Web site at which the consumer has obtained a product or service, a reasonable opportunity to opt out would include giving the consumer 30 days after the consumer acknowledges receipt of the electronic notice to opt out by any reasonable means. The acknowledgement of receipt aspect of this example is consistent with an example in the GLBA privacy regulations.[268] The example also illustrates that for notices provided by e-mail to a consumer who had agreed to receive disclosures by e-mail from the

[253] *See supra* note 244.

[254] *See* 17 CFR 248.7(a)(3)(i)–(ii).

[255] Under this proposed example, the Covered Person provided a simple process of opting out at the Internet Web site where the transaction was occurring. The opt out notice was automatically provided to the consumer, such as through the use of a mandatory link to an intermediate Web page, or ''speed bump.'' The consumer was given a choice of either opting out or not opting out at that time through a simple process conducted at the Internet Web site. In this situation we indicated that a consumer could be required to check a box on the Internet Web site in order to opt out or decline to opt out before continuing with the transaction. However, this example would not have included a situation in which the consumer was required to send a separate e-mail or visit a different Internet Web site in order to opt out.

[256] In this situation, the consumer would be allowed to exercise the opt out in the same manner and with the same amount of time to exercise the opt out as with respect to the GLBA privacy notice. This example takes into account the statutory requirement that we consider methods for coordinating and combining notices. *See* FACT Act Section 214(b)(3).

[257] In the proposal, we noted that some persons subject to Regulation S–AM might have a policy of not allowing affiliates to use eligibility information for marketing purposes unless a consumer affirmatively consented, or ''opted in,'' to receiving such marketing solicitations. However, we also noted that a pre-selected check box on a Web form or boilerplate language in a standard contract or disclosure document would not be evidence of the consumer's affirmative consent.

[258] *See* Coalition Letter; FSR Letter; ICBA Letter.

[259] *See* FSR Letter; Wells Fargo Letter.

[260] *See* Coalition Letter; ICBA Letter.

[261] *See* ACLI Letter; Coalition Letter; FSR Letter; ICBA Letter.

[262] *See* Coalition Letter.

[263] *See* ACLI Letter; ICBA Letter.

[264] *See* Coalition Letter.

[265] *See* ACB Letter. The E–Sign Act is codified at 15 U.S.C. Chapter 96.

[266] *See* Coalition Letter.

[267] *See* USAA Letter.

[268] *See* 17 CFR 248.9(b)(1)(iii).

person sending the notice, a reasonable opportunity to opt out would include giving the consumer 30 days after the e-mail is sent to elect to opt out by any reasonable means. Consumer acknowledgement is not necessary when the consumer has agreed to receive disclosures by e-mail. Moreover, the electronic delivery of affiliate marketing opt out notices does not require consumer consent in accordance with the E–Sign Act because neither Section 624 of the FCRA nor these final rules require that the notice be provided in writing. Persons that provide electronic affiliate marketing opt out notices under Regulation S–AM may do so pursuant to the agreement of the consumer, as specified in these rules, or in accordance with the requirements of the E–Sign Act.

We agree with commenters that the example regarding electronic transactions in redesignated § 248.124(b)(3) is limited in scope, and have added a new example for in-person transactions in § 248.124(b)(4). Together, these examples illustrate that an abbreviated opt out period is appropriate when the consumer is given a ''yes'' or ''no'' choice and is not permitted to proceed with the transaction unless he or she makes a choice.[269]

We received no comments on proposed § 247.22(b)(4), which provides that an affiliate marketing opt out notice can be included in a GLBA privacy notice, and are adopting it substantially as proposed, redesignated as § 248.124(b)(5). We are not adopting the example in proposed § 247.22(b)(5) that would have illustrated the option of providing a consumer with an opportunity to ''opt in'' to affiliate marketing because the example was unnecessary and confusing.

H. Section 248.125 Reasonable and Simple Methods of Opting Out

Proposed § 247.23(a) provided guidance on how a person could provide consumers with reasonable and simple methods of opting out. These examples generally track the examples of reasonable opt out means from Section 7(a)(2)(ii) of the GLBA privacy rules,[270] with certain modifications to give effect to Congress's mandate in the FACT Act that the method of opting out of affiliate marketing must also be ''simple.'' Accordingly, the example in proposed § 247.23(a)(2) contemplated the use of a self-addressed envelope with which the consumer could mail his or her reply form and opt out notice. If consumers were given the choice of calling a toll-free telephone number to opt out, the example contemplated that the system would be adequately designed and staffed to enable consumers to opt out with a single phone call.[271]

Proposed § 247.23(b) provided examples of opt out methods that would not be considered reasonable and simple. These methods include requiring the consumer to write a letter or to call or write to obtain an opt out form that was not included with the notice. A consumer who agrees to receive the opt out notice in electronic form only, such as by electronic mail or at an Internet Web site, would have to be allowed to opt out by the same or a substantially similar electronic form and should not be required to opt out solely by telephone or paper mail.

Eight commenters addressed these examples,[272] and generally agreed that the examples of the use of oral opt outs were reasonable and simple methods.[273] One commenter stated that consumers should also be able to orally revoke their opt outs.[274] Some commenters requested that the Commission clarify that this section is intended only to provide examples and is not mandatory.[275] Another commenter suggested that we delete the examples of methods that did not provide a reasonable and simple method of opting out, stating that these examples could expose Covered Persons to civil liability.[276] Other commenters objected to the reference to self-addressed envelopes.[277] One stated that a self-addressed envelope was unnecessary and inconsistent with Congress's intent because it was not required by the statute or necessary for GLBA notices.[278] Another commenter asserted that Covered Persons would view the use of a self-addressed envelope as a requirement.[279] This commenter opined that consumers would use the envelopes for other purposes, like sending remittances or address change forms, which would have ''disastrous'' consequences including unavoidable delays and lapsed notices.

Other commenters addressed electronic opt outs.[280] One commenter viewed the proposed requirement for the opt out to be electronic when the notice is electronic as arbitrary, stating that a similar requirement is not imposed on opt out notices sent by mail.[281] Another commenter opined that this requirement was not intended by Congress and requested that we adopt the GLBA rule examples.[282] Finally, some commenters believed that a company that provides a reasonable and simple method of opting out should not be required to honor an opt out through a different mechanism.[283]

We are adopting § 247.23, redesignated as § 248.125, revised as discussed below. Paragraph (a) provides the general rule that Covered Persons must not use eligibility information from an affiliate in order to make marketing solicitations to a consumer unless the consumer has been provided with a reasonable and simple method to opt out. Paragraph (b) provides examples illustrating opt out methods that are reasonable and simple, as well as examples that are not.[284]

We decline to follow commenters' suggestion that we adopt the GLBA examples without change. Section 624 of the FCRA requires the Commission to ensure that the consumer is given reasonable and *simple* methods of opting out. The GLBA did not require simple methods of opting out, although the Commission sought to provide examples of simple methods in the GLBA privacy rules. Most of the examples we are adopting are substantially similar to those in proposed § 247.23, but have been revised for clarity. We are retaining the examples in proposed §§ 247.23(a)(1) and (3), redesignated as § 248.125(b)(1)(i) and (iii), respectively. The example in § 248.125(b)(1)(ii) has been revised to reflect our understanding that the reply form and self-addressed envelope would be included together with the opt out notice and to clarify that the example is not mandatory. We do not find commenters' other views on this example to be persuasive. As in the proposal, the example in § 248.125(b)(1)(iv) contemplates that a

[269] For in-person transactions, consumers could be provided with a form that requires them to write ''yes'' or ''no'' to indicate their opt out preference, or a form that contains two blank check boxes: one to opt out and one not to opt out. Of course, if an opportunity to opt out is to be reasonable, a consumer must be permitted to choose freely whether to opt out or not, and must not be induced to forego his or her right to opt out.

[270] *See, e.g.,* 17 CFR 248.7(a)(2)(ii).

[271] *See* Proposed § 247.23(a)(4).

[272] *See* ACLI Letter; Coalition Letter; FSR Letter; IAA Letter; ICBA Letter; ICI Letter; T. Rowe Price Letter; Wells Fargo Letter.

[273] *See* FSR Letter; IAA Letter; ICI Letter; T. Rowe Price Letter.

[274] *See* FSR Letter.

[275] *See* ICBA Letter; Coalition Letter.

[276] *See* Wells Fargo Letter.

[277] *See* ACLI Letter; FSR Letter.

[278] *See* FSR Letter.

[279] *See* ACLI Letter.

[280] *See* Coalition Letter; Wells Fargo Letter.

[281] *See* Wells Fargo Letter.

[282] *See* Coalition Letter.

[283] *See* Coalition Letter; ICBA Letter.

[284] The examples of specific methods identified in the final rules are not an exhaustive list of permissible methods.

toll-free telephone number that consumers may call to opt out would be adequately designed and staffed to enable consumers to opt out in a single phone call. In setting up a toll-free telephone number that consumers may use to exercise their opt out rights, institutions should minimize extraneous marketing or other messages directed to consumers who are in the process of opting out.

One new example in § 248.125(b)(1)(v) illustrates that reasonable and simple methods include allowing consumers to exercise all of their opt out rights described in a consolidated opt out notice that includes GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt outs, by a single method, such as calling a single toll-free telephone number. This example furthers the Commission's statutory directive to ensure that notices and disclosures may be coordinated and consolidated.[285]

We have retained the examples of opt out methods that are not reasonable and simple in proposed §§ 247.23(b)(1) through (b)(3), redesignated as §§ 248.125(b)(2)(i) through (b)(2)(iii) respectively. The example redesignated as § 248.125(b)(2)(iii) has been slightly modified to illustrate that it is not reasonable or simple to require a consumer who receives the opt out notice in electronic form, such as through posting at an Internet Web site, to opt out solely by paper mail or solely by visiting a different Web site without providing a link to that site. We did not find the commenters' views on these examples to be persuasive.

In order to be consistent with the Joint Rules and the FTC rule,[286] the Commission has added new § 248.125(c), which clarifies that a consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for the consumer. This section corresponds to a provision in Regulation S–P.[287]

I. Section 248.126 Delivery of Opt Out Notices

Paragraph (a) of proposed § 247.24 provided that a person covered by the proposed rule would have needed to deliver its opt out notice so that each consumer reasonably could be expected to receive actual notice. An electronically delivered opt out notice could have been delivered either in accordance with the electronic disclosure provisions in proposed Regulation S–AM or in accordance with the E–Sign Act.[288] The proposed rule included an example where a Covered Person could e-mail its affiliate marketing notice to consumers who had previously agreed to the electronic delivery of information and could provide the notice on its Internet Web site for consumers who obtain products or services electronically through that Web site. One commenter expressed concern over the proposed requirement that the consumer acknowledge receipt of the notice as a necessary step to obtaining a particular product or service.[289] The commenter viewed this as inconsistent with the E–Sign Act.

Proposed § 247.24(b) provided examples of fulfilling the expectation of actual notice. We indicated that the ''reasonable expectation of delivery'' standard is a lesser standard than actual notice. For instance, if a communicating affiliate mailed a printed copy of its notice to the last known mailing address of a consumer, it would have met its obligation even if the consumer has changed addresses and never received the notice. One commenter expressed support for this standard.[290]

We are adopting § 247.24, redesignated as § 248.126, with modifications. We retained the reasonable expectation of actual notice standard, and the examples of a reasonable expectation of actual notice for an electronic notice have been revised and divided into two sets of examples of what does and does not meet the requirement.[291] The examples in paragraphs (b)(3)–(4) of § 248.126 illustrate that a consumer may reasonably be expected to receive actual notice if the affiliate providing the notice provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice, or posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice. Conversely, the examples in paragraphs (c)(2)–(c)(3) of § 248.126 illustrate that a consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice sends the notice by e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice, or posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

As discussed above, the Commission has determined that the electronic delivery of opt out notices does not require consumer consent in accordance with the E–Sign Act because nothing in Section 624 of the FCRA requires the notice to be provided in writing. Thus, we believe that requiring an acknowledgement of receipt is not inconsistent with the E–Sign Act. Moreover, this example is consistent with an example in the GLBA privacy rules and is appropriate, particularly where the notice is posted on an Internet Web site.

Unlike the Agencies, the Commission did not receive requests to require the mandatory delivery of electronic notices by e-mail. Like the Agencies, however, we decline to do so. The Commission agrees with the Agencies that concerns about unsolicited e-mail and the security of e-mail make it inappropriate to require e-mail as the only permissible form of electronic delivery for opt out notices.

J. Section 248.127 Renewal of Opt Out Elections

Proposed § 247.26 described procedures for extending an opt out. Proposed paragraph (a) of § 247.26 required consumers to be provided with a new notice and a reasonable opportunity to extend their opt out before a receiving affiliate could make marketing solicitations based on the consumer's eligibility information upon expiration of the opt out period. The affiliate that initially provided the notice, or its successor, would provide the extension notice. If an extension notice were not provided to the consumer, the opt out period would continue indefinitely. The requirement to provide an extension notice upon expiration of the opt out period would apply to any opt out—even if, for example, the consumer failed to opt out initially and informed the communicating affiliate of his or her opt out at some later time. The consumer could extend the opt out at the expiration of each successive opt out period. Proposed paragraph (b) of § 247.26 provided that each opt out extension would be effective for a period of at least five years, in compliance with proposed § 247.25.

Proposed § 247.26(c) addressed the contents of an extension notice.[292] Like the initial notice, an extension notice

[285] *See* 15 U.S.C. 1681s(b).

[286] *See* Joint Rules at 72 FR 62935; FTC Rule at 72 FR 61448.

[287] *See* 17 CFR 248.7(a)(2)(iv).

[288] *See* 15 U.S.C. 7001, *et seq.*

[289] *See* ACB Letter.

[290] *See* Coalition Letter.

[291] This is consistent with the approach taken in paragraph (b) of § 248.124.

[292] Covered Persons are not required to provide extension notices if they treat the consumer's opt out election as valid in perpetuity unless revoked by the consumer.

would have to be clear, conspicuous, and concise. Proposed paragraph (c) provided some flexibility in the design and contents of the notice. Under one approach, the notice could have accurately disclosed the same items required to be disclosed in the initial opt out notice under proposed § 247.21(a), along with a statement explaining that the consumer's prior opt out had expired or was about to expire, as applicable, and that the consumer would have to opt out again if he or she wished to keep the opt out election in force. Under another approach, the extension notice could have provided: (1) That the consumer previously elected to limit affiliates from using eligibility information about the consumer to make marketing solicitations to the consumer; (2) that the consumer's election had expired or was about to expire, as applicable; (3) that the consumer could have elected to extend his or her previous election; and (4) a reasonable and simple method for the consumer to extend the opt out. We requested comment regarding whether persons subject to proposed Regulation S–AM would plan to limit the duration of the opt out, and on the relative burdens and benefits of providing limited or unlimited opt out periods.

Proposed § 247.26(d) addressed the timing of the extension notice and provided that an extension notice could be delivered to the consumer either a reasonable period of time before an opt out period expired, or any time after the opt out period expired, but before covered marketing solicitations were made to the consumer. Requiring the extension notice a reasonable period of time before the opt out period expired was intended to facilitate the smooth transition of consumers who choose to change their elections. An extension notice given too far in advance of the expiration of the opt out period might confuse consumers. We did not propose to set a fixed time for what would constitute a ''reasonable period of time,'' noting that a reasonable period of time could depend upon the amount of time given to the consumer for a reasonable opportunity to opt out, the amount of time necessary to process opt outs, and other factors. Nevertheless, we stated that providing an extension notice in combination with the last annual privacy notice required by the GLBA that was provided to the consumer before expiration of the affiliate marketing opt out period would have been reasonable in all cases. Proposed § 247.26(e) made clear that sending an extension notice to a consumer before the expiration of the opt out period would not shorten the five-year opt out period.

We also noted that opt out elections under the GLBA do not expire, and that GLBA notices typically state that a consumer need not opt out again if the consumer previously opted out. We recognized that including an affiliate marketing opt out notice or an extension notice in combination with an initial or annual notice under the GLBA required complying with both FCRA and GLBA requirements as applicable. Under the proposal, if a person chose to make the affiliate marketing opt out effective in perpetuity, the statement in the GLBA notice would have remained correct. However, the GLBA notice would not have been accurate with respect to the extension notice if the affiliate marketing opt out were limited to a defined period of five or more years. In that case, the extension notice regarding affiliate marketing would have had to make clear to the consumer the necessity of opting out again in order to extend the opt out. We requested comment on this interaction between the FACT Act and GLBA notices, including whether the Commission should provide further guidance regarding how a communicating affiliate might ensure that the difference in opt out rights is clear to consumers.

Commenters expressed concern that the extension notice would differ from the initial notice because the extension notice would be required to inform the consumer that the consumer's prior opt out had expired or was about to expire, as applicable, and that the consumer would have to opt out again to keep the opt out election in force.[293] In their view, this additional disclosure would have been costly and have provided little benefit to consumers. One commenter maintained that the additional disclosure would make it difficult, if not impossible, to combine the extension notice with the GLBA privacy notice.[294]

The Commission is adopting proposed § 247.26, redesignated as § 248.127, with modifications as discussed below. The final rules also replace the references to ''extension'' with references to a ''renewal'' notice.

Section 248.127(a) provides that after an opt out period expires, a person may not make marketing solicitations to a consumer who previously opted out unless the consumer has been given a compliant renewal notice and a reasonable opportunity to opt out, and the consumer does not renew the opt out. This section also clarifies that a person can make marketing solicitations to a consumer after expiration of the opt out period if one of the exceptions in § 248.121(c) applies.

Section 248.127(a)(2) addresses the opt out renewal period. We continue to believe it is not necessary to set a fixed minimum period of time for a reasonable opportunity to renew the opt out, and that doing so would be inconsistent with the approach taken in other sections of Regulation S–AM and in the GLBA privacy rules. We received no comment regarding the minimum five-year period duration of the renewed opt out and are adopting this provision as proposed. Section 248.127(a)(3) states that a renewal notice must be provided either by the affiliate (or its successor) who provided the previous opt out notice, or as part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt out notice. This provision balances the goal of ensuring that the notice is provided by an entity known to the consumer with the need to provide a degree of flexibility to recognize changes in corporate structure that may occur over time.

In the proposal, we recognized that the content of the extension or renewal notice would differ from the content of the initial notice. We note that while the statute does not require that affiliate marketing initial and opt out renewal notices be identical, it does require that the Commission provide guidance to ensure that opt out notices are clear, conspicuous, and concise. We find it unreasonable to expect a consumer, after receiving a renewal notice, to remember that he or she previously opted out five years ago (or longer). We also find it unreasonable to expect a consumer who remembers opting out to know that he or she must opt out again in order to renew that decision. To ensure that a consumer receives a meaningful renewal notice, the consumer must be: (1) Reminded that he or she previously opted out; (2) informed that the previous opt out has expired or is about to expire; and (3) advised that to continue to limit solicitations from affiliates, he or she must renew the previous opt out. The renewal notice can state that ''the consumer's election has expired or is about to expire.'' The final rule omits the words ''as applicable'' to clarify that the notice does not have to be tailored to differentiate consumers for whom the election ''has expired'' from those for whom the election ''is about to expire.''

The Commission does not agree with the commenters who indicated that the renewal notice's additional content

[293] *See* Coalition Letter; ICBA Letter.

[294] *See* ICBA Letter.

frustrates the combination of FCRA affiliate marketing opt out notices with GLBA privacy notices. Even if the language of the renewal notice were identical to the initial notice, it still could be difficult to avoid honoring a consumer's opt out in perpetuity if the opt out notice is incorporated into the GLBA privacy notice. GLBA privacy notices often state that if a consumer has previously opted out, it is not necessary for the consumer to opt out again. This statement is accurate for affiliate marketing if the consumer's opt out will be honored in perpetuity, but is inaccurate if an affiliate marketing opt out, included as part of the notice, will be effective only for a limited period of time, subject to renewal by the consumer in five-year intervals. Thus, if an affiliate marketing opt out notice were consolidated with a GLBA privacy notice and affiliate marketing opt outs were effective only for a limited period of time, the notice would have to be modified to make clear that statements about the consumer not needing to opt out again do not apply to the affiliate marketing renewal notice. Therefore, the Commission does not believe that requiring a renewal notice to contain information not included in an initial notice will significantly affect the ability to incorporate affiliate marketing opt out notices into GLBA privacy notices because consolidation of the notices is most likely to occur when the affiliate marketing opt out will be honored in perpetuity. Entities that prefer not to provide renewal notices may do so by honoring the consumer's opt out in perpetuity. We therefore are adopting § 247.26(b) substantially as proposed, but redesignated as § 248.127(b) with revisions that reflect the changes to § 248.123, as discussed above.[295]

Proposed § 247.26(d) addressed the timing of the extension or renewal notice. We received no comment on this section and are adopting it substantially as proposed, redesignated as § 248.127(d).[296] Proposed § 247.26(e) addressed the effect of an extension or renewal notice on the existing opt out period. We received no comment on this section and are adopting it substantially as proposed, redesignated as § 248.127(d), with some modifications.[297]

K. Section 248.128 Effective Date, Compliance Date, and Prospective Application

1. Section 248.128(a) and (b)

In the Proposing Release, we recognized that some institutions may want to combine their affiliate marketing opt out notice with their next annual GLBA privacy notice. Twelve commenters addressed the effective and mandatory compliance dates.[298] These commenters believed that the mandatory compliance date should be delayed until some time after the effective date of the final rules. The commenters suggested various periods for delaying the mandatory compliance date from six, 12,[299] 15,[300] and 18 months.[301] In addition, they argued that a delayed mandatory compliance date was necessary in order to make significant changes to business practices and procedures, to implement necessary operational and systems changes, and to design and provide affiliate marketing opt out notices. Commenters also noted that many institutions would like to send the affiliate marketing notices with their initial or annual GLBA privacy notices, both to minimize costs and to avoid consumer confusion. These commenters noted that many large institutions provide GLBA privacy notices on a rolling basis, and indicated that a delayed mandatory compliance date was necessary to enable institutions to introduce affiliate marketing opt out notices into this cycle. A few industry commenters believed that Congress knew that an effective date is not necessarily the same as a mandatory compliance date because banking regulations commonly have effective dates and mandatory compliance dates that differ.

Regulation S–AM becomes effective approximately 30 days after publication in the **Federal Register**.[302] Compliance with Regulation S–AM is required not later than January 1, 2010.[303] The mandatory compliance date is delayed to give Covered Persons a reasonable amount of time to include the affiliate marketing opt out notice with their initial and annual privacy notices.[304] This is consistent with the FCRA's directive that notices may be consolidated and coordinated. The Commission believes that delaying the mandatory compliance date until January 1, 2010 will give Covered Persons adequate time to develop and distribute opt out notices, as well as provide Covered Persons sufficient time to develop and distribute consolidated notices.

2. Section 248.128(c)

Proposed § 247.20(e) provided that Regulation S–AM would not apply to eligibility information received by a receiving affiliate prior to the required compliance date. Some commenters argued that the proposed rule did not track the statutory language or reflect the intent of Congress.[305] These commenters asserted the final rules should grandfather all information received by any financial institution or affiliate in a holding company before the mandatory compliance date, rather than grandfather only that information received before the mandatory compliance date by a person that intends to use the information to make solicitations to the consumer. In the alternative, one commenter requested that, if we adopted the rule as proposed, we clarify that any information placed into a common database by an affiliate be considered to have been provided to an affiliated person.[306] The commenter argued that without such a clarification, affiliated companies would have to undertake costly deconstruction of existing databases to ensure compliance.

We are adopting § 247.20(e) substantially as proposed, redesignated as § 248.128(c), with modifications discussed below. To address concerns expressed by commenters, the final rules clarify that a Covered Person receives eligibility information from an affiliate when the affiliate places that information in a common database that is accessible by a Covered Person, even if the Covered Person has not accessed or used that information as of the compliance date. The final rules do not apply to eligibility information placed in a common database before the mandatory compliance date by an affiliate who has a pre-existing business relationship with a consumer. The rules

[295] These changes relate to identification of the affiliates or group of affiliates providing the opt out, descriptions of the types of eligibility information that may be used and the ability of the consumer to limit the use of that information, as well as other requirements that make the opt out notice reasonable and simple.

[296] We have changed the reference from ''extension'' to ''renewal'' of a notice and deleted ''before any affiliate makes or sends'' as unnecessary. Proposed § 247.26(d)(2) is now referred to as ''Combination with annual privacy notice'' in § 248.127(c)(2) and clarified for ease of reference.

[297] The phrase ''to a period of less than 5 years'' has been omitted as unnecessary.

[298] *See* ACB Letter; ACLI Letter; AIA Letter; Coalition Letter; FSR Letter; IAA Letter; ICBA Letter; ICI Letter; Metlife Letter; SIFMA Letter I; T. Rowe Price Letter; USAA Letter.

[299] *See* ACB Letter; AIA Letter; Coalition Letter; ICBA Letter; Metlife Letter.

[300] *See* IAA Letter; T. Rowe Price Letter.

[301] *See* ACLI Letter.

[302] *See* § 248.128(a).

[303] *See* § 248.128(b).

[304] In the proposal, we indicated that the final rules would become effective six months after the date on which they were issued in final form. This was consistent with the requirements of Section 624 of the FCRA. *See* Proposing Release at 69 FR 42302.

[305] *See* ACLI Letter; Coalition Letter; Wells Fargo Letter.

[306] *See* Coalition Letter.

do apply if eligibility information is obtained by an affiliate before the mandatory compliance date and is not, before the mandatory compliance date: (1) placed into a common database that is accessible to other affiliates; or (2) provided to another affiliate. The final rules also apply to new or updated eligibility information placed in a common database after the mandatory compliance date.

IV. Appendix to Subpart B—Model Forms

Proposed Appendix A provided model forms as examples to illustrate how Covered Persons could comply with the notice and opt out requirements of Section 624 of the FCRA and proposed Regulation S–AM.[307] Proposed Appendix A included three proposed model forms. Model Form A–1 was an initial opt out notice. Model Form A–2 was an extension notice that could be used when a consumer's prior opt out has expired or was about to expire. Model Form A–3 was for persons subject to proposed Regulation S–AM to use if they offered consumers a broader right to opt out of marketing than required by law.

We stated that use of the proposed model forms would not be mandatory.[308] We also noted that persons subject to proposed Regulation S–AM could use the model forms, modify them to suit particular circumstances, or use some other form, so long as the requirements of the proposed rules were met. We noted that although Model Forms A–1 and A–2 used five years as the duration of the opt out period, communicating affiliates could have chosen an opt out period longer than five years and substituted the longer time period in the opt out notices. The proposal also provided an illustration in which the communicating affiliates chose to treat the consumer's opt out as effective in perpetuity and thereby omitted from the initial notice any reference to the limited duration of the opt out period or the right to extend the opt out.

Each of the proposed model forms was designed as a stand-alone form. We anticipated that some Covered Persons might want to combine the affiliate marketing opt out notice with a GLBA privacy notice. We noted that if the notices were combined, we expected that Covered Persons would integrate the affiliate marketing opt out notice with other required disclosures and avoid repetition of information such as the methods for opting out. Finally, we noted that the development of a model form that would combine the various opt out notices was beyond the scope of the proposed rulemaking. We received one comment on the model forms that generally supported the development of templates.[309] This commenter also suggested there should be a safe harbor for companies that use the model forms.

We are adopting the model forms in Appendix A of the proposal substantially as proposed, redesignated as Appendix to Subpart B—Model Forms, with additions and revisions to reflect changes incorporated in the final rules, discussed above. The model forms are designed to be helpful for entities that give notices and beneficial for consumers. As under the proposal, the model forms are provided as stand-alone documents. Persons may also choose to combine their affiliate marketing notices with other consumer disclosures, such as GLBA privacy notices.[310] Creating a consolidated model form is beyond the scope of this rulemaking. However, as discussed above, institutions can combine affiliate marketing opt out notices with other disclosures, including GLBA privacy and opt out notices. If a combined model notice is adopted, we would expect the use of that model to satisfy the requirement to provide an initial affiliate marketing opt out notice.[311] As adopted, the Appendix includes five model forms. Model Form A–1 is for an initial notice provided by a single affiliate. Model Form A–2 is for an initial notice provided as a joint notice from two or more affiliates. Model Form A–3 is for a renewal notice provided by a single affiliate. Model Form A–4 is for a renewal notice provided as a joint notice from two or more affiliates. Model Form A–5 is for a voluntary ''no marketing'' opt out.

While use of the model forms is not mandatory, appropriate use of the model forms satisfies the requirement in Section 624 of the FCRA that Covered Persons provide notices that are ''clear, conspicuous, and concise.''[312] As adopted, the model forms state that a consumer's opt out election applies either for a fixed number of years or for ''at least 5 years.'' This revision permits Covered Persons that use a longer opt out period or that subsequently extend their opt out period to rely on the model language. The model forms also contain a reference to the consumer's right to revoke an opt out, and the model forms clarify that, with an opt out of limited duration, the consumer does not have to opt out again until a renewal notice is sent.

V. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits of its rules and understands that the rules may impose costs on Covered Persons. Regulation S–AM's requirement to provide consumers with notice and an opportunity to opt out of receiving affiliate marketing solicitations is designed to benefit consumers by enabling them to limit certain marketing solicitations from affiliated companies. In addition, the notice requirement should enhance the transparency of each Covered Person's affiliate marketing and information sharing practices.

In the proposal, we noted that the proposed rules would impose costs upon Covered Persons[313] that wish to engage in affiliate marketing based on the communication of eligibility information. Absent an exception, a Covered Person is prohibited from *using* eligibility information received from an affiliate to make marketing solicitations to consumers, unless: (1) The potential marketing use of the information has been clearly, conspicuously and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the

[307] *See* Proposing Release at 69 FR 42322.

[308] *See* Proposing Release at 69 FR 42312.

[309] *See* ICBA Letter.

[310] On March 31, 2006, the Commission and the Agencies released a report entitled *Evolution of a Prototype Financial Privacy Notice* prepared by Kleimann Communication Group, Inc., summarizing research that led to the development of a prototype short-form GLBA privacy notice. This report is available at *http://www.ftc.gov/privacy/privacyinitiatives/FTCFinalReportExecutiveSummary.pdf.* That prototype included an affiliate marketing opt out notice. The prototype assumed that the notice would be provided by the affiliate that is sharing eligibility information. The Commission believes that providing model forms in this rule for stand-alone opt out notices that may be used in a more diverse set of circumstances than a model privacy form is appropriate and consistent with efforts to develop a model privacy form. On March 29, 2007, the Commission, the Agencies, and the CFTC published for public comment in the **Federal Register** a model privacy form based on the prototype that includes the affiliate marketing opt out notice. *See supra* note 244.

[311] *See supra* Part III.F.

[312] Persons may use or not use the model forms, or modify the forms, so long as the requirements of the regulation are met. For example, although some of the model forms use five years as the duration of the opt out period, an opt out period of longer than five years may be used and the longer time substituted in the opt out notices. However, Covered Persons that modify the forms or use different forms for their notice requirements should take care to ensure that their notices are clear, conspicuous, and concise.

[313] ''Covered Persons'' include brokers, dealers (except notice-registered broker-dealers), and investment companies, as well as investment advisers and transfer agents that are registered with the Commission.

marketing solicitation; and (3) the consumer has not opted out.

In proposing the rules, we estimated that approximately 6,768 broker-dealers, 5,182 investment companies, 7,977 registered investment advisers, and 443 registered transfer agents would be required to comply with Regulation S–AM.[314] We also indicated that a Covered Person's obligation to provide notice and opportunity to opt out would depend on the information sharing policies of that person and the marketing policies of its affiliates.[315] After considering a number of factors,[316] we estimated in the Proposing Release that approximately 10% of Covered Persons, or 2,037 respondents, would be required to provide consumers with notice and an opt out opportunity under Regulation S–AM.[317] We further estimated that 14,259 Covered Persons each would require 1 hour on average to review its information sharing and affiliate marketing policies and practices to determine whether notice and an opt out opportunity would be necessary. After assuming a cost of $125 per hour for managerial staff time, we estimated that the total one-time cost of review would be approximately $1,782,375 (14,259 × $125). We estimated that, upon completion of the review, 2,037 Covered Persons actually would be required to provide a notice and an opt out opportunity, and that those persons would need an average of 6 hours to develop an initial notice and opt out form and 2 hours to design notices for new customers to receive on an ongoing basis (a total of 8 hours per affected Covered Person, or 16,296 hours). We assumed this time would be divided between senior staff, computer professionals, and secretarial staff, with review by legal professionals. Assuming an average per-hour staff cost of $95, we estimated the total cost to be $1,548,120 (16,296 × $95) in the first year. We also estimated that each of the 2,037 affected Covered Persons would spend approximately 2 hours per year (or 4,074 hours) delivering notices to new consumers and recording any opt outs that are received on an ongoing basis. Finally, we noted that these tasks would not require managerial or professional involvement; thus, we estimated an average staff cost of $40 per hour, for a total annual cost of $162,960 (4,074 × $40).[318]

We received one comment on the cost-benefit analysis, which stated that the estimates understated the compliance burden associated with Regulation S–AM.[319] The commenter indicated that the Banking Agencies estimated that it would take approximately 18 hours to prepare and distribute the initial notice to customers. It also indicated that reprogramming costs could run into the millions of dollars for the securities industry. The commenter stated that, based on the experience of the securities industry in complying with the GLBA, each firm would have to spend several hundred hours to review its information sharing and affiliate marketing policies, to provide initial notice and opt out, to design notices to be sent to new customers on an ongoing basis, to deliver the notices to customers and to record any opt outs that are received. The commenter did not provide us with specific data regarding its estimates.

The Commission recognizes that costs for developing and maintaining records of delivery of affiliate marketing notices and recording opt out elections, and costs for personal training, will vary greatly, depending on the size of a financial institution, its customer base, number of affiliates, and the extent to which the institution intends to share information. Accordingly, we have revised our estimates to make them consistent with the compliance estimates provided by the Banking Agencies in their Joint Rules,[320] to update the number of entities subject to Regulation S–AM and make the dollar costs economically current. For the purposes of the final rules, we estimate that approximately 5,561 broker-dealers, 4,586 investment companies, 11,300 registered investment advisers, and 413 registered transfer agents will be required to comply with Regulation S–AM.[321] After considering a number of factors, we estimate that approximately 10% of Covered Persons, or 2,186 respondents, will be required to provide consumers with notice and an opt out opportunity under Regulation S–AM. Moreover, we estimate that 12,242[322] Covered Persons each will require 1 hour on average to review its information sharing and affiliate marketing policies and practices to determine whether notice and an opt out opportunity is necessary. Assuming a cost of $180 per hour for managerial staff time,[323] the staff estimates that the total one-time cost of review will be approximately $2,203,560 (12,242 × $180). Once the review is complete, we estimate that 2,186 Covered Persons will be required to provide an affiliate marketing notice and an opt out opportunity, and that those persons will need an average of 18 hours to prepare an initial notice and distribute it to consumers (a total of 39,348 hours). We assume that this time will be divided between senior staff, computer professionals, and secretarial staff, with review by legal professionals. We estimate an average per-hour staff cost

[314] *See* Proposing Release at 69 FR 42313.

[315] For purposes of the Paperwork Reduction Act analysis in the Proposing Release, we estimated that approximately 70% of Covered Persons have affiliates. Updated statistics reported in registration forms filed by investment advisers show that approximately 56% of registered investment advisers have a corporate affiliate, and we estimated that other Covered Persons would report a rate of affiliation similar to that reported by registered investment advisers. *Id.*

[316] In the Proposing Release we indicated that: (1) A Covered Person that does not have affiliates or that does not communicate eligibility information to its affiliates would not be required to comply with the proposed notice and opt out requirements; (2) even if a communicating affiliate shared eligibility information, notice and opt out would not be required if the receiving affiliate did not use the information as a basis for marketing solicitations; (3) because the proposed rules allowed for a single, joint notice on behalf of a common corporate family, Covered Persons would not be required to independently provide affiliate marketing notices and opt out opportunities if they were included in an affiliate's notice; and (4) the proposed rules incorporated a number of statutory exceptions that would further reduce the number of persons required to provide affiliate marketing notices. In addition, in the Proposing Release we noted that if an institution were required to provide consumers notice and an opportunity to opt out, the notice could be combined with GLBA privacy notices or with any other document, including other disclosure documents or account statements. We expressed our expectation that most institutions that would be required to provide an affiliate marketing notice would combine that notice with some other form of communication. *Id.*

[317] *Id.* at 42313–14.

[318] *Id.* at 42314.

[319] *See* SIFMA Letter I.

[320] The Banking Agencies estimated that 18 hours was reasonable but expected that figure to vary among Covered Persons. *See* 69 FR 42513. In the Proposing Release, the Commission estimated that the ''hour burden for developing, sending and tracking the opt out notices would range from 2–20 hours, with an average of 6 hours.'' *See* Proposing Release at 69 FR 42315.

[321] A Covered Person's obligation to provide notices and opt out opportunities will depend on the information sharing policies of that person and the marketing policies of its affiliates. For purposes of the Paperwork Reduction Act, we now estimate that approximately 56% of Covered Persons have affiliates. Statistics reported in registration forms filed by investment advisers show that approximately 56% of registered investment advisers have a corporate affiliate, and we estimate that other Covered Persons would report a rate of affiliation similar to that reported by registered investment advisers.

[322] This estimate is based on the following calculation: (5,561 + 4,586 + 11,300 + 413 = 21,860 × .56 = 12,242).

[323] This is the per hour cost of Senior Compliance Officer, who we feel will be the appropriate person to review notices. This figure is derived from *See* Securities Industry and Financial Markets Association, *Report on Management and Professional Earnings in the Securities Industry—2007* (2007) (''SIFMA Report''), modified by the Commission's Office of Economic Analysis to account for an 1800-hour work year, bonuses, firm size, employee benefits, and overhead.

of $256,[324] with an estimated total cost of $10,073,088 (39,348 × $256) in the first year. We also estimate that each of the 2,186 Covered Persons will spend approximately 4 hours per year (or 8,744 hours) for creating and delivering notices to new consumers and recording any opt outs that are received on an ongoing basis. Finally, as in the Proposing Release, we note that these tasks should not require managerial or professional involvement. Thus, we estimate an average staff cost of $56 per hour,[325] for a total annual cost of $489,664 (8,744 hours × $56).[326]

VI. Paperwork Reduction Act

Certain provisions of Regulation S–AM may constitute a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995.[327] The Commission submitted Regulation S–AM to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, and the OMB approved the collection of information. The title for the collection of information is ''Regulation S–AM: Limitations on Affiliate Marketing,'' its expiration date is November 30, 2010, and its OMB control number is 3235–0609. 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.[328] Responses to these collections of information will not be kept confidential. The Commission received no comments on the PRA analysis included in its proposal to adopt Regulation S–AM.[329] We do not believe that any differences between Regulation S–AM as proposed and Regulation S–AM as adopted, including the increase in average estimated burden hours, would significantly affect the collection of information or the estimated hour burden associated with the collection of information.

A. Collection of Information

Before an affiliate may use eligibility information received from another affiliate to make marketing solicitations to a consumer, the consumer must be provided with a notice informing the individual of his or her right to opt out of such marketing. In addition, as a practical matter, Covered Persons must keep records of any opt out elections in order for the opt outs to be effective. The opt out period must last at least five years. At the end of the opt out period, the consumer must be provided with a renewal notice and a new chance to opt out before the resumption of marketing solicitations to the consumer based on the consumer's eligibility information.

Notice and opt out are only required if a Covered Person uses eligibility information from an affiliate for use in marketing solicitations. Covered Persons that do not have affiliates, or whose affiliates do not make marketing solicitations based on eligibility information received from a Covered Person, are not required to provide notice and opt out. Regulation S–AM contains a number of other exceptions as directed by Section 214 of the FACT Act, such as for situations in which the affiliate has a pre-existing business relationship with the consumer or in which the consumer requests marketing information. In the final rules, we have attempted to retain procedural flexibility and to minimize compliance burdens except as required by the terms of the FACT Act.

B. Use of Information

Section 624 of the FCRA is intended to enhance the protection of consumer financial information in the affiliate marketing context and to enable consumers to limit Covered Persons from using eligibility information they receive from an affiliate to make marketing solicitations. Regulation S–AM is necessary to fulfill the statutory mandate, in Section 214 of the FACT Act, that the Commission prescribe regulations to implement Section 624.

C. Respondents

We estimate that approximately 5,561 broker-dealers, 4,586 investment companies, 11,300 registered investment advisers, and 413 registered transfer agents will be required to comply with Regulation S–AM. However, we expect that only a fraction of all Covered Persons will be required to provide notices and opt out opportunities to consumers. First, the rules only apply to Covered Persons that have affiliates, and then only if affiliates receiving eligibility information make marketing solicitations based on the eligibility information received from a Covered Person. Based on a review of forms filed with the Commission, we estimate that approximately 56% of Covered Persons have an affiliate.[330] However, we assume that many of those Covered Persons do not communicate eligibility information to their affiliates for marketing purposes and thus will not be subject to the notice and opt out requirements of Regulation S–AM.[331] The rules also incorporate a number of statutory exceptions that further reduce the number of Covered Persons required to provide affiliate marketing notices. In addition, any notices required by Regulation S–AM can be combined with notices already required by Regulation S–P. Further, if notice is required, Regulation S–AM allows all affiliates under common ownership or control to provide a single, joint notice. Accordingly, Covered Persons that are required to provide affiliate marketing notices could be covered by a notice sent by one or more affiliates, and may not be required to provide a notice independently. In light of these factors, we estimate that approximately 10% of Covered Persons, or approximately 2,186 respondents, will be required to provide consumers with notices and an opportunity to opt out under Regulation S–AM.

D. Total Annual Reporting and Recordkeeping Burdens

Every Covered Person that has one or more affiliates likely would incur a one-time burden in reviewing its policies and business practices to determine the

[324] This estimate is derived from averaging the per hour costs of a Programmer Analyst ($194), a Senior Database Administrator ($266), a Compliance Manager ($245), a Director of Compliance ($394), a Paralegal ($168) and a Compliance Attorney ($270). *See* SIFMA Report.

[325] This estimate is derived from averaging the per hour costs of a Senior General Clerk ($52), a General Clerk ($40), an Administrative Assistant ($65), a Compliance Clerk ($62) and a Data Entry Clerk ($61). *See* SIFMA Report.

[326] We note that Regulation S–AM includes several considerations that should minimize compliance costs for affected persons. First, as required by the FACT Act, Regulation S–AM allows Covered Persons to combine their affiliate marketing opt out notices with any other notice required by law, including the privacy notices required under the GLBA. Covered Persons are already required to provide privacy notices and to accept consumer opt out elections related to information sharing. Second, Regulation S–AM allows Covered Persons some flexibility to develop and distribute the affiliate marketing opt out notices, and to record opt out elections in the manner best suited to their business and needs. Third, Regulation S–AM is consistent and comparable with the rules proposed by the Agencies, which should provide greater certainty to Covered Persons that are part of a family of affiliated companies because such affiliated companies are subject to consistent requirements. Finally, Regulation S–AM includes examples that provide specific guidance regarding what types of policies and procedures Covered Persons could develop.

[327] As amended, codified at 44 U.S.C. Chapter 35.

[328] 44 U.S.C. 3512.

[329] *See* Proposing Release at 69 FR 42314–16.

[330] This estimate is based upon statistics reported on Form ADV, the Universal Application for Investment Adviser Registration, which contains specific questions regarding affiliations between investment advisers and other persons in the financial industry. We estimate that other Covered Persons would report a rate of affiliation similar to that reported by registered investment advisers.

[331] For example, professional standards require investment advisers to preserve the confidentiality of information communicated by clients or prospects. *See* Association for Investment Management and Research, Standards of Practice Handbook 123, 125 (1996).

extent to which it communicates eligibility information to affiliates for marketing purposes and whether those affiliates make marketing solicitations based on that eligibility information. This determination should be straightforward for most entities, in part because GLBA privacy regulations already require Covered Persons other than transfer agents to review their information sharing practices and disclose whether they share information with affiliates.[332] We estimate that approximately 56% of all Covered Persons, or approximately 12,242, have an affiliate. The amount of time required to review their policies will vary widely, from a few minutes for those that do not share eligibility information with affiliates to 4 hours or more for Covered Persons with more complex information sharing arrangements. We estimate that each Covered Person will require 1 hour on average to review its policies and practices, for a total one-time burden of 12,242 hours. We estimate that 2,186 Covered Persons will be required to provide notice and opt out opportunities under the rules. This process consists of several steps. First, an affiliate marketing notice would have to be created. The amount of time required to develop a notice should be reduced significantly by the inclusion of model forms in Regulation S–AM. Second, the notices will need to be delivered. The final rules allow that affiliate marketing notices may be combined with any other notice or disclosure required by law. We expect that most Covered Persons will combine their affiliate marketing notices with some other form of communication, such as an account statement or an annual privacy notice under the GLBA. Because those communications are already delivered to consumers, adding a brief affiliate marketing notice should not result in added costs for processing or for postage and materials.[333] Notices may be delivered electronically to consumers who have agreed to electronic communications, which should further reduce the costs of delivery. Third, as a practical matter, Covered Persons will need to keep accurate records in order to honor any opt out elections and to track the expiration of the opt out period. The number of actual notice mailings in any given year will depend on the number of consumers who do business with each affected person. For purposes of the PRA, we estimate that the hour burden for developing, sending, and tracking the opt out notices will range from 2–50 hours, with an average of 18 hours for each Covered Person (39,348 hours total).[334] We estimate that postage and materials costs for the notices would be negligible because the notices likely will be combined with other required mailings.[335]

Because the notice and opt out requirements are a prerequisite to conducting covered forms of affiliate marketing, most Covered Persons would provide notice within the first year after which compliance with Regulation S–AM is required. However, additional notices will be required as new customer relationships are formed. We anticipate that many Covered Persons will ensure delivery to new consumers with a minimum of additional effort by providing or combining the notices with other documents such as account opening documents or initial GLBA privacy notices. Accordingly, we estimate an ongoing annual burden of 4 hours per year (or 8,744 hours total) for creating and delivering notices to new consumers and recording any opt outs that are received on an ongoing basis.[336]

A consumer opt out may expire at the end of five years, as long as the person that provided the initial notice provides the consumer with renewed notice and an opportunity to extend his or her opt out election before any affiliate marketing may begin.[337] Designing, sending, and recording opt out renewal notices will require additional hours and costs. However, because the initial opt out period must last for at least five years, any burden related to renewal notices would not arise within the first four years of the collection of information.

In sum, we estimate that each of approximately 12,242 Covered Persons will require an average one-time burden of 1 hour to review affiliate marketing practices (12,242 hours total). We estimate that the approximately 2,186 Covered Persons required to provide notices and opt out opportunities will incur an average first-year burden of 18 hours to provide notices and allow for consumer opt outs, for a total estimated first-year burden of 39,348 hours. With regard to continuing notice burdens, we estimate that each of the approximately 2,186 Covered Persons required to provide notices and opt out opportunities will incur an annual burden of 2 hours to develop notices for new consumers (4,372 hours total) and an annual burden of 2 hours to deliver the notices and record any opt outs for new consumers (4,372 hours total). These estimates represent a total one-time burden of 51,590 hours (12,242 hours plus 39,348 hours) and an ongoing annual burden of 8,744 hours (4,372 hours plus 4,372 hours). We do not expect that Covered Persons will incur start-up or materials costs in addition to the staff time discussed above.

E. Retention Period for Recordkeeping Requirements

Regulation S–AM does not contain express provisions governing the retention of records related to opt outs. However, as noted above, a person subject to Regulation S–AM would need to keep some record of consumer opt outs in order to know which consumers should not receive marketing solicitations based on eligibility information. These records would need to be retained for at least as long as the opt out period of five or more years, so that the person responsible for providing the renewal notice would know when that notice is required.

F. Collection of Information Is Mandatory

As noted, Covered Persons that use eligibility information from their affiliates for marketing purposes will be required to comply with the notice and opt out provisions of Regulation S–AM. Assuming that no other exception applies, the disclosure and recordkeeping requirements will be mandatory with respect to those Covered Persons.

VII. Final Regulatory Flexibility Analysis

The Commission has prepared this Final Regulatory Flexibility Analysis for Regulation S–AM in accordance with 5 U.S.C. 604.

A. Need for the Rule

Regulation S–AM implements Section 214 of the FACT Act (which added new Section 624 to the FCRA) that, in general, prohibits a person from using certain information received from an

[332] *See* 17 CFR 248.6(a)(3) (initial, annual, and revised GLBA privacy notices must include ''the categories of affiliates * * * to whom you disclose nonpublic personal information''). Transfer agents are subject to consistent and comparable requirements promulgated by the Agencies.

[333] Because we assume that most affiliate marketing notices will be combined with other required mailings, we base our estimates on the resources required to integrate an affiliate marketing notice into another mailing, rather than on the resources required to create and send a separate mailing.

[334] *See* discussion of new cost estimates and burden hours *supra* Part V.

[335] *See* discussion of consolidated notices *supra* Part III.F.2.

[336] *See* discussion of new cost estimates and burden hours *supra* Part V.

[337] In order to ease the burden of tracking each opt out period, many affiliated persons may decide to implement an opt out period of longer than five years, including a period that never expires.

affiliate to make marketing solicitations to a consumer, unless the consumer is given notice, as well as an opportunity and a simple method to opt out, of the possibility of receiving such solicitations. Section 214 also required the Agencies and the Commission, in consultation and coordination with one another, to issue implementing regulations that are consistent and comparable to the extent possible. The objectives of Regulation S–AM are discussed in detail in the Background, Overview of Comments Received and Explanation of Regulation S–AM, and Section-by-Section Analysis at Sections I through III above. The legal basis for Regulation S–AM is Section 214 of the FACT Act,[338] as well as Sections 17, 17A, 23, and 36 of the Exchange Act,[339] Sections 31 and 38 of the Investment Company Act,[340] and Sections 204 and 211 of the Investment Advisers Act.[341] The Commission received no comments regarding the Initial Regulatory Flexibility Analysis.

B. Description of Small Entities to Which the Final Rules Will Apply

Regulation S–AM applies to any Covered Person that uses eligibility information for the purpose of making marketing solicitations. Of the entities registered with the Commission, 896 broker-dealers, 197 investment companies, 671 registered investment advisers, and 76 registered transfer agents are considered small entities.[342] Only affiliated entities are subject to Regulation S–AM. We estimate that 56% of all Covered Persons have affiliates, although it is not clear whether small entities differ significantly from larger entities in their rates of corporate affiliation. While we invited comment from small entities that would be subject to the proposed rules as well as general comment regarding information that would help us to quantify the number of small entities that may be affected by Regulation S–AM, we received none.

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements

Regulation S–AM requires Covered Persons to provide consumers with notice and an opportunity to opt out of affiliated persons' use of eligibility information for marketing purposes. The final rule prohibits a Covered Person from using eligibility information received from an affiliate to make marketing solicitations to consumers, unless: (1) The potential marketing use of the information has been clearly, conspicuously and concisely disclosed to the consumer; (2) the consumer has been provided a reasonable opportunity and a simple method to opt out of receiving the marketing solicitation; and (3) the consumer has not opted out.

For those entities that provide the Section 624 notice in consolidation with other documents such as notices provided under the GLBA or other Federally mandated disclosures, the final rules impose very limited additional reporting or recordkeeping requirements. However, for Covered Persons that choose to send the notices separately, the reporting and recordkeeping requirements and other compliance requirements may be more substantial. Although the final rules do not include specific recordkeeping requirements, in practice some system of recordkeeping must exist to ensure that any consumer opt outs are honored.

There are a number of features of the FACT Act's affiliate marketing provisions as implemented by Regulation S–AM that limit its scope. First, the law only applies to the use of eligibility information by affiliates for the purpose of making marketing solicitations. Thus, affiliates that make marketing solicitations based solely upon their own information or without regard to eligibility information are not affected by this law. Second, the law provides exceptions to its notice and opt out requirements that permit Covered Persons to market to consumers with whom they have a ''pre-existing business relationship'' or from whom they have received a request for information. Third, § 248.123(a)(1)(i) allows a single, joint notice to be sent to a consumer on behalf of multiple affiliates.

A number of alternatives exist that could reduce the costs associated with compliance with Regulation S–AM. First, significant cost savings may be obtained by consolidating affiliate marketing notices with GLBA privacy notices or with other documents provided to consumers such as account statements. In addition, the model forms could be used for opt out notices that comply with the requirements of the rules. Regulation S–AM also permits Covered Persons to reduce the need for ongoing tracking by offering a permanent opt out from both the sharing of information between affiliates and from receiving marketing based on such sharing, which would be consistent with both the GLBA and FCRA notice and opt out requirements as well as with the FACT Act's notice and opt out requirements. Small entities may wish to consider whether consolidation of their privacy and affiliate marketing notices and opt out forms can reduce their compliance costs. Similar considerations can reduce the burden of providing affiliate marketing notices to new consumers. For example, as long as the notices remain clear, conspicuous, and concise,[343] small entity Covered Persons can combine affiliate marketing notices with account opening documents or initial privacy notices provided under the GLBA in order to ensure that affiliate marketing notices are delivered to new consumers without substantial additional efforts on the part of the Covered Person.

The Commission was concerned about the potential impact of the proposed rules on small entities and requested comment on: (1) The potential impact of any or all of the provisions in the proposed rules, including any benefits and costs, that the Commission should consider; (2) the costs and benefits of any alternatives, paying special attention to the effect of the proposed rules on small entities in light of the above analysis; (3) costs to implement and to comply with the proposed rules, including any expenditure of time or money for, for example, employee training, legal counsel, or other professional time, for preparing and processing the notices; and (4) costs to record and track consumers' elections to opt out. We received no comments on these issues.

[338] Public Law 108–159, 117 Stat. 1952 (2003).

[339] 15 U.S.C. 78q, 78q–1, 78w, and 78mm.

[340] 15 U.S.C. 80a–30 and 80a–37.

[341] 15 U.S.C. 80b–4 and 80b–11.

[342] For purposes of the Regulatory Flexibility Act, under the Exchange Act a small entity is a broker or dealer that had total capital of less than $500,000 on the date of its prior fiscal year and is not affiliated with any person that is not a small entity. 17 CFR 240.0–10. Under the Investment Company Act a ''small entity'' is an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0–10. Under the Investment Advisers Act, a small entity is an investment adviser that: (i) Manages less than $25 million in assets, (ii) has total assets of less than $5 million on the last day of its most recent fiscal year, and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that manages $25 million or more in assets, or any person that had total assets of $5 million or more on the last day of the most recent fiscal year. 17 CFR 275.0–7. A small entity in the transfer agent context is defined to be any transfer agent that (i) received less than 500 items for transfer and less than 500 items for processing during the preceding six months: (ii) transferred only items of issuers that would be deemed ''small businesses'' or ''small organizations'' under Rule 0–10 under the Exchange Act; (iii) maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts at all times during the preceding fiscal year; and (iv) is not affiliated with any person (other than a natural person) that is not a small business or small organization under Rule 0–10. 17 CFR 240.0–10.

[343] *See* § 248.123(a).

D. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

With the exception of the opt out for affiliate sharing under Section 603(d)(2)(A)(iii) of the FCRA, we have not identified any Federal statutes or regulations that duplicate, overlap, or conflict with Regulation S–AM. As discussed previously, while there is some overlap between Regulation S–AM and the affiliate sharing provisions of the FCRA and the notice provisions of Regulation S–P, we expect that Covered Persons will consolidate the notice provisions of Regulation S–AM, the affiliate sharing provisions of the FCRA and the privacy notice provisions of Regulation S–P.[344] We sought and received no comment regarding any other statute or regulation, including State or local statutes or regulations, that would duplicate, overlap, or conflict with the proposed rules.

E. Agency Actions To Minimize Effects on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objectives of a rule while minimizing any significant adverse impact on small businesses. In connection with Regulation S–AM, the Commission considered the following alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed rules for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the proposed rules, or any part thereof, for small entities.

The Commission does not believe that an exemption from coverage or special compliance or reporting requirements for small entities would be consistent with the mandates of the FACT Act. Section 214 of the FACT Act addresses the protection of consumer privacy, and consumer privacy concerns do not depend on the size of the entity involved. However, we have endeavored throughout the final rules to minimize the regulatory burden on all Covered Persons, including small entities, while meeting the statutory requirements. Small entities should benefit from the existing emphasis on performance rather than design standards throughout the final rules and the use of examples, including model forms for affiliate marketing notices. The Commission solicited and received no comment on any alternative system that would be consistent with the FACT Act but would minimize the impact on small entities.

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

Section 23(a)(2) of the Exchange Act[345] requires the Commission, in adopting rules under the Exchange Act, to consider the impact that the rules may have upon competition. Regulation S–AM, which implements Section 214 of the FACT Act, applies to all brokers, dealers, investment companies, registered investment advisers, and registered transfer agents. Each of these entities must provide notice and an opportunity to opt out to customers before an affiliate uses eligibility information to make marketing solicitations to consumers. Because other entities will be subject to substantially similar affiliate marketing and opt out notice rules adopted by the Agencies,[346] all financial institutions will have to bear costs of implementing the rules or substantially similar rules. We do not believe the rules will result in anti-competitive effects. Other affiliated persons that make marketing solicitations using eligibility information received from a Covered Person subject to Regulation S–AM or the substantially similar rules of the Agencies will be subject to substantially similar requirements. Therefore, all persons that engage in affiliate marketing based on eligibility information will be required to bear the costs of implementing the rules or substantially similar rules. Although these costs may vary among persons subject to the various affiliate marketing rules, we do not believe that the costs would be significantly greater for any particular entity or entities based on which affiliate marketing rule applies to that entity.

Section 3(f) of the Exchange Act,[347] Section 202(c) of the Investment Advisers Act, and Section 2(c) of the Investment Company Act[348] require the Commission, when engaging in rulemaking to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. We solicited comment on these issues but received none.[349] The rules will result in additional costs for Covered Persons and their affiliates, which may affect their efficiency. As discussed above, however, the rules and the model forms should promote efficiency by minimizing compliance costs. The ability of Covered Persons and their affiliates to use joint notices should further promote efficiency by facilitating the use of notices already prepared by affiliates and the allocation of compliance and notice delivery costs among affiliates. The rules and model forms also should promote competition among Covered Persons and between Covered Persons and other types of entities subject to the affiliate marketing rules of the Agencies by providing a common set of requirements relating to the use of eligibility information for affiliate marketing purposes. We are not aware of any effect the final rules will have on capital formation.

IX. Statutory Authority

The Commission is adopting Regulation S–AM and making conforming, technical amendments to Regulation S–P under the authority set forth in Section 214 of the FACT Act,[350] Sections 17, 17A, 23, and 36 of the Exchange Act,[351] Sections 31 and 38 of the Investment Company Act,[352] and Sections 204 and 211 of the Investment Advisers Act.[353]

X. Text of Final Rules

List of Subjects in 17 CFR Part 248

Affiliate marketing, Brokers, Consumer protection, Dealers, Investment advisers, Investment companies, Privacy, Reporting and recordkeeping requirements, Securities, Transfer agents.

■ For the reasons stated in the preamble, the Securities and Exchange Commission amends 17 CFR part 248 as follows:

PART 248—REGULATIONS S–P AND S–AM

■ 1. The authority citation for part 248 is revised to read as follows:

Authority: 15 U.S.C. 78q, 78q–1, 78w, 78mm, 80a–30, 80a–37, 80b–4, 80b–11, 1681s–3 and note, 1681w(a)(1), 6801–6809, and 6825.

[344] *See* discussion of overlap of Regulation S–AM with the affiliate sharing provisions of the FCRA *supra* Parts II.B and III.

[345] 15 U.S.C. 78w(a)(2).

[346] *See* Joint Rules and FTC rule.

[347] 15 U.S.C. 78c(f).

[348] 15 U.S.C. 80a–2(c).

[349] *See* Proposing Release at 69 FR 42318.

[350] Public Law 108–159, Section 214, 117 Stat. 1952 (2003).

[351] 15 U.S.C. 78q, 78q–1, 78w, and 78mm.

[352] 15 U.S.C. 80a–30 and 80a–37.

[353] 15 U.S.C. 80b–4 and 80b–11.

■ 2. The heading for part 248 is revised to read as set forth above.

■ 3. In part 248, wherever it may occur, remove each reference to ''this part'' and add the reference ''this subpart'' in its place.

§ 248.3 [Amended]

■ 4. In § 248.3, amend paragraphs (a)(1), (a)(2) and (p) by removing the reference ''G–L–B Act'' and adding the reference ''GLBA'' in its place.

Subpart A—[Amended]

■ 5. Remove the heading of subpart A of part 248 and add in its place the following undesignated center heading: ''Privacy and Opt Out Notices''.

Subpart B—[Amended]

■ 6. Remove the heading of subpart B of part 248 and add in its place the following undesignated center heading: ''Limits on Disclosures''.

Subpart C—[Amended]

■ 7. Remove the heading of subpart C of part 248 and add in its place the following undesignated center heading: ''Exceptions''.

Subpart D—[Amended]

■ 8. Remove the heading of subpart D of part 248 and add in its place the following undesignated center heading: ''Relation to Other Laws; Effective Date''.

Subpart A—Regulation S–P: Privacy of Consumer Financial Information and Safeguarding Personal Information

■ 9. Designate §§ 248.1 through 248.30 as subpart A and add a heading to read as set forth above.

■ 10. Reserve §§ 248.31 through 248.100 in subpart A.

Appendix A to Subpart A [Redesignated as Appendix B to Subpart A]

■ 11. Appendix A to part 248 is redesignated as Appendix B to subpart A.

■ 12a. A new Appendix A to Subpart A is added and reserved to read as follows:

Appendix A to Subpart A—Forms [Reserved]

■ 12b. The heading for newly redesignated Appendix B to Subpart A is revised to read as follows:

Appendix B to Subpart A—Sample Clauses

■ 13. Subpart B (§§ 248.101 through 248.128 and Appendix to Subpart B) is added to part 248 to read as follows:

Subpart B—Regulation S–AM: Limitations on Affiliate Marketing

Sec.
248.101 Purpose and scope.
248.102 Examples.
248.103–248.119 [Reserved]
248.120 Definitions.
248.121 Affiliate marketing opt out and exceptions.
248.122 Scope and duration of opt out.
248.123 Contents of opt out notice; consolidated and equivalent notices.
248.124 Reasonable opportunity to opt out.
248.125 Reasonable and simple methods of opting out.
248.126 Delivery of opt out notices.
248.127 Renewal of opt out elections.
248.128 Effective date, compliance date, and prospective application.

Appendix to Subpart B—Model Forms

Subpart B—Regulation S–AM: Limitations on Affiliate Marketing

§ 248.101 Purpose and scope.

(a) *Purpose.* The purpose of this subpart is to implement section 624 of the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* (''FCRA''). Section 624, which was added to the FCRA by section 214 of the Fair and Accurate Credit Transactions Act of 2003, Public Law 108–159, 117 Stat. 1952 (2003) (''FACT Act'' or ''Act''), regulates the use of consumer information received from an affiliate to make marketing solicitations.

(b) *Scope.* This subpart applies to any broker or dealer other than a notice-registered broker or dealer, to any investment company, and to any investment adviser or transfer agent registered with the Commission. These entities are referred to in this subpart as ''you.''

§ 248.102 Examples.

The examples in this subpart are not exclusive. The examples in this subpart provide guidance concerning the rules' application in ordinary circumstances. The facts and circumstances of each individual situation, however, will determine whether compliance with an example, to the extent applicable, constitutes compliance with this subpart. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise under this subpart. Similarly, the examples do not illustrate any issues that may arise under other laws or regulations.

§§ 248.103–248.119 [Reserved]

§ 248.120 Definitions.

As used in this subpart, unless the context requires otherwise:

(a) *Affiliate* of a broker, dealer, or investment company, or an investment adviser or transfer agent registered with the Commission means any person that is related by common ownership or common control with the broker, dealer, or investment company, or the investment adviser or transfer agent registered with the Commission. In addition, a broker, dealer, or investment company, or an investment adviser or transfer agent registered with the Commission will be deemed an affiliate of a company for purposes of this subpart if:

(1) That company is regulated under section 214 of the FACT Act, Public Law 108–159, 117 Stat. 1952 (2003), by a government regulator other than the Commission; and

(2) Rules adopted by the other government regulator under section 214 of the FACT Act treat the broker, dealer, or investment company, or investment adviser or transfer agent registered with the Commission as an affiliate of that company.

(b) *Broker* has the same meaning as in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)). A ''broker'' does not include a broker registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(c) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(d) *Commission* means the Securities and Exchange Commission.

(e) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(f) *Concise.* (1) *In general.* The term ''concise'' means a reasonably brief expression or statement.

(2) *Combination with other required disclosures.* A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by Federal or State law.

(g) *Consumer* means an individual.

(h) *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. Any presumption regarding control may be rebutted by evidence, but, in the case of an investment company, will continue until the Commission makes a decision to the contrary according to the procedures described in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)).

(i) *Dealer* has the same meaning as in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)). A ''dealer'' does not include a dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11)).

(j) *Eligibility information* means any information the communication of which would be a consumer report if the exclusions from the definition of ''consumer report'' in section 603(d)(2)(A) of the FCRA did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(k) *FCRA* means the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*).

(l) *GLBA* means the Gramm-Leach-Bliley Act (15 U.S.C. 6801, *et seq.*).

(m) *Investment adviser* has the same meaning as in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)).

(n) *Investment company* has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) and includes a separate series of the investment company.

(o) *Marketing solicitation.* (1) *In general.* The term ''marketing solicitation'' means the marketing of a product or service initiated by a person to a particular consumer that is:

(i) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(ii) Intended to encourage the consumer to purchase or obtain such product or service.

(2) *Exclusion of marketing directed at the general public.* A marketing solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, billboard advertisements and publicly available Web sites that are not directed to particular consumers would not constitute marketing solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(3) *Examples of marketing solicitations.* A marketing solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(p) *Person* means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(q) *Pre-existing business relationship.* (1) *In general.* The term ''pre-existing business relationship'' means a relationship between a person, or a person's licensed agent, and a consumer based on:

(i) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(ii) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(iii) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(2) *Examples of pre-existing business relationships.* (i) If a consumer has a brokerage account with a broker-dealer that is currently in force, the broker-dealer has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(ii) If a consumer has an investment advisory contract with a registered investment adviser, the investment adviser has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(iii) If a consumer was the record owner of securities issued by an investment company, but the consumer redeems these securities, the investment company has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date the consumer redeemed the investment company's securities.

(iv) If a consumer applies for a margin account offered by a broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the broker-dealer, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the application.

(v) If a consumer makes a telephone inquiry to a broker-dealer about its products or services and provides contact information to the broker-dealer, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(vi) If a consumer makes an inquiry by e-mail to a broker-dealer about one of its affiliated investment company's products or services but does not obtain a product or service from, or enter into a financial contract or transaction with the broker-dealer or the investment company, the broker-dealer and the investment company both have a pre-existing business relationship with the consumer and can therefore use eligibility information they receive from their affiliates to make solicitations to the consumer about their products or services for three months after the date of the inquiry.

(vii) If a consumer who has a pre-existing business relationship with an investment company that is part of a group of affiliated companies makes a telephone call to the centralized call center for the affiliated companies to inquire about products or services offered by a broker-dealer affiliated with the investment company, and provides contact information to the call center, the call constitutes an inquiry to the broker-dealer. In these circumstances, the broker-dealer has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from the investment company to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(3) *Examples where no pre-existing business relationship is created.* (i) If a consumer makes a telephone call to a

centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a broker-dealer, the call does not constitute an inquiry to any affiliate other than the broker-dealer that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding broker-dealer.

(ii) If a consumer who has an advisory contract with a registered investment adviser makes a telephone call to an affiliate of the investment adviser to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(iii) If a consumer makes a telephone call to a broker-dealer in response to an advertisement offering a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the broker-dealer's products or services will be marketed to consumers who call in response, the call does not create a pre-existing business relationship between the consumer and the broker-dealer because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(r) *Transfer agent* has the same meaning as in section 3(a)(25) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(25)).

(s) *You* means:

(1) Any broker or dealer other than a broker or dealer registered by notice with the Commission under section 15(b)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(11));

(2) Any investment company;

(3) Any investment adviser registered with the Commission under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1, *et seq.*); and

(4) Any transfer agent registered with the Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1).

§ 248.121 Affiliate marketing opt out and exceptions.

(a) *Initial notice and opt out requirement.* (1) *In general.* You may not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation to the consumer, unless:

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make marketing solicitations to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to ''opt out,'' or the consumer prohibits you from using eligibility information to make marketing solicitations to the consumer; and

(iii) The consumer has not opted out.

(2) *Example.* A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliated investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its discretionary advisory accounts. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The investment adviser is prohibited from using eligibility information received from its broker-dealer affiliate to make marketing solicitations to the consumer about its discretionary advisory accounts unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) *Making marketing solicitations.* (1) *In general.* For purposes of this subpart, you make a marketing solicitation if:

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a marketing solicitation;

(B) Establish criteria used to select the consumer to receive a marketing solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your marketing solicitation to that consumer; and

(iii) As a result of your use of the eligibility information, the consumer is provided a marketing solicitation.

(2) *Receiving eligibility information from an affiliate, including through a common database.* You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) *Receipt or use of eligibility information by your service provider.* Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraph (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) *Use by an affiliate of its own eligibility information.* Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a marketing solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the affiliate's consumer; or

(ii) Directs its service provider to use the affiliate's own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer to market your products or services to the consumer, and you do not communicate directly with the service provider regarding that use.

(5) *Use of eligibility information by a service provider.* (i) *In general.* You do not make a marketing solicitation subject to this subpart if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to that affiliate's consumer, so long as:

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use your affiliate's eligibility information to market your products and services (or those of affiliates generally) to your affiliate's consumers, such as the identity of the affiliated companies whose products or services may be marketed to the affiliate's consumers by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times your affiliate's consumers may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses your affiliate's eligibility information in accordance with the terms and conditions established by your affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) *Writing requirements.* (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) *Examples of making marketing solicitations.* (i) A consumer has an investment advisory contract with a registered investment adviser that is affiliated with a broker-dealer. The broker-dealer receives eligibility information about the consumer from the investment adviser. The broker-dealer uses that eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, and, as a result, the broker-dealer provides a marketing solicitation to the consumer about its brokerage services. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a marketing solicitation about brokerage products and services, the broker-dealer asks the registered investment adviser to send the marketing solicitation to the consumer and the investment adviser does so. Pursuant to paragraph (b)(1) of this section, the broker-dealer has made a marketing solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a marketing solicitation about its products or services, and, as a result, a marketing solicitation was provided to the consumer about the broker-dealer's products and services.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers who have an investment advisory contract with a registered investment adviser is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the investment adviser's eligibility information, the broker-dealer develops selection criteria and provides those criteria, marketing materials, and related instructions to the investment adviser. The investment adviser reviews eligibility information about its own consumers using the selection criteria provided by the broker-dealer to determine which consumers should receive the broker-dealer's marketing materials and sends the broker-dealer's marketing materials to those consumers. Even though the broker-dealer has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the investment adviser used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the registered investment adviser provides the broker-dealer's criteria to the investment adviser's service provider and directs the service provider to use the investment adviser's eligibility information to identify investment adviser consumers who meet the criteria and to send the broker-dealer's marketing materials to those consumers. The broker-dealer does not communicate directly with the service provider regarding the use of the investment adviser's information to market its products or services to the investment adviser's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the broker-dealer has not made a marketing solicitation to the consumer.

(v) An affiliated group of companies includes an investment company, a principal underwriter for the investment company, a retail broker-dealer, and a transfer agent that also acts as a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The investment company controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the investment company and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the investment company's eligibility information in accordance with specific terms and conditions established by the investment company relating to the marketing of the products and services of all affiliates, including the principal underwriter and the retail broker-dealer. In a separate written communication, the investment company specifies the terms and conditions under which the service provider may use the investment company's eligibility information to market the retail broker-dealer's products and services to the investment company's consumers. The specific terms and conditions are: a list of affiliated companies (including the retail broker-dealer) whose products or services may be marketed to the investment company's consumers by the service provider; the specific products or services or types of products or services that may be marketed to the investment company's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the investment company's consumers; the types or categories of the investment company's consumers to whom the service provider may market products or services of investment company affiliates; the number and types of marketing communications that the service provider may send to the investment company's consumers; and the length of time during which the service provider may market the products or services of the investment company's affiliates to its consumers.

The investment company periodically evaluates the service provider's compliance with these terms and conditions. The retail broker-dealer asks the service provider to market brokerage services to certain of the investment company's consumers. Without using the investment company's eligibility information, the retail broker-dealer develops selection criteria and provides those criteria, its marketing materials, and related instructions to the service provider. The service provider uses the investment company's eligibility information from the common database to identify the investment company's consumers to whom brokerage services will be marketed. When the retail broker-dealer's marketing materials are provided to the identified consumers, the name of the investment company is displayed on the retail broker-dealer's marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the retail broker-dealer has not made a marketing solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the investment company's eligibility information to market the products and services of other affiliates to the investment company's consumers whenever the service provider deems it appropriate to do so. The service provider uses the investment company's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) *Exceptions.* The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a marketing solicitation to a consumer with whom you have a pre-existing business relationship;

(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(3) To perform services on behalf of an affiliate, except that this paragraph shall not be construed as permitting you to send marketing solicitations on behalf of an affiliate if the affiliate would not be permitted to send the marketing solicitation as a result of the election of the consumer to opt out under this subpart;

(4) In response to a communication about your products or services initiated by the consumer;

(5) In response to an authorization or request by the consumer to receive solicitations; or

(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.

(d) *Examples of exceptions.* (1) *Example of the pre-existing business relationship exception.* A consumer has a brokerage account with a broker-dealer. The consumer also has a deposit account with the broker-dealer's affiliated depository institution. The broker-dealer receives eligibility information about the consumer from its depository institution affiliate and uses that information to make a marketing solicitation to the consumer about the broker-dealer's college savings accounts. The broker-dealer may make this marketing solicitation even if the consumer has not been given a notice and opportunity to opt out because the broker-dealer has a pre-existing business relationship with the consumer.

(2) *Examples of service provider exception.* (i) A consumer has a brokerage account with a broker-dealer. The broker-dealer furnishes eligibility information about the consumer to its affiliate, a registered investment adviser. Based on that eligibility information, the investment adviser wants to make a marketing solicitation to the consumer about its advisory services. The investment adviser does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt out notice and has elected to opt out of receiving such marketing solicitations. The investment adviser asks a service provider to send the marketing solicitation to the consumer on its behalf. The service provider may not send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's opt out election, the investment adviser is not permitted to make the marketing solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt out notice, but has not elected to opt out. The investment adviser asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the marketing solicitation on behalf of the investment adviser because, as a result of the consumer's not opting out, the investment adviser is permitted to make the marketing solicitation.

(3) *Examples of consumer-initiated communications.* (i) A consumer who is the record owner of shares in an investment company initiates a communication with an affiliated registered investment adviser about advisory services. The affiliated investment adviser may use eligibility information about the consumer it obtains from the investment company or any other affiliate to make marketing solicitations regarding the affiliated investment adviser's services in response to the consumer-initiated communication.

(ii) A consumer who has a brokerage account with a broker-dealer contacts the broker-dealer to request information about how to save and invest for a child's college education without specifying the type of savings or investment vehicle in which the consumer may be interested. Information about a range of different products or services offered by the broker-dealer and one or more of its affiliates may be responsive to that communication. Such products, services, and investments may include the following: investments in affiliated investment companies; investments in section 529 plans offered by the broker-dealer; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make marketing solicitations to the consumer in response to this communication.

(iii) A registered investment adviser makes a marketing call to the consumer without using eligibility information received from an affiliate. The investment adviser leaves a voice-mail message that invites the consumer to call a toll-free number to receive information about services offered by the investment adviser. If the consumer calls the toll-free number to inquire about the investment advisory services, the call is a consumer-initiated communication about a product or service, and the investment adviser may now use eligibility information it receives from its affiliates to make marketing solicitations to the consumer.

(iv) A consumer calls a broker-dealer to ask about retail locations and hours, but does not request information about

its products or services. The broker-dealer may not use eligibility information it receives from an affiliate to make marketing solicitations to the consumer because the consumer-initiated communication does not relate to the broker-dealer's products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a broker-dealer to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about mutual funds (*i.e.,* registered open-end investment companies). The customer service representative offers to provide that information by telephone and mail additional information to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The broker-dealer may use eligibility information it receives from an affiliate to make marketing solicitations to the consumer about mutual funds because such marketing solicitations would respond to the consumer-initiated communication about mutual funds.

(4) *Examples of consumer authorization or request for marketing solicitations.* (i) A consumer who has a brokerage account with a broker-dealer authorizes or requests information about life insurance offered by the broker-dealer's insurance affiliate. The authorization or request, whether given to the broker-dealer or the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the broker-dealer or any other affiliate to make marketing solicitations to the consumer about life insurance.

(ii) A consumer completes an online application to open an online brokerage account with a broker-dealer. The broker-dealer's online application contains a blank check box that the consumer may check to authorize or request information from the broker-dealer's affiliates. The consumer checks the box. The consumer has authorized or requested marketing solicitations from the broker-dealer's affiliates.

(iii) A consumer completes an online application to open an online brokerage account with a broker-dealer. The broker-dealer's online application contains a check box indicating that the consumer authorizes or requests information from the broker-dealer's affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested marketing solicitations from the broker-dealer's affiliates.

(iv) The terms and conditions of a brokerage account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the broker-dealer's affiliates. The consumer has not authorized or requested marketing solicitations from the broker-dealer's affiliates.

(e) *Relation to affiliate-sharing notice and opt out.* Nothing in this subpart limits the responsibility of a person to comply with the notice and opt out provisions of Section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)) where applicable.

§ 248.122 Scope and duration of opt out.

(a) *Scope of opt out.* (1) *In general.* Except as otherwise provided in this section, the consumer's election to opt out prohibits any affiliate covered by the opt out notice from using eligibility information received from another affiliate as described in the notice to make marketing solicitations to the consumer.

(2) *Continuing relationship.* (i) *In general.* If the consumer establishes a continuing relationship with you or your affiliate, an opt out notice may apply to eligibility information obtained in connection with:

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt out notice, so long as the notice adequately describes the continuing relationships covered by the opt out; or

(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

(ii) *Examples of continuing relationships.* A consumer has a continuing relationship with you or your affiliate if the consumer:

(A) Opens a brokerage account or enters into an advisory contract with you or your affiliate;

(B) Obtains a loan for which you or your affiliate owns the servicing rights;

(C) Purchases investment company shares in his or her own name;

(D) Holds an investment through you or your affiliate; such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;

(E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;

(F) Enters into a lease of personal property with you or your affiliate; or

(G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) *No continuing relationship.* (i) *In general.* If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or an application that is denied, an opt out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

(ii) *Examples of isolated transactions.* An isolated transaction occurs if:

(A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or

(B) A broker-dealer opens a brokerage account for the consumer solely for the purpose of liquidating or purchasing securities as an accommodation, *i.e.,* on a one-time basis, without the expectation of engaging in other transactions.

(4) *Menu of alternatives.* A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt out notice but not other types of affiliates covered by the notice, electing to prohibit marketing solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit marketing solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all marketing solicitations from all of the affiliates that are covered by the notice.

(5) *Special rule for a notice following termination of all continuing relationships.* (i) *In general.* A consumer must be given a new opt out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a marketing solicitation. The new opt out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt out

notice would not override a prior opt out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt out notice applies to eligibility information obtained in connection with the terminated relationship.

(ii) *Example.* A consumer has an advisory contract with a company that is registered with the Commission as both a broker-dealer and an investment adviser, and that is part of an affiliated group. The consumer terminates the advisory contract. One year after terminating the advisory contract, the consumer opens a brokerage account with the same company. The consumer must be given a new notice and opportunity to opt out before the company's affiliates may make marketing solicitations to the consumer using eligibility information obtained by the company in connection with the new brokerage account relationship, regardless of whether the consumer opted out in connection with the advisory contract.

(b) *Duration of opt out.* The election of a consumer to opt out must be effective for a period of at least five years (the ''opt out period'') beginning when the consumer's opt out election is received and implemented, unless the consumer subsequently revokes the opt out in writing or, if the consumer agrees, electronically. An opt out period of more than five years may be established, including an opt out period that does not expire unless revoked by the consumer.

(c) *Time of opt out.* A consumer may opt out at any time.

§ 248.123 Contents of opt out notice; consolidated and equivalent notices.

(a) *Contents of opt out notice.* (1) *In general.* A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC bank and securities companies and the XYZ insurance companies'';

(ii) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and securities companies and the XYZ insurance companies'';

(iii) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make marketing solicitations to the consumer;

(v) That the consumer's election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit marketing solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) *Joint relationships.* (i) If two or more consumers jointly obtain a product or service, a single opt out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt out notice must explain how an opt out direction by a joint consumer will be treated. An opt out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require *all* joint consumers to opt out before implementing *any* opt out direction.

(3) *Alternative contents.* If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt out rights.

(4) *Model notices.* Model notices are provided in the Appendix to this subpart.

(b) *Coordinated and consolidated notices.* A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the FCRA (15 U.S.C. 1681a(d)(2)(A)(iii)) and the GLBA privacy notice.

(c) *Equivalent notices.* A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 248.124 Reasonable opportunity to opt out.

(a) *In general.* You must not use eligibility information that you receive from an affiliate to make marketing solicitations to a consumer about your products or services unless the consumer is provided a reasonable opportunity to opt out, as required by § 248.121(a)(1)(ii).

(b) *Examples of a reasonable opportunity to opt out.* The consumer is given a reasonable opportunity to opt out if:

(1) *By mail.* The opt out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) *By electronic means.* (i) The opt out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or

service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) *At the time of an electronic transaction.* The opt out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) *At the time of an in-person transaction.* The opt out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a ''yes'' or ''no'' to indicate their opt out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) *By including in a privacy notice.* The opt out notice is included in a GLBA privacy notice. The consumer is allowed to exercise the opt out within a reasonable period of time and in the same manner as the opt out under that privacy notice.

§ 248.125 Reasonable and simple methods of opting out.

(a) *In general.* You must not use eligibility information about a consumer that you receive from an affiliate to make a marketing solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 248.121(a)(1)(ii).

(b) *Examples.* (1) *Reasonable and simple opt out methods.* Reasonable and simple methods for exercising the opt out right include:

(i) Designating a check-off box in a prominent position on the opt out form;

(ii) Including a reply form and a self-addressed envelope together with the opt out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt out rights described in a consolidated opt out notice that includes the GLBA privacy, FCRA affiliate sharing, and FCRA affiliate marketing opt outs, by a single method, such as by calling a single toll-free telephone number.

(2) *Opt out methods that are not reasonable and simple.* Reasonable and simple methods for exercising an opt out right *do not* include:

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt out notice; or

(iii) Requiring the consumer who receives the opt out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) *Specific opt out means.* Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 248.126 Delivery of opt out notices.

(a) *In general.* The opt out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001, *et seq.*

(b) *Examples of reasonable expectation of actual notice.* A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) *Examples of no reasonable expectation of actual notice.* A consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice by e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 248.127 Renewal of opt out elections.

(a) *Renewal notice and opt out requirement.* (1) *In general.* After the opt out period expires, you may not make marketing solicitations to a consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§ 248.124 through 248.126, and a reasonable opportunity and a reasonable and simple method to renew the opt out, and the consumer does not renew the opt out; or

(ii) An exception in § 248.121(c) applies.

(2) *Renewal period.* Each opt out renewal must be effective for a period of at least five years as provided in § 248.122(b).

(3) *Affiliates who may provide the notice.* The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt out notice.

(b) *Contents of renewal notice.* The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as ''ABC,'' then the notice may indicate it is being provided by multiple companies with the ABC name

or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates providing the joint notice do not all share a common name, then the notice must either separately identify each affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice is provided by ''all of the ABC and XYZ companies'' or by ''the ABC banking and securities companies and the XYZ insurance companies'';

(2) A list of the affiliates or types of affiliates whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as ''ABC,'' then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by ''all of the ABC companies,'' ''the ABC banking, credit card, insurance, and securities companies,'' or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to ''all of the ABC and XYZ companies'' or to ''the ABC banking and securities companies and the XYZ insurance companies'';

(3) A general description of the types of eligibility information that may be used to make marketing solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make marketing solicitations to the consumer;

(5) That the consumer's election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer's previous election;

(7) If applicable, that the consumer's election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) *Timing of the renewal notice.* (1) *In general.* A renewal notice may be provided to the consumer either:

(i) A reasonable period of time before the expiration of the opt out period; or

(ii) Any time after the expiration of the opt out period but before marketing solicitations that would have been prohibited by the expired opt out are made to the consumer.

(2) *Combination with annual privacy notice.* If you provide an annual privacy notice under the GLBA, providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt out period is a reasonable period of time before expiration of the opt out in all cases.

(d) *No effect on opt out period.* An opt out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt out period, even if the consumer does not renew the opt out.

§ 248.128 Effective date, compliance date, and prospective application.

(a) *Effective date.* This subpart is effective September 10, 2009.

(b) *Mandatory compliance date.* Compliance with this subpart is required not later than January 1, 2010.

(c) *Prospective application.* The provisions of this subpart do not prohibit you from using eligibility information that you receive from an affiliate to make a marketing solicitation to a consumer if you receive such information prior to January 1, 2010. For purposes of this section, you are deemed to receive eligibility information when such information is placed into a common database and is accessible by you.

Appendix to Subpart B—Model Forms

a. Although you and your affiliates are not required to use the model forms in this Appendix, use of a model form (if applicable to each person that uses it) complies with the requirement in section 624 of the FCRA for clear, conspicuous, and concise notices.

b. Although you may need to change the language or format of a model form to reflect your actual policies and procedures, any such changes may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Acceptable changes include, for example:

1. Rearranging the order of the references to ''your income,'' ''your account history,'' and ''your credit score.''

2. Substituting other types of information for ''income,'' ''account history,'' or ''credit score'' for accuracy, such as ''payment history,'' ''credit history,'' ''payoff status,'' or ''claims history.''

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as ''the [ABC] group of companies.''

4. Substituting other types of affiliates covered by the notice for ''credit card,'' ''insurance,'' or ''securities'' affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt out period, the notice may omit information about the renewal notice.

6. Adding a statement informing the consumer how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: ''If you previously opted out, you do not need to do so again.''

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address.

10. Adding disclosures regarding the treatment of opt-outs by joint consumers to comply with § 248.123(a)(2), if applicable.

A–1—Model Form for Initial Opt Out Notice (Single-Affiliate Notice)

A–2—Model Form for Initial Opt Out Notice (Joint Notice)

A–3—Model Form for Renewal Notice (Single-Affiliate Notice)

A–4—Model Form for Renewal Notice (Joint Notice)

A–5—Model Form for Voluntary ''No Marketing'' Notice

A–1—Model Form for Initial Opt Out Notice (Single-Affiliate Notice)—[Your Choice to Limit Marketing]/[Marketing Opt Out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC] group of companies, such as our [investment adviser, broker, transfer agent, and investment company] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Do not allow your affiliates to use my personal information to market to me.

A–2—Model Form for Initial Opt Out Notice (Joint Notice)—[Your Choice to Limit Marketing]/[Marketing Opt Out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC investment companies, investment advisers, transfer agents, and broker-dealers] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice]/[for x years from when you tell us your choice]/[for at least 5 years from when you tell us your choice]. [Include if the opt out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years]/[at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

A–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt Out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [investment adviser, investment company, transfer agent, and broker-dealer] affiliates, from marketing their products or services to you based on your personal information that we share with them. This information includes your [income], your [account history with us], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Renew my choice to limit marketing for [x] more years.

A–4—Model Form for Renewal Notice (Joint Notice)—[Renewing Your Choice to Limit Marketing]/[Renewing Your Marketing Opt Out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You previously chose to limit the [ABC] companies, such as the [ABC investment adviser, investment company, transfer agent, and broker-dealer] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].

• Your choice has expired or is about to expire.

To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Renew my choice to limit marketing for [x] more years.

A–5—Model Form for Voluntary "No Marketing" Notice—Your Choice to Stop Marketing

• [Name of Affiliate] is providing this notice.

• You may choose to stop all marketing from us and our affiliates.

• [Your choice to stop marketing from us and our affiliates will apply until you tell us to change your choice.]

To stop all marketing, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: *www.—.com*

• By mail: check the box and complete the form below, and send the form to:

[Company name]

[Company address]

☐ Do not market to me.

Dated: August 4, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–19020 Filed 8–10–09; 8:45 am]

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Federal Register

Tuesday,
August 11, 2009

Part IV

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1910

Revising Standards Referenced in the Acetylene Standard; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA–2008–0034]

RIN 1218–AC08

Revising Standards Referenced in the Acetylene Standard

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Direct final rule; request for comments.

SUMMARY: In this direct final rule, the Agency is revising its Acetylene Standard for general industry by updating references to standards published by standards developing organizations (*i.e.*, ''SDO standards''). This rulemaking is a continuation of OSHA's ongoing effort to update references to SDO standards used throughout its rules.

DATES: This direct final rule will become effective on November 9, 2009 unless significant adverse comment is received by September 10, 2009. If adverse comment is received, OSHA will publish a timely withdrawal of the rule in the **Federal Register**. Comments to this direct final rule (including comments to the information-collection (paperwork) determination described under the section titled Procedural Determinations), hearing requests, and other information must be submitted by September 10, 2009. All submissions must bear a postmark or provide other evidence of the submission date. (The following section titled **ADDRESSES** describes methods available for making submissions.)

The incorporation by reference of specific publications listed in this direct final rule is approved by the Director of the Federal Register as of November 9, 2009.

ADDRESSES: Submit comments and hearing requests as follows:

- *Electronic.* Submit comments electronically to *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.
- *Facsimile.* OSHA allows facsimile transmission of comments and hearing requests that are 10 pages or fewer in length (including attachments). Send these documents to the OSHA Docket Office at (202) 693–1648; OSHA does not require hard copies of these documents. Instead of transmitting facsimile copies of attachments that supplement these documents (*e.g.*, studies, journal articles), commenters must submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and docket number (*i.e.*, OSHA–2008–0034) so that the Agency can attach them to the appropriate document.
- *Regular mail, express delivery, hand (courier) delivery, and messenger service.* Submit three copies of comments and any additional material (*e.g.*, studies, journal articles) to the OSHA Docket Office, Docket No. OSHA–2008–0034 or RIN No. 1218–AC08, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone: (202) 693–2350. (OSHA's TTY number is (877) 889–5627.) Note that security-related procedures may result in significant delays in receiving comments and other written materials by regular mail. Please contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m. to 4:45 p.m., e.t.
- *Instructions.* All submissions must include the Agency name and the OSHA docket number (*i.e.*, OSHA Docket No. OSHA–2008–0034). Comments and other material, including any personal information, are placed in the public docket without revision, and will be available online at *http://www.regulations.gov*. Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

OSHA requests comments on all issues related to this direct final rule. It also welcomes comments on its findings that this direct final rule would have no negative economic, paperwork, or other regulatory impacts on the regulated community. This direct final rule is the companion document to a notice of proposed rulemaking also published in the ''Proposed Rules'' section of today's **Federal Register**. If OSHA receives no significant adverse comment on this direct final rule, it will publish a **Federal Register** document confirming the effective date of this direct final rule and withdrawing the companion proposed rule. The confirmation may include minor stylistic or technical corrections to the document. For the purpose of judicial review, OSHA considers the date that it confirms the effective date of the direct final rule to be the date of issuance. However, if OSHA receives significant adverse comment on the direct final rule, it will publish a timely withdrawal of this direct final rule and proceed with the proposed rule, which addresses the same revisions to the Acetylene Standard.

- *Docket.* The electronic docket for this direct final rule established at *http://www.regulations.gov* lists most of the documents in the docket. However, some information (*e.g.*, copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

Press inquiries. Contact Jennifer Ashley, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1999.

General and technical information. Contact Ted Twardowski, Office of Safety Systems, Directorate of Standards and Guidance, Room N–3609, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–2255; fax: (202) 693–1663.

SUPPLEMENTARY INFORMATION:

Copies of this **Federal Register** *notice.* Electronic copies are available at *http://www.regulations.gov*. This **Federal Register** notice, as well as news releases and other relevant information, also are available at OSHA's Webpage at *http://www.osha.gov*.

Availability of Incorporated Standards. The standards published by the Compressed Gas Association and the National Fire Protection Association required in § 1910.102 are incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than the editions specified in § 1910.102, the Occupational Safety and Health Administration (OSHA) must publish a notice of change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at the National Archives and Records

Administration (NARA). For information on the availability of this material at NARA, telephone 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Also, the material is available for inspection at any OSHA Regional Office or the OSHA Docket Office (U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2625, Washington, DC 20210; telephone 202–693–2350 (TTY number: 877–889–5627)).

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I. Background

This action is part of a rulemaking project instituted by the Occupational Safety and Health Administration (''OSHA'' or ''the Agency'') to update OSHA standards that reference or include language from outdated standards published by standards developing organizations (''SDO standards'') (69 FR 68283). The SDO standards referenced in OSHA's Acetylene Standard (29 CFR 1910.102) are among the SDO standards that the Agency identified for revision.

OSHA adopted the Acetylene Standard in 1974 pursuant to Section 6(a) of the Occupational Safety and Health Act of 1970 (OSH Act; 29 U.S.C. 651, 655). This section allowed OSHA, during the first two years after passage of the OSH Act, to adopt existing Federal and national consensus standards as OSHA safety and health standards, including the current Acetylene Standard.

After OSHA announced the SDO rulemaking project, the Agency met with the Compressed Gas Association (''CGA'') about the rulemaking project. CGA, a private standards organization, provided detailed recommendations on updating SDO standards referenced in OSHA standards, including the Acetylene Standard (Ex. OSHA–2008–0034–0003). Thereafter, the U.S. Chemical Safety and Hazard Investigation Board (''Chemical Safety Board'') also recommended that OSHA update the SDO standards referenced in the Acetylene Standard (Ex. OSHA–2008–0034–0004).

II. Direct Final Rulemaking

In a direct final rulemaking, an agency publishes a direct final rule in the **Federal Register** along with a statement that the rule will become effective unless the agency receives significant adverse comment within a specified period. The agency also publishes concurrently an identical proposed rule. If the agency receives no significant adverse comment, the direct final rule goes into effect. If, however, the agency receives significant adverse comment, the agency withdraws the direct final rule and treats the comments as submissions on the proposed rule.

OSHA uses direct final rules in the SDO rulemaking project because it expects the rules to: Be noncontroversial; provide protection to employees that is at least equivalent to the protection afforded to them by the outdated SDO standard; and impose no significant new compliance costs on employers (69 FR 68283, 68285). OSHA is using direct final rules to update or, when appropriate, revoke references to outdated national SDO standards in OSHA rules (*see, e.g.,* 69 FR 68283, 70 FR 76979, and 71 FR 80843).

For purposes of the direct final rule, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach. In determining whether a comment necessitates withdrawal of the direct final rule, OSHA will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process. OSHA will not consider a comment recommending additional revisions to a rule to be a significant adverse comment unless the comment states why the direct final rule would be ineffective without the revisions. If OSHA receives a timely significant adverse comment, the Agency will publish a **Federal Register** notice withdrawing the direct final rule no later than 90 days after the publication date of the notice.

OSHA believes that the revisions made to the Acetylene Standard by this direct final rule do not compromise the safety of employees, and instead enhance employee protection. For example, the updated Acetylene Standard includes mandatory requirements for acetylene piping systems, has special requirements for high-pressure piping systems, and prohibits storage of acetylene cylinders in confined spaces—requirements that are not included in the current SDO standards. The updated SDO standards also provide employers with new and more extensive information than the current standards, which should facilitate compliance. OSHA believes that replacing the unenforceable SDO standard in § 1910.102(b) (*i.e.,* Compressed Gas Association Pamphlet G–1.3–1959; *see* discussion below under Section III.A (''§ 1910.102(c)—Generators and filling cylinders'')) clarifies employers' compliance obligations and prevents inappropriate enforcement action, while also increasing employee protection.

The Agency determined that updating and replacing the SDO standards in the Acetylene Standard is appropriate for direct final rulemaking. As described below, the revisions will make the requirements of OSHA's Acetylene Standard consistent with current industry practices, thereby eliminating confusion and clarifying employer obligations. Eliminating confusion and clarifying employer obligations should increase employee safety while reducing compliance costs.

III. Summary and Explanation of Revisions to the Acetylene Standard

This direct final rule updates the SDO standards referenced in the three paragraphs that comprise the Acetylene Standard. The Compressed Gas Association (CGA) published several editions of these SDO standards after OSHA adopted them in 1974, and one of these standards (*i.e.,* Compressed Gas Association Pamphlet G–1.4–1966), is no longer available for purchase from CGA. Therefore, to ensure that employers have access to the latest safety requirements for managing acetylene, this rulemaking is adopting the requirements specified in the most recent versions of the SDO standards.

The following discussion provides a summary of the revisions OSHA is making to paragraphs (a), (b), and (c) of the Acetylene Standard.

A. Section 1910.102(a)—Cylinders

For paragraph (a) of § 1910.102, the direct final rule is replacing the reference to the 1966 edition of CGA Pamphlet G–1 (''Acetylene'') (Ex. OSHA–2008–0034–0005) with the most recent (*i.e.,* 2003) edition of that standard (also entitled ''Acetylene'') ((Ex. OSHA–2008–0034–0006). According to CGA, the 2003 edition is the fifth revision of the standard since OSHA adopted the 1966 edition in 1974 (Ex. OSHA–2008–0034–0003).

In reviewing CGA–1–2003, OSHA identified two provisions in that standard that appear to be substantive

revisions from the 1966 edition. First, the last provision of paragraph 5.2 in the 2003 edition prohibits storing acetylene cylinders in confined spaces such as drawers, closets, unventilated cabinets, automobile trunks, or toolboxes. In addition, the document recommends that acetylene cylinders should not be stored or transported in automobiles or any enclosed vehicles. The 1966 edition contains neither the above prohibition nor recommendation. Second, both editions recommend flow rates that will minimize withdrawal of liquid solvent when releasing acetylene from a cylinder; however, the recommended flow rates differ between the two editions. Paragraph 5.3.3.13 of the 1966 edition specifies that the flow rate should be one-seventh of the capacity of the cylinder per hour regardless of the duration of use, while paragraph 6.2 of the 2003 edition recommends a flow rate of one-tenth of the cylinder capacity per hour during intermittent use, and one-fifteenth of the cylinder capacity per hour during continuous use.[1]

Other differences between the 1966 and 2003 editions of CGA G–1 include adding the following sentence to the provision warning employers to avoid abnormal mechanical shocks that could damage cylinders, valves, and pressure-relief devices:[2] ''This [avoiding abnormal mechanical shocks] is especially important on those small cylinders not equipped with protection caps.'' This sentence notifies employers that the valves of small cylinders are especially susceptible to damage (and possible release of acetylene) because protective caps or guards do not cover the valves. Similarly, in the 2003 edition, CGA added a provision to section 6.2 (''Withdrawing acetylene from cylinders'')[3] requiring employers to ''[v]isually examine the CGA connection on the cylinder and remove any visible contamination before connecting the regulator. Clean out the contaminant using nitrogen, air, or a clean rag. Avoid opening an acetylene cylinder valve without a suitable regulator and flow restrictor such as a torch attached.'' This provision prevents the following two hazards: (1) Acetylene-related explosions (by removing contaminants that could serve as an ignition source), and (2) massive releases of acetylene into the workplace (by notifying employers to use suitable regulators and restrictors to control the rate at which acetylene flows from a cylinder).

The remaining differences between the 1966 and 2003 editions include: Making plain-language revisions to the text; providing measurements using the International System of Units; listing current Department of Transportation specifications; presenting guidance in the 2003 edition on how to handle leaking cylinders; and noting in the 2003 edition that commercial acetylene generally is considered nontoxic. CGA also added text to the 2003 edition that prohibits tightening leaking fuseplugs or valves while the cylinder is under pressure, as well as enhanced illustrations (Figure 1) of acetylene cylinder-shell constructions.

OSHA believes that the provisions of CGA G–1–2003 are consistent with the usual and customary practice of employers in the industry, and has determined that incorporating CGA G–1–2003 into paragraph (a) of § 1910.102 does not add compliance burden for employers. OSHA invites the public to comment on whether the revisions made to CGA G–1–1966 in the 2003 edition of the standard represent current industry practice.

B. Section 1910.102(b)—Piped Systems

CGA no longer publishes CGA Pamphlet G–1.3–1959 (''Acetylene Transmission for Chemical Synthesis'') (Ex. OSHA–2008–0034–0007). In addition, both this standard and its recent replacement (*i.e.,* Part 3 of CGA G–1.2–2006 (''Acetylene piping''), (Ex. OSHA–2008–0034–0008)) consist entirely of advisory provisions. Under existing law (*see, e.g., Usery* v. *Kennecott Copper Corporation* (577 F.2d 1113 (10th Cir. 1977)), OSHA cannot enforce advisory provisions. Therefore, this direct final rule revises paragraph (b) of § 1910.102 to refer instead to the requirements for acetylene piping systems specified in Chapter 9 (''Acetylene Piping'') of NFPA 51A–2006 (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0009) or Chapter 7 (''Acetylene Piping'') of NFPA 51A–2001 (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0010). Whether employers use NFPA 51A–2006 or NFPA 51A–2001 depends on when the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders were approved for construction or installation. (*See* discussion of which NFPA standard applies in Section III.C below (''§ 1910.102(c)—Generators and filling cylinders'').)

The piping-system requirements specified in NFPA 51A–2006 or NFPA 51A–2001 are not as extensive as the requirements contained in either CGA Pamphlet G–1.3–1959 or Part 3 of CGA G–1.2–2006. However, OSHA believes that the piping-system requirements in the two NFPA standards will provide employers with important information for installing and maintaining piping systems used to transfer acetylene until a more detailed (and enforceable) standard becomes available. In addition, unlike CGA Pamphlet G–1.3–1959, the two NFPA standards have special requirements for high-pressure acetylene piping systems, which OSHA believes will likely increase employee protection. Meanwhile, paragraph (b)(iv) of § 1910.102 refers employers to Part 3 of CGA G–1.2–2006 for additional information on acetylene piping systems.

OSHA believes that the revisions to § 1910.102(b) represent the usual and customary practice of the industry today. Therefore, OSHA concludes that making these revisions will not impose an additional compliance burden on employers. Accordingly, OSHA requests public comment on the extent to which the revisions made in § 1910.102(b) represent current industry practice.

C. Section 1910.102(c)—Generators and Filling Cylinders

CGA no longer publishes the consensus standard referenced in paragraph (c) of CGA G–1.4–1966 (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0011). In 1970, the National Fire Protection Association (NFPA) adopted this CGA standard as NFPA 51A (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0012). NFPA manages revisions to this standard, the latest versions of which it published in 2001 and 2006.

Section 1.4.1 of the 2006 standard excepts from the standard any ''facilities, equipment, structures, or installations that existed or were approved for construction or installation prior to the effective date of the standard.''[4] This section also states, ''Where specified, the provisions of this standard shall be retroactive.''[5] Therefore, this provision requires compliance with the entire standard only when facilities, equipment, structures, or installations were approved for construction or installation on or after February 16, 2006, the

[1] Note that both of these flow-rate provisions are advisory, not mandatory.

[2] See paragraph 5.2.1 of the 1966 edition, and the first paragraph of section 6.1 of the 2003 edition.

[3] Section 5.3 of the 1966 version regulates the withdrawal of acetylene from cylinders.

[4] OSHA interprets the phrase ''were approved for construction or installation prior to the effective date of the standard'' to mean that construction and installation occurred on or after the effective date of the standard.

[5] OSHA found no such provisions in the standard.

effective date of the 2006 standard. However, the 2001 edition of NFPA 51A (Ex. OSHA–2008–0034–0013) has no effective-date provision, and applies retroactively to all facilities, equipment, structures, or installations that existed (or were approved for construction and installation) prior to February 16, 2006.

OSHA is requiring in this direct final rule that employers comply with NFPA 51A–2001, provided they demonstrate that the installations, facilities, equipment, or structures used to generate acetylene or to charge (fill) acetylene cylinders existed, or were approved for construction or installation, prior to February 16, 2006. Employers having installations, facilities, equipment, or structures approved for construction or installation on or after February 16, 2006, must comply with NFPR 51A–2006.[6] By removing the reference to an outdated, unavailable standard from § 1910.102(c), and updating the referenced standards to be consistent with current industry practices, OSHA believes that the revisions to § 1910.102(c) will reduce regulatory confusion and ensure up-to-date employee protection.

While many of the differences between CGA G–1.4–1966 and NFPA 51A–2001 and –2006 involve minor revisions to the text, usually to update the terminology or to improve the comprehensibility of the text, a number of the differences are substantive. OSHA compiled lists of these substantive differences, and is making these lists available in the docket at *http://www.regulations.gov* (*see* Exs. OSHA–2008–0034–0014 and –0015).

OSHA presumes that employers in the industry currently apply the requirements of NFPA 51A–2001 to installations, facilities, equipment, or structures constructed or installed prior to February 16, 2006, and that they apply NFPA 51A–2006 to installations, facilities, equipment, or structures approved for construction or installation on or after February 16, 2006. Consequently, OSHA has determined that this direct final rule will impose no additional compliance burden on these employers. OSHA invites the public to comment on the extent to which employers involved in charging acetylene cylinders already comply with NFPA 51A–2001 and –2006, as well as any additional burden this direct final rule imposes on these employers.

[6] While not mandated, OSHA encourages employers covered by NFPA 51A–2001 to comply with the requirements of NFPA 51A–2006.

IV. Procedural Determinations

A. Legal Considerations

The purpose of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) is ''to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources.'' 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. 29 U.S.C. 655(b), 654(b). A safety or health standard is a standard ''which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment.'' 29 U.S.C. 652(8). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) when a significant risk of material harm exists in the workplace and the standard would substantially reduce or eliminate that workplace risk.

This direct final rule will not reduce the employee protections put into place by the standards OSHA is updating under this rulemaking. In fact, this rulemaking likely will enhance employee safety by adding requirements, eliminating confusing requirements, and clarifying employer obligations. Therefore, it is unnecessary to determine significant risk, or the extent to which this rule would reduce that risk, as typically is required by *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute* (448 U.S. 607 (1980)).

B. Preliminary Economic Analysis and Regulatory Flexibility Act Certification

The direct final rule is not ''economically significant'' as specified by Executive Order 12866, or a ''major rule'' under Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''; 5 U.S.C. 804). The direct final rule does not impose significant additional costs on any private- or public-sector entity, and does not meet any of the criteria for an economically significant or major rule specified by Executive Order 12866 and the relevant statutes. (While not economically significant, as part of OSHA's regulatory agenda, the direct final rule is a ''significant regulatory action'' under Executive Order 12866.)

The direct final rule simply updates references to outdated SDO standards in OSHA's Acetylene Standard. The Agency concludes that the revisions will not impose any additional costs on employers because it believes that the updated SDO standards represent the usual and customary practice of employers in the industry. Consequently, the direct final rule imposes no costs on employers. Therefore, OSHA certifies that it will not have a significant impact on a substantial number of small entities. Accordingly, the Agency is not preparing a regulatory flexibility analysis under the SBREFA (5 U.S.C. 601 *et seq.*).

C. OMB Review Under the Paperwork Reduction Act of 1995

Neither the existing nor updated SDO standards addressed by this direct final rule contain collection of information requirements. Therefore, this direct final rule does not impose or remove any information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* and 5 CFR part 1320. Accordingly, the Agency does not have to prepare an Information Collection Request in association with this rulemaking.

Members of the public may respond to this paperwork determination by sending their written comments to the Office of Information and Regulatory Affairs, Attn: OSHA Desk Officer (RIN 1218–AC08), Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503. The Agency encourages commenters to submit these comments to the rulemaking docket, along with their comments on other parts of the direct final rule. For instructions on submitting these comments and accessing the docket, *see* the sections of this **Federal Register** notice titled **DATES** and **ADDRESSES.** However, OSHA will not consider any comment received on this paperwork determination to be a ''significant adverse comment'' as specified under Section II (''Direct Final Rulemaking'') of this notice.

To make inquiries, or to request other information, contact Mr. Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

D. Federalism

OSHA reviewed this direct final rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional authority exists and the

problem is national in scope. Executive Order 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption must be limited to the extent possible.

Under Section 18 of the Occupational Safety and Health Act of 1970 (''OSH Act''; U.S.C. 651 *et seq.*), Congress expressly provides that States may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards; States that obtain Federal approval for such a plan are referred to as ''State-Plan States.'' (29 U.S.C. 667.) Occupational safety and health standards developed by State-Plan States must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Subject to these requirements, State-Plan States are free to develop and enforce their own requirements for occupational safety and health standards.

While OSHA drafted this direct final rule to protect employees in every State, Section 18(c)(2) of the Act permits State-Plan States and Territories to develop and enforce their own standards for acetylene operations provided these requirements are at least as effective in providing safe and healthful employment and places of employment as the requirements specified in this direct final rule.

In summary, this direct final rule complies with Executive Order 13132. In States without OSHA-approved State Plans, any standard developed from this direct final rule would limit State policy options in the same manner as every standard promulgated by OSHA. In States with OSHA-approved State Plans, this rulemaking would not significantly limit State policy options.

E. State-Plan States

When Federal OSHA promulgates a new standard or a more stringent amendment to an existing standard, the 26 States or U.S. Territories with their own OSHA-approved occupational safety and health plans (''State-Plan States'') must amend their standards to reflect the new standard or amendment, or show OSHA why such action is unnecessary (*e.g.*, because an existing State standard covering this area is already ''at least as effective'' as the new Federal standard or amendment. (29 CFR 1953.5(a).) The State standard must be at least as effective as the final Federal rule, must be applicable to both the private and public (State and local government employees) sectors, and must be completed within six months of the publication date of the final Federal rule. When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than the existing standard, State-Plan States are not required to amend their standards, although OSHA may encourage them to do so.

OSHA has determined that the State-Plan States must adopt provisions comparable to the provisions in this direct final rule within six months after the effective date of the rule. OSHA believes that the provisions of this direct final rule provide employers in State-Plan States and Territories with new and critical information and methods necessary to protect their employees from the hazards found in and around workplaces engaged in acetylene operations. The 26 States and territories with OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only. Until a State-Plan State/Territory promulgates its own comparable provisions based on this direct final rule, Federal OSHA will provide the State/Territory with interim enforcement assistance, as appropriate.

F. Unfunded Mandates Reform Act of 1995

OSHA reviewed this direct final rule in accordance with the Unfunded Mandates Reform Act of 1995 (''UMRA''; 2 U.S.C. 1501 *et seq.*) and Executive Order 12875 (56 FR 58093). As discussed above in Section IV.B (''Preliminary Economic Analysis and Regulatory Flexibility Act Certification'') of this notice, the Agency determined that this direct final rule will not impose additional costs on any private- or public-sector entity. Accordingly, this direct final rule requires no additional expenditures by either public or private employers.

As noted above under Section IV.E (''State-Plan States'') of this notice, the Agency's standards do not apply to State and local governments except in States that have elected voluntarily to adopt a State Plan approved by the Agency. Consequently, this direct final rule does not meet the definition of a ''Federal intergovernmental mandate'' (*see* Section 421(5) of the UMRA (2 U.S.C. 658(5))). Therefore, for the purposes of the UMRA, the Agency certifies that this direct final rule does not mandate that State, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than $100 million in any year.

G. Public Participation

OSHA requests comments on all issues concerning this direct final rule. The Agency also welcomes comments on its determination that this direct final rule has no negative economic or other regulatory impacts on employers, and will increase employee protection. If OSHA receives no significant adverse comment, it will publish a **Federal Register** document confirming the effective date of this direct final rule and withdrawing the companion proposed rule. Such confirmation may include minor stylistic or technical corrections to the document. A full discussion of what constitutes a significant adverse comment is discussed above in Section II (''Direct Final Rulemaking'').

The Agency will withdraw this direct final rule if it receives significant adverse comment on the amendments contained in it, and proceed with the companion proposed rule by addressing the comment(s) and publishing a new final rule. Should the Agency receive a significant adverse comment regarding some actions taken in the direct final rule, but not others, it may (1) finalize those actions that did not receive significant adverse comment, and (2) conduct further rulemaking under the companion proposed rule for the actions that received significant adverse comment. The comment period for this direct final rule runs concurrently with that of the companion proposed rule. Therefore, any comments received under this direct final rule will be treated as comments regarding the companion proposed rule. Similarly, OSHA will consider a significant adverse comment submitted to this direct final rule as a comment to the companion proposed rule; the Agency will consider such a comment in developing a subsequent final rule.

Comments received will be posted without revision to *http://www.regulations.gov*, including any personal information provided. Accordingly OSHA cautions commenters about submitting personal information such as Social Security numbers and birth dates.

List of Subjects in 29 CFR Part 1910

Acetylene, General industry, Incorporation by reference, Occupational safety and health, Safety.

V. Authority and Signature

Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this notice. The Agency is issuing this notice under Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order 5–2007 (72 FR 31159), and 29 CFR part 1911.

Signed at Washington, DC on July 30, 2009.

Jordan Barab,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

■ For the reasons stated above in the preamble, OSHA is amending 29 CFR part 1910 as follows:

PART 1910—[AMENDED]

Subpart A—[Amended]

■ 1. Revise the authority citation for subpart A of part 1910 to read as follows:

Authority: Sections 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Numbers 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), and 5–2007 (72 FR 31159), as applicable.

Sections 1910.7 and 1910.8 also issued under 29 CFR part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Public Law 106–113 (113 Stat. 1501A–222); and OMB Circular A–25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

■ 2. Amend § 1910.6 as follows:

■ A. Revise paragraph (k)(3).

■ B. Remove paragraphs (k)(4) and (k)(5), and redesignate paragraphs (k)(6) through (k)(15) as paragraphs (k)(4) through (k)(13).

■ C. Add new paragraphs (q)(34) and (q)(35).

The additions and revisions read as follows:

§ 1910.6 Incorporation by reference.

* * * * *

(k) * * *

(3) CGA G–1–2003 Acetylene, IBR approved for § 1910.102(a). Copies of CGA Pamphlet G–1–2003 are available for purchase from the: Compressed Gas Association, Inc., 4221 Walney Road, 5th Floor, Chantilly, VA 20151; telephone: 703–788–2700; fax: 703–961–1831; e-mail: *cga@cganet.com.*

* * * * *

(q) * * *

(34) NFPA 51A (2001) Standard for Acetylene Cylinder Charging Plants, IBR approved for § 1910.102(b) and (c). Copies of NFPA 51A–2001 are available for purchase from the: National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169–7471; telephone: 1–800–344–35557; e-mail: *custserv@nfpa.org.*

(35) NFPA 51A (2006) Standard for Acetylene Cylinder Charging Plants, IBR approved for § 1910.102(b) and (c). Copies of NFPA 51A–2006 are available for purchase from the: National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169–7471; telephone: 1–800–344–35557; e-mail: *custserv@nfpa.org.*

* * * * *

Subpart H—[Amended]

■ 3. Revise the authority citation for subpart H of part 1910 to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31159), as applicable; and 29 CFR part 11.

Sections 1910.103, 1910.106 through 1910.111, and 1910.119, 1910.120, and 1910.122 through 1910.126 also issued under 29 CFR part 1911.

Section 1910.119 also issued under Section 304, Clean Air Act Amendments of 1990 (Pub. L. 101–549), reprinted at 29 U.S.C. 655 Note.

Section 1910.120 also issued under Section 126, Superfund Amendments and Reauthorization Act of 1986 as amended (29 U.S.C. 655 Note), and 5 U.S.C. 553.

■ 4. Revise § 1910.102 to read as follows:

§ 1910.102 Acetylene.

(a) *Cylinders.* Employers must ensure that the in-plant transfer, handling, storage, and use of acetylene in cylinders comply with the provisions of CGA Pamphlet G–1–2003 (''Acetylene'') (Compressed Gas Association, Inc., 11th ed., 2003).

(b) *Piped systems.* (1) Employers must comply with Chapter 9 (''Acetylene Piping'') of NFPA 51A–2006 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2006 ed., 2006).

(2) When employers can demonstrate that the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders were installed prior to February 16, 2006, these employers may comply with the provisions of Chapter 7 (''Acetylene Piping'') of NFPA 51A–2001 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2001 ed., 2001).

(3) The provisions of § 1910.102(b)(2) also apply when the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders were approved for construction or installation prior to February 16, 2006, but constructed and installed on or after that date.

(4) For additional information on acetylene piping systems, *see* CGA G–1.2–2006, Part 3 (''Acetylene piping'') (Compressed Gas Association, Inc., 3rd ed., 2006).

(c) *Generators and filling cylinders.* (1) Employers must ensure that facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders comply with the provisions of NFPA 51A–2006 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2006 ed., 2006).

(2) When employers can demonstrate that the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) of acetylene cylinders were constructed or installed prior to February 16, 2006, these employers may comply with the provisions of NFPA 51A–2001 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2001 ed., 2001).

(3) The provisions of § 1910.102(c)(2) also apply when the facilities, equipment, structures, or installations were approved for construction or installation prior to February 16, 2006, but constructed and installed on or after that date.

[FR Doc. E9–18644 Filed 8–10–09; 8:45 am]

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Federal Register

Tuesday,
August 11, 2009

Part V

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1910

Revising Standards Referenced in the Acetylene Standard; Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA–2008–0034]

RIN 1218–AC08

Revising Standards Referenced in the Acetylene Standard

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this Notice of Proposed Rulemaking (NPRM), the Agency is proposing to revise its Acetylene Standard for general industry by updating references to standards published by standards developing organizations (*i.e.,* ''SDO standards''). OSHA also is publishing a direct final rule in today's **Federal Register** taking these same actions. This NPRM is the companion document to the direct final rule. This rulemaking is a continuation of OSHA's ongoing effort to update references to SDO standards used throughout its rules.

DATES: Submit comments to this NPRM (including comments to the information-collection (paperwork) determination described under the section titled Procedural Determinations), hearing requests, and other information by September 10, 2009. All submissions must bear a postmark or provide other evidence of the submission date. (The following section titled **ADDRESSES** describes methods available for making submissions.)

ADDRESSES: Submit comments and hearing requests as follows:

- *Electronic.* Submit comments electronically to *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.
- *Facsimile.* OSHA allows facsimile transmission of comments and hearing requests that are 10 pages or fewer in length (including attachments). Send these documents to the OSHA Docket Office at (202) 693–1648; OSHA does not require hard copies of these documents. Instead of transmitting facsimile copies of attachments that supplement these documents (*e.g.,* studies, journal articles), commenters must submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and docket number (*i.e.,* OSHA–2008–0034) so that the Agency can attach them to the appropriate document.
- *Regular mail, express delivery, hand (courier) delivery, and messenger service.* Submit three copies of comments and any additional material (*e.g.,* studies, journal articles) to the OSHA Docket Office, Docket No. OSHA–2008–0034 or RIN No. 1218–AC08, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone: (202) 693–2350. (OSHA's TTY number is (877) 889–5627.) Note that security-related procedures may result in significant delays in receiving comments and other written materials by regular mail. Please contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m. to 4:45 p.m., E.T.
- *Instructions.* All submissions must include the Agency name and the OSHA docket number (*i.e.,* OSHA Docket No. OSHA–2008–0034). Comments and other material, including any personal information, are placed in the public docket without revision, and will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

OSHA requests comments on all issues related to this NPRM. It also welcomes comments on its findings that this NPRM would have no negative economic, paperwork, or other regulatory impacts on the regulated community. This NPRM is the companion document to a direct final rule also published in today's **Federal Register.** If OSHA receives no significant adverse comment on the companion direct final rule, it will publish a **Federal Register** document confirming the effective date of the direct final rule and withdrawing this NPRM. The confirmation may include minor stylistic or technical corrections to the document. For the purpose of judicial review, OSHA considers the date that it confirms the effective date of the direct final rule to be the date of issuance. However, if OSHA receives significant adverse comment on the direct final rule, it will publish a timely withdrawal of the direct final rule and proceed with this proposal, which addresses the same revisions to the Acetylene Standard.

- *Docket.* The electronic docket for this proposal established at *http://www.regulations.gov* lists most of the documents in the docket. However, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT: *Press inquiries.* Contact Jennifer Ashley, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1999.

General and technical information. Contact Ted Twardowski, Office of Safety Systems, Directorate of Standards and Guidance, Room N–3609, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–2255; fax: (202) 693–1663.

SUPPLEMENTARY INFORMATION: *Copies of this* **Federal Register** *notice.* Electronic copies are available at *http://www.regulations.gov.* This **Federal Register** notice, as well as news releases and other relevant information, also are available at OSHA's Web page at *http://www.osha.gov.*

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I. Background

This action is part of a rulemaking project instituted by the Occupational Safety and Health Administration (''OSHA'' or ''the Agency'') to update OSHA standards that reference or include language from outdated standards published by standards developing organizations (''SDO standards'') (69 FR 68283). The SDO

standards referenced in OSHA's Acetylene Standard (29 CFR 1910.102) are among the SDO standards that the Agency identified for revision.

OSHA adopted the Acetylene Standard in 1974 pursuant to Section 6(a) of the Occupational Safety and Health Act of 1970 (OSH Act; 29 U.S.C. 651, 655). This section allowed OSHA, during the first two years after passage of the OSH Act, to adopt existing Federal and national consensus standards as OSHA safety and health standards, including the current Acetylene Standard.

After OSHA announced the SDO rulemaking project, the Agency met with the Compressed Gas Association (''CGA'') about the rulemaking project. CGA, a private standard organization, provided detailed recommendations on updating SDO standards referenced in OSHA standards, including the Acetylene Standard (Ex. OSHA–2008–0034–0003). Thereafter, the U.S. Chemical Safety and Hazard Investigation Board (''Chemical Safety Board'') also recommended that OSHA update the SDO standards referenced in the Acetylene Standard (Ex. OSHA–2008–0034–0004).

II. Direct Final Rulemaking

In a direct final rulemaking (''DFR''), an agency publishes a DFR in the **Federal Register** along with a statement that the rule will become effective unless the agency receives significant adverse comment within a specified period. The agency also publishes concurrently an identical proposed rule. If the agency receives no significant adverse comment, the DFR goes into effect. If, however, the agency receives significant adverse comment, the agency withdraws the DFR and treats the comments as submissions on the proposed rule.

OSHA uses DFRs in the SDO rulemaking project because it expects the rules to: be noncontroversial; provide protection to employees that is at least equivalent to the protection afforded to them by the outdated SDO standard; and impose no significant new compliance costs on employers (69 FR 68283, 68285). OSHA is using DFRs to update or, when appropriate, revoke references to outdated national SDO standards in OSHA rules (*see, e.g.,* 69 FR 68283, 70 FR 76979, and 71 FR 80843).

For purposes of the DFR, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach. In determining whether a comment necessitates withdrawal of the DFR, OSHA will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process. OSHA will not consider a comment recommending additional revisions to a rule to be a significant adverse comment unless the comment states why the DFR would be ineffective without the revisions. If OSHA receives a timely significant adverse comment, the Agency will publish a **Federal Register** notice withdrawing the DFR no later than 90 days after the publication date of the notice.

OSHA believes that the proposed revisions to the Acetylene Standard would not compromise the safety of employees, and instead would enhance employee protection. For example, the updated Acetylene Standard would include mandatory requirements for acetylene piping systems, have special requirements for high-pressure piping systems, and prohibit storage of acetylene cylinders in confined spaces—requirements that are not included in the current SDO standards. The updated SDO standards also provide employers with new and more extensive information than the current standards, which should facilitate compliance. Replacing the unenforceable SDO standard in § 1910.102(b) (*i.e.,* Compressed Gas Association Pamphlet G–1.3–1959; *see* discussion below under Section III.A (''§ 1910.102(c)—Generators and filling cylinders'')) will clarify employers' compliance obligations and prevent inappropriate enforcement action, while also increasing employee protection.

The Agency preliminarily determined that updating and replacing the SDO standards in the Acetylene Standard is appropriate for direct final rulemaking. As described below, the proposed revisions will make the requirements of OSHA's Acetylene Standard consistent with current industry practices, thereby eliminating confusion and clarifying employer obligations. Eliminating confusion and clarifying employer obligations should increase employee safety while reducing compliance costs.

III. Summary and Explanation of Revisions to the Acetylene Standard

This NPRM would update the SDO standards referenced in the three paragraphs that comprise the Acetylene Standard. The Compressed Gas Association (CGA) published several editions of these SDO standards after OSHA adopted them in 1974, and one of these standards (*i.e.,* Compressed Gas Association Pamphlet G–1.4–1966), is no longer available for purchase from CGA. Therefore, to ensure that employers have access to the latest safety requirements for managing acetylene, OSHA is proposing in this rulemaking to adopt the requirements specified in the most recent versions of the SDO standards. The following discussion provides a summary of the revisions OSHA is proposing for paragraphs (a), (b), and (c) of the Acetylene Standard.

A. § 1910.102(a)—Cylinders.

For paragraph (a) of § 1910.102, the NPRM proposes to replace the reference to the 1966 edition of CGA Pamphlet G–1 (''Acetylene'') (Ex. OSHA–2008–0034–0005) with the most recent (*i.e.,* 2003) edition of that standard (also entitled ''Acetylene'') ((Ex. OSHA–2008–0034–0006). According to CGA, the 2003 edition is the fifth revision of the standard since OSHA adopted the 1966 edition in 1974 (Ex. OSHA–2008–0034–0003).

In reviewing CGA–1–2003, OSHA identified two provisions in that standard that appear to be substantive revisions from the 1966 edition. First, the last provision of paragraph 5.2 in the 2003 edition prohibits storing acetylene cylinders in confined spaces such as drawers, closets, unventilated cabinets, automobile trunks, or toolboxes. In addition, the document recommends that acetylene cylinders should not be stored or transported in automobiles or any enclosed vehicles. The 1966 edition contains neither the above prohibition nor recommendation. Second, both editions recommend flow rates that will minimize withdrawal of liquid solvent when releasing acetylene from a cylinder; however, the recommended flow rates differ between the two editions. Paragraph 5.3.3.13 of the 1966 edition specifies that the flow rate should be one-seventh of the capacity of the cylinder per hour regardless of the duration of use, while paragraph 6.2 of the 2003 edition recommends a flow rate of one-tenth of the cylinder capacity per hour during intermittent use, and one-fifteenth of the cylinder capacity per hour during continuous use.[1]

Other differences between the 1966 and 2003 editions of CGA G–1 include adding the following sentence to the provision warning employers to avoid abnormal mechanical shocks that could damage cylinders, valves, and pressure-relief devices:[2] ''This [avoiding abnormal mechanical shocks] is especially important on those small cylinders not equipped with protection

[1] Note that both of these flow-rate provisions are advisory, not mandatory.

[2] See paragraph 5.2.1 of the 1966 edition, and the first paragraph of section 6.1 of the 2003 edition.

caps.'' This sentence notifies employers that the valves of small cylinders are especially susceptible to damage (and possible release of acetylene) because protective caps or guards do not cover the valves. Similarly, in the 2003 edition, CGA added a provision to section 6.2 (''Withdrawing acetylene from cylinders'') [3] requiring employers to ''[v]isually examine the CGA connection on the cylinder and remove any visible contamination before connecting the regulator. Clean out the contaminant using nitrogen, air, or a clean rag. Avoid opening an acetylene cylinder valve without a suitable regulator and flow restrictor such as a torch attached.'' This provision prevents the following two hazards: (1) Acetylene-related explosions (by removing contaminants that could serve as an ignition source), and (2) massive releases of acetylene into the workplace (by notifying employers to use suitable regulators and restrictors to control the rate at which acetylene flows from a cylinder).

The remaining differences between the 1966 and 2003 editions include: making plain-language revisions to the text; providing measurements using the International System of Units; listing current Department of Transportation specifications; presenting guidance in the 2003 edition on how to handle leaking cylinders; and noting in the 2003 edition that commercial acetylene generally is considered nontoxic. CGA also added text to the 2003 edition that prohibits tightening leaking fuseplugs or valves while the cylinder is under pressure, as well as enhanced illustrations (Figure 1) of acetylene cylinder-shell constructions.

OSHA believes that the provisions of CGA G–1–2003 are consistent with the usual and customary practice of employers in the industry, and preliminarily determines that incorporating CGA G–1–2003 into paragraph (a) of § 1910.102 would not add compliance burden for employers. OSHA invites the public to comment on whether the revisions made to CGA G–1–1966 in the 2003 edition of the standard represent current industry practice.

B. § 1910.102(b)—Piped systems.

CGA no longer publishes CGA Pamphlet G–1.3–1959 (''Acetylene Transmission for Chemical Synthesis'') (Ex. OSHA–2008–0034–0007). In addition, both this standard and its recent replacement (*i.e.,* Part 3 of CGA G–1.2–2006 (''Acetylene piping''), (Ex. OSHA–2008–0034–0008)) consist entirely of advisory provisions. Under existing law (*see, e.g., Usery* v. *Kennecott Copper Corporation* (577 F.2d 1113 (10th Cir. 1977)), OSHA cannot enforce advisory provisions. Therefore, this NPRM proposes to revise paragraph (b) of § 1910.102 to refer instead to the requirements for acetylene piping systems specified in Chapter 9 (''Acetylene Piping'') of NFPA 51A–2006 (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0009) or Chapter 7 (''Acetylene Piping'') of NFPA 51A–2001 (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0010). Whether employers use NFPA 51A–2006 or NFPA 51A–2001 would depend on when the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders were approved for construction or installation. (*See* discussion of which NFPA standard applies in the Section III.C below (''§ 1910.102(c)—Generators and filling cylinders'').)

The piping-system requirements specified in NFPA 51A–2006 or NFPA 51A–2001 are not as extensive as the requirements contained in either CGA Pamphlet G–1.3–1959 or Part 3 of CGA G–1.2–2006. However, OSHA believes that the piping-system requirements in the two NFPA standards will provide employers with important information for installing and maintaining piping systems used to transfer acetylene until a more detailed (and enforceable) standard becomes available. In addition, unlike CGA Pamphlet G–1.3–1959, the two NFPA standards have special requirements for high-pressure acetylene piping systems, which likely would increase employee protection. Meanwhile, paragraph (b)(iv) of § 1910.102 refers employers to Part 3 of CGA G–1.2–2006 for additional information on acetylene piping systems.

OSHA believes that the revisions it is proposing to § 1910.102(b) represent the usual and customary practice of the industry today. Therefore, OSHA preliminarily concludes that making the proposed revisions would not impose an additional compliance burden on employers. Accordingly, OSHA requests public comment on the extent to which the revisions proposed for § 1910.102(b) represent current industry practice.

C. § 1910.102(c)—Generators and filling cylinders.

CGA no longer publishes the consensus standard referenced in paragraph (c) of CGA G–1.4–1966 (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0011). In 1970, the National Fire Protection Association (NFPA) adopted this CGA standard as NFPA 51A (''Standard for Acetylene Charging Plants'') (Ex. OSHA–2008–0034–0012). NFPA manages revisions to this standard, the latest versions of which it published in 2001 and 2006.

Section 1.4.1 of the 2006 standard excepts from the standard any ''facilities, equipment, structures, or installations that existed or were approved for construction or installation prior to the effective date of the standard.'' [4] This section also states, ''Where specified, the provisions of this standard shall be retroactive.'' [5] Therefore, this provision requires compliance with the entire standard only when facilities, equipment, structures, or installations were approved for construction or installation on or after February 16, 2006, the effective date of the 2006 standard. However, the 2001 edition of NFPA 51A (Ex. OSHA–2008–0034–0013) has no effective-date provision, and applies retroactively to all facilities, equipment, structures, or installations that existed (or were approved for construction and installation) prior to February 16, 2006.

OSHA is proposing in this NPRM that employers comply with NFPA 51A–2001, provided they demonstrate that the installations, facilities, equipment, or structures used to generate acetylene or to charge (fill) acetylene cylinders existed, or were approved for construction or installation, prior to February 16, 2006. Employers having installations, facilities, equipment, or structures approved for construction or installation on or after February 16, 2006, would have to comply with NFPR 51A–2006.[6] By removing the reference to an outdated, unavailable standard from § 1910.102(c), and updating the referenced standards to be consistent with current industry practices, OSHA believes that the proposed revisions to § 1910.102(c) would reduce regulatory confusion and ensure up-to-date employee protection.

While many of the differences between CGA G–1.4–1966 and NFPA 51A–2001 and –2006 involve minor revisions to the text, usually to update the terminology or to improve the

[3] Section 5.3 of the 1966 version regulates the withdrawal of acetylene from cylinders.

[4] OSHA interprets the phrase ''were approved for construction or installation prior to the effective date of the standard'' to mean that construction and installation occurred on or after the effective date of the standard.

[5] OSHA found no such provisions in the standard.

[6] While not mandated, OSHA encourages employers covered NFPA 51A–2001 to comply with the requirements of NFPA 51A–2006.

comprehensibility of the text, a number of the differences are substantive. OSHA compiled lists of these substantive differences, and is making these lists available in the docket at *http://www.regulations.gov* (*see* Exs. OSHA–2008–0034–0014 and –0015).

OSHA believes that employers in the industry currently apply the requirements of NFPA 51A–2001 to installations, facilities, equipment, or structures constructed or installed prior to February 16, 2006, and that they apply NFPA 51A–2006 to installations, facilities, equipment, or structures approved for construction or installation on or after February 16, 2006. Consequently, OSHA preliminarily determines that this NPRM would impose no additional compliance burden on these employers. OSHA invites the public to comment on the extent to which employers involved in charging acetylene cylinders already comply with NFPA 51A–2001 and –2006, as well as any additional burden these employers would have if OSHA adopted the proposed standard.

IV. Procedural Determinations

A. Legal Considerations

The purpose of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), is ''to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources.'' 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. 29 U.S.C. 655(b), 654(b). A safety or health standard is a standard ''which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment.'' 29 U.S.C. 652(8). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) when a significant risk of material harm exists in the workplace and the standard would substantially reduce or eliminate that workplace risk.

This proposed rule will not reduce the employee protections put into place by the standards OSHA is updating under this rulemaking. In fact, this rulemaking likely would enhance employee safety by adding requirements, eliminating confusing requirements, and clarifying employer obligations. Therefore, it is unnecessary to determine significant risk, or the extent to which this rule would reduce that risk, as typically is required by *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute* (448 U.S. 607 (1980)).

B. Preliminary Economic Analysis and Regulatory Flexibility Act Certification

The proposed standard would not be ''economically significant'' as specified by Executive Order 12866, or a ''major rule'' under Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''; 5 U.S.C. 804). The direct final rule does not impose significant additional costs on any private- or public-sector entity, and does not meet any of the criteria for an economically significant or major rule specified by Executive Order 12866 and the relevant statutes. (While not economically significant, as part of OSHA's regulatory agenda, the proposed standard is a ''significant regulatory action'' under Executive Order 12866.)

The NPRM simply proposes to update references to outdated SDO standards in OSHA's Acetylene Standard. The Agency preliminarily concludes that the proposed revisions would not impose any additional costs on employers because it believes that the updated SDO standards represent the usual and customary practice of employers in the industry. Consequently, the proposal imposes no costs on employers. Therefore, OSHA certifies that it would not have a significant impact on a substantial number of small entities. Accordingly, the Agency is not preparing a regulatory flexibility analysis under the SBREFA (5 U.S.C. 601 *et seq.*).

C. OMB Review Under the Paperwork Reduction Act of 1995

Neither the existing nor updated SDO standards addressed by this NPRM contain collection-of-information requirements. Therefore, this NPRM does not impose or remove any information-collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* and 5 CFR part 1320. Accordingly, the Agency does not have to prepare an Information Collection Request in association with this rulemaking.

Members of the public may respond to this paperwork determination by sending their written comments to the Office of Information and Regulatory Affairs, Attn: OSHA Desk Officer (RIN 1218–AC08), Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503. The Agency encourages commenters to submit these comments to the rulemaking docket, along with their comments on other parts of the direct final rule. For instructions on submitting these comments and accessing the docket, *see* the sections of this **Federal Register** notice titled **DATES** and **ADDRESSES.** However, OSHA will not consider any comment received on this paperwork determination to be a ''significant adverse comment'' as specified above under Section II (''Direct Final Rulemaking'').

To make inquiries, or to request other information, contact Mr. Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

D. Federalism

OSHA reviewed this NPRM in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption must be limited to the extent possible.

Under Section 18 of the Occupational Safety and Health Act of 1970 (''OSH Act''; U.S.C. 651 *et seq.*), Congress expressly provides that States may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards; States that obtain Federal approval for such a plan are referred to as ''State-Plan States.'' (29 U.S.C. 667.) Occupational safety and health standards developed by State-Plan States must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Subject to these requirements, State-Plan States are free to develop and enforce their own requirements for occupational safety and health standards.

While OSHA drafted this NPRM to protect employees in every State, Section 18(c)(2) of the Act permits State-Plan States and Territories to develop and enforce their own standards for acetylene operations provided these requirements are at least as effective in providing safe and healthful employment and places of employment as the final requirements that result from this proposal.

In summary, this NPRM complies with Executive Order 13132. In States without OSHA-approved State Plans,

any standard developed from this proposal would limit State policy options in the same manner as every standard promulgated by OSHA. In States with OSHA-approved State Plans, this rulemaking would not significantly limit State policy options.

E. State-Plan States

When Federal OSHA promulgates a new standard or a more stringent amendment to an existing standard, the 26 States or U.S. Territories with their own OSHA-approved occupational safety and health plans (''State-Plan States'') must amend their standards to reflect the new standard or amendment, or show OSHA why such action is unnecessary (*e.g.,* because an existing State standard covering this area is already ''at least as effective'' as the new Federal standard or amendment. (29 CFR 1953.5(a).) The State standard must be at least as effective as the final Federal rule, must be applicable to both the private and public (State and local government employees) sectors, and must be completed within six months of the publication date of the final Federal rule. When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than the existing standard, State-Plan States are not required to amend their standards, although OSHA may encourage them to do so.

OSHA preliminarily determined that the State-Plan States would have to adopt provisions comparable to the provisions in this NPRM within six months after the Agency publishes the final rule that results from this proposal. OSHA believes that the provisions of this NPRM would provide employers in State-Plan States and Territories with new and critical information and methods necessary to protect their employees from the hazards found in and around workplaces engaged in acetylene operations. The 26 States and Territories with OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only. Until a State-Plan State/Territory promulgates its own comparable provisions based on the final rule developed from this NPRM, Federal OSHA will provide the State/Territory with interim enforcement assistance, as appropriate.

F. Unfunded Mandates Reform Act of 1995

OSHA reviewed this NPRM in accordance with the Unfunded Mandates Reform Act of 1995 (''UMRA''; 2 U.S.C. 1501 *et seq.*) and Executive Order 12875 (56 FR 58093). As discussed above in Section IV.B (''Preliminary Economic Analysis and Regulatory Flexibility Act Certification'') of this notice, the Agency determined preliminarily that this NRPM would not impose additional costs on any private- or public-sector entity. Accordingly, this NRPM would require no additional expenditures by either public or private employers.

As noted above under Section IV.E (''State-Plan States'') of this notice, the Agency's standards do not apply to State and local governments except in States that have elected voluntarily to adopt a State Plan approved by the Agency. Consequently, this NPRM would not meet the definition of a ''Federal intergovernmental mandate'' (*see* Section 421(5) of the UMRA (2 U.S.C. 658(5))). Therefore, for the purposes of the UMRA, the Agency certifies that this proposed rule does not mandate that State, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than $100 million in any year.

G. Public Participation

OSHA requests comments on all issues concerning this NPRM. The Agency also welcomes comments on its determination that this NPRM would have no negative economic or other regulatory impacts on employers, and will increase employee protection. If OSHA receives no significant adverse comment, it will publish a **Federal Register** document confirming the effective date contained in the companion direct final rule (DFR) and withdrawing this NPRM. Such confirmation may include minor stylistic or technical corrections to the document. A full discussion of what constitutes a significant adverse comment is discussed above in Section II (''Direct Final Rulemaking'').

The Agency will withdraw the DFR if it receives significant adverse comment on the amendments contained in the DFR, and proceed with this NPRM by addressing the comment(s) and publishing a new final rule. Should the Agency receive a significant adverse comment regarding some actions taken in the DFRs, but not others, it may (1) finalize those actions that did not receive significant adverse comment, and (2) conduct further rulemaking under this NPRM for the actions that received significant adverse comment. The comment period for this NPRM runs concurrently with that of the DFR. Therefore, any comments received under this NPRM will be treated as comments regarding the DFR. Similarly, OSHA will consider a significant adverse comment submitted to the DFR as a comment to this NPRM; the Agency will consider such a comment in developing a subsequent final rule.

Comments received will be posted without revision to *http://www.regulations.gov,* including any personal information provided. Accordingly OSHA cautions commenters about submitting personal information such as Social Security numbers and birth dates.

List of Subjects in 29 CFR Part 1910

Acetylene, General industry, Occupational safety and health, Safety.

V. Authority and Signature

Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this proposed standard. The Agency is issuing this proposed standard under Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order 5–2007 (72 FR 31159), and 29 CFR part 1911.

Signed at Washington, DC on July 30, 2009.

Jordan Barab,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons stated above in the preamble, OSHA is proposing to amend 29 CFR part 1910 as follows:

PART 1910—[AMENDED]

Subpart A—[Amended]

1. Revise the authority citation for subpart A of part 1910 to read as follows:

Authority: Sections 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Numbers 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), and 5–2007 (72 FR 31159), as applicable.

Sections 1910.7 and 1910.8 also issued under 29 CFR part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106–113 (113 Stat. 1501A–222); and OMB Circular A–25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

2. Amend § 1910.6 as follows:

A. Revise paragraph (k)(3).

B. Remove paragraphs (k)(4) and (k)(5), and redesignate paragraphs (k)(6) through (k)(15) as paragraphs (k)(4) through (k)(13).

C. Add new paragraphs (q)(34) and (q)(35).

The additions and revisions read as follows:

§ 1910.6 Incorporation by reference.

* * * * *

(k) * * *

(3) CGA G–1–2003 Acetylene, IBR approved for § 1910.102(a). Copies of CGA Pamphlet G–1–2003 are available for purchase from the: Compressed Gas Association, Inc., 4221 Walney Road, 5th Floor, Chantilly, VA 20151; telephone: 703–788–2700; fax: 703–961–1831; e-mail: *cga@cganet.com.*

* * * * *

(q) * * *

(34) NFPA 51A (2001) Standard for Acetylene Cylinder Charging Plants, IBR approved for § 1910.102(b) and (c). Copies of NFPA 51A–2001 are available for purchase from the: National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169–7471; telephone: 1–800–344–3555; e-mail: *custserv@nfpa.org.*

(35) NFPA 51A (2006) Standard for Acetylene Cylinder Charging Plants, IBR approved for § 1910.102(b) and (c). Copies of NFPA 51A–2006 are available for purchase from the: National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169–7471; telephone: 1–800–344–3555; e-mail: *custserv@nfpa.org.*

* * * * *

Subpart H—[Amended]

3. Revise the authority citation for subpart H of part 1910 to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31159), as applicable; and 29 CFR part 11.

Sections 1910.103, 1910.106 through 1910.111, and 1910.119, 1910.120, and 1910.122 through 1910.126 also issued under 29 CFR part 1911.

Section 1910.119 also issued under Section 304, Clean Air Act Amendments of 1990 (Pub. L. 101–549), reprinted at 29 U.S.C. 655 Note.

Section 1910.120 also issued under Section 126, Superfund Amendments and Reauthorization Act of 1986 as amended (29 U.S.C. 655 Note), and 5 U.S.C. 553.

4. Revise § 1910.102 to read as follows:

§ 1910.102 Acetylene.

(a) *Cylinders.* Employers must ensure that the in-plant transfer, handling, storage, and use of acetylene in cylinders comply with the provisions of CGA Pamphlet G–1–2003 (''Acetylene'') (Compressed Gas Association, Inc., 11th ed., 2003).

(b) *Piped systems.* (1) Employers must comply with Chapter 9 (''Acetylene Piping'') of NFPA 51A–2006 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2006 ed., 2006).

(2) When employers can demonstrate that the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders were installed prior to February 16, 2006, these employers may comply with the provisions of Chapter 7 (''Acetylene Piping'') of NFPA 51A–2001 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2001 ed., 2001).

(3) The provisions of § 1910.102(b)(2) also apply when the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders were approved for construction or installation prior to February 16, 2006, but constructed and installed on or after that date.

(4) For additional information on acetylene piping systems, *see* CGA G–1.2–2006, Part 3 (''Acetylene piping'') (Compressed Gas Association, Inc., 3rd ed., 2006).

(c) *Generators and filling cylinders.* (1) Employers must ensure that facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) acetylene cylinders comply with the provisions of NFPA 51A–2006 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2006 ed., 2006).

(2) When employers can demonstrate that the facilities, equipment, structures, or installations used to generate acetylene or to charge (fill) of acetylene cylinders were constructed or installed prior to February 16, 2006, these employers may comply with the provisions of NFPA 51A–2001 (''Standard for Acetylene Charging Plants'') (National Fire Protection Association, 2001 ed., 2001).

(3) The provisions of § 1910.102(c)(2) also apply when the facilities, equipment, structures, or installations were approved for construction or installation prior to February 16, 2006, but constructed and installed on or after that date.

[FR Doc. E9–18643 Filed 8–10–09; 8:45 am]

BILLING CODE 4510–26–P

Federal Register

Tuesday,
August 11, 2009

Part VI

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1

Federal Acquisition Regulation; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009–0001, Sequence 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–36; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–36. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov*.

DATES: For effective dates and comment dates, see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–36 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–36

Item	Subject	FAR case	Analyst
I	Federal Technical Data Solution (FedTeDS)	2008–038	Loeb.
II	Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses	2007–021	Murphy.
III	New Designated Country—Taiwan	2009–014	Murphy.
IV	Prohibition on Restricted Business Operations in Sudan and Imports from Burma	2008–004	Murphy.
V	List of Approved Attorneys, Abstractors, and Title Companies	2006–013	Chambers.
VI	Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses.	2007–002	Chambers.
VII	Technical Amendments		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–36 amends the FAR as specified below:

Item I—Federal Technical Data Solution (FedTeDS) (FAR Case 2008–038)

This final rule amends the Federal Acquisition Regulation (FAR) subparts 5.1, 5.2, and 7.1 to remove all references to the Federal Technical Data Solution (FedTeDS) System, and refer to the enhanced capabilities of the Governmentwide Point of Entry (GPE) system. The FedTeDS system was used to post on-line technical data packages and other items associated with solicitations that required some level of access control. It was interfaced directly with the GPE system. In April 2008, the newest version of the GPE was launched. This version incorporated the capabilities of FedTeDS, allowing the FedTeDS system to be retired. This rule will only have a slight impact on Government. It will inform and direct both internal and external users to the new system and website. This rule does not have a significant impact on any automated systems.

Item II—Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses (FAR Case 2007–021)

This final rule amends the Federal Acquisition Regulation (FAR) to specifically require the incorporation of FAR clauses 52.222–43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts) and 52.222–44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, in time-and-materials and labor-hour service contracts that are subject to the Service Contract Act.

Item III—New Designated Country—Taiwan (FAR Case 2009–014) (Interim)

This interim rule implements in FAR Parts 22, 25, and 52, as appropriate, the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. This FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

Item IV—Prohibition on Restricted Business Operations in Sudan and Imports from Burma (FAR Case 2008–004)

This final rule converts the interim rule published in the **Federal Register** at 73 FR 33636 on June 12, 2008, to a final rule with changes. This final rule implements Section 6 of the Sudan Accountability and Divestment Act of 2007, which requires certification in each contract entered into by an executive agency that the contractor does not conduct certain business operations in Sudan. In addition, in accordance with Executive Orders 13310 and 13448, the Councils added Burma to the list of countries from which most imports are prohibited.

Item V—List of Approved Attorneys, Abstractors, and Title Companies (FAR Case 2006–013)

This final rule amends Federal Acquisition Regulation (FAR) 28.203–3 and 52.228–11 to update the procedures for the acceptance of a bond with a security interest in real property. The FAR has relied on the Department of Justice (DOJ) to provide a ''List of Approved Attorneys, Abstractors, and Title Companies''. However, DOJ has discontinued maintenance of the List. Replacing the List, DOJ published ''Title Standards 2001'', establishing the evidence requirements for acceptance of

title to real property for individual sureties.

The rule also provides that in lieu of evidence of title that is consistent with DOJ standards, that sureties may provide a mortgagee title insurance policy in an insurance amount equal to the amount of the lien.

Item VI—Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses (FAR Case 2007–002)

This final rule converts, without change, the interim rule published in the **Federal Register** at 73 FR 54011 September 17, 2008. No comments were received in response to the interim rule. The interim rule amended the Federal Acquisition Regulation (FAR) to revise FAR 30.201–4(b)(1) and FAR 52.230–1 through 52.230–5 to maintain consistency between the Federal Acquisition Regulation (FAR) and Cost Accounting Standards (CAS) regarding the administration of the CAS Board's rules, regulations and standards.

Effective June 14, 2007, the CAS Board amended the contract clauses contained in its rules and regulations at 48 CFR 9903.201–4, pertaining to the administration of CAS, to adjust the CAS applicability threshold in accordance with section 822 of the 2006 National Defense Authorization Act (Pub. L. 109–163). That section amended 41 U.S.C. 422(f)(2)(A) to require that the threshold for CAS applicability be the same as the threshold for compliance with the Truth in Negotiations Act (TINA).

Item VII—Technical Amendments

Editorial changes are made at FAR 32.503–9, 52.213–4, and 52.244–6.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular (FAC) 2005-36 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-36 is effective August 11, 2009, except for Items I, II, and V, which are effective September 10, 2009.

Dated: August 3, 2009.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: August 3, 2009.

Rodney P. Lantier,

Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, U.S. General Services Administration.

Dated: August 3, 2009.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E9–19161 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5 and 7

[FAC 2005–36; FAR Case 2008–038; Item I; Docket 2009–0028, Sequence 1]

RIN 9000–AL32

Federal Acquisition Regulation; FAR Case 2008–038, Federal Technical Data Solution (FedTeDS)

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to reflect that FedTeDS capabilities have been incorporated into the Governmentwide Point of Entry (GPE). References to FedTeDS are amended to reflect the GPE i.e., FedBizOpps system.

DATES: *Effective Date:* September 10, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Ed Loeb, Director, Contract Policy Division at (202) 501–0650. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–36, FAR case 2008–038.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Technical Data Solution (FedTeDS) is the system that was used for the past several years to post on-line technical data packages and other items associated with solicitations that required some level of access control. It was interfaced directly with the Governmentwide Point of Entry (GPE) i.e., FedBizOpps system. In April 2008, a new version of the GPE was launched. This version incorporated the capabilities of FedTeDS, thereby allowing FedTeDS to be retired. FAR Sections 5.102, 5.207 and 7.105 will be amended to (1) remove all references to FedTeDS and refer to the enhanced controls of the GPE, (2) address technical data availability via GPE in lieu of FedTeDS, and (3) substitute GPE in lieu of FedTeDS in references to acquisition plans.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Parts 5 and 7 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–36, FAR case 2008–038), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 5 and 7

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5 and 7 as set forth below:

■ 1. The authority citation for 48 CFR parts 5 and 7 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.102 by—

■ a. Revising paragraph (a)(4) and the introductory text of paragraph (a)(5);

■ b. Removing paragraph (a)(5)(iii); and

■ c. Redesignating paragraph (a)(5)(iv) as (a)(5)(iii).

■ The revised text reads as follows:

5.102 Availability of solicitations.

(a) * * *

(4) When an agency determines that a solicitation contains information that requires additional controls to monitor access and distribution (e.g., technical data, specifications, maps, building designs, schedules, etc.), the information shall be made available through the enhanced controls of the GPE, unless an exception in paragraph (a)(5) of this section applies. The GPE meets the synopsis and advertising requirements of this part.

(5) The contracting officer need not make a solicitation available through the GPE as required in paragraph (a)(4) of this section, when—

* * * * *

5.207 [Amended]

■ 3. Amend section 5.207 by removing from paragraph (c)(18) ''FedTeDS *(https://www.fedteds.gov)*'' and adding ''*http://www.fedbizopps.gov*'' in its place.

PART 7—ACQUISITION PLANNING

7.105 [Amended]

■ 4. Amend section 7.105 by removing from paragraph (b)(15) ''Federal Technical Data Solution (FedTeDS)'' and adding ''enhanced controls of the GPE at *http://www.fedbizopps.gov*'' in its place.

[FR Doc. E9–19162 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 2005–36; FAR Case 2007–021; Item II; Docket 2009–0004; Sequence 2]

RIN 9000–AL14

Federal Acquisition Regulation; FAR Case 2007–021, Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to specifically require the incorporation of FAR clauses 52.222–43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts) and 52.222–44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, in time-and-materials and labor-hour service contracts that are subject to the Service Contract Act. No comments were received in response to the proposed rule.

DATES: *Effective Date*: September 10, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–36, FAR case 2007–021.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to revise the clause prescriptions at FAR 22.1006(c)(1) and (2) to specifically require that time-and-materials and labor-hour service contracts subject to the Service Contract Act contain the appropriate price adjustment clauses set forth at FAR 52.222–43 and 52.222–44.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 872 on January 9, 2009.

Despite the fact that the previous prescriptions did not require use of the clauses in time-and-materials or labor-hour contracts, there was actually broad usage of the clause(s) in such contracts. This change will achieve consistency throughout the Government acquisition community and resolve potential inequities where the clauses have not been applied. It will achieve an equitable result for contractors and will also allow the Government to avoid use of other means of adjusting contract unit price labor rates which may be more costly to the Government. Other means of adjusting contract labor rates, such as allowing for wage/benefit escalation, equitable adjustment or economic price adjustment, would likely include profit, overhead, and general and administrative expenses. The FAR clauses at 52.222–43 and 52.222–44 explicitly exclude these additional costs.

The clause prescriptions at FAR 22.1006(c)(1) and (c)(2) currently require that Service Contract Act wage determination updates be applied to contracts subject to the FAR clause at 52.222–41, Service Contract Act of 1965 but, as required by FAR clause 52.222–41, minimum monetary wages and fringe benefits to be paid to service employees under the contract may be subject to adjustment, under wage determinations issued by the Department of Labor. While there may be other means permitted to adjust fixed labor rates on time-and-materials or labor-hour contracts, those other means do not achieve the consistent results that use of the Service Contract Act price adjustment clause(s) will achieve.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it merely clarifies the existing prescriptions relating to service contracts. FAR clause 52.222–41 requires contractors to comply with wage determinations of the Department of Labor and may require adjustment to wage rates during the term of the contract. Most contracts that include

this clause therefore provide some mechanism for dealing with the potential required price adjustment. The Councils have been advised that use of these clauses for time-and-materials and labor-hour service contracts is already widespread. Uniform use of the appropriate clause will ensure consistency in the adjustment method for any required increase in wage rate, but should not have a significant cost impact.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1006 [Amended]

■ 2. Amend section 22.1006 by removing from paragraphs (c)(1) and (c)(2) ''fixed-price'' and adding ''fixed-price, time-and-materials, or labor-hour'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–5 [Amended]

■ 3. Amend section 52.212–5 by removing from the date of the clause ''(June 2009)'' and adding ''(Sep 2009)'' in its place; by removing from paragraph (c)(3) ''(Nov 2006)'' and adding ''(Sep 2009)'' in its place; and by removing from paragraph (c)(4) ''(Feb 2002)'' and adding ''(Sep 2009)'' in its place.

■ 4. Amend section 52.222–43 by revising the date of the clause, introductory text in paragraph (d), and the third and fourth sentences of paragraph (f) to read as follows:

52.222–43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts).

* * * * *

FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (Sep 2009)

* * * * *

(d) The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

* * * * *

(f) * * * The notice shall contain a statement of the amount claimed and the change in fixed hourly rates (if this is a time-and-materials or labor-hour contract), and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price, contract unit price labor rates, or fixed hourly rates shall be modified in writing. * * *

* * * * *

■ 5. Amend section 52.222–44 by revising the date of the clause, introductory text of paragraph (c), and the third and fourth sentences of paragraph (e) to read as follows:

52.222–44 Fair Labor Standards Act and Service Contract Act—Price Adjustment.

* * * * *

FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (Sep 2009)

* * * * *

(c) The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits to the extent that these increases or decreases are made to comply with—

* * * * *

(e) * * * The notice shall contain a statement of the amount and the change in fixed hourly rates (if this is a time-and-materials or labor-hour contract) claimed and any relevant supporting data that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price, contract unit price labor rates, or fixed hourly rates shall be modified in writing. * * *

* * * * *

[FR Doc. E9–19163 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2005–36; FAR Case 2009–014; Item III; Docket 2009–0027, Sequence 1]

RIN 9000–AL34

Federal Acquisition Regulation; FAR Case 2009–014, New Designated Country—Taiwan

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to add Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei))'' as a designated country, due to the accession of Taiwan to membership in the World Trade Organization Agreement on Government Procurement.

DATES: *Effective Date*: August 11, 2009.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before October 13, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–36, FAR case 2009–014, by any of the following methods:

• Regulations.gov: *http://www.regulations.gov*.

Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–014'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–014. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–014'' on your attached document.

• Fax: 202–501–4067.

• Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–36, FAR case 2009–014, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR Case 2009–014.

SUPPLEMENTARY INFORMATION:

A. Background

On July 15, 2009, Taiwan became a designated country based on its accession to the World Trade Organization Agreement on Government Procurement. This interim rule adds Taiwan to the list of World Trade Organization Government Procurement Agreement countries in FAR 22.1503, 25.003, 52.222–19, 52.225–5, 52.225–11, and 52.225–23.

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

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule opens up Government procurement to the goods and services of Taiwan, the Councils do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at Defense Federal Acquisition Regulation Supplement (DFARS) 225.401–70, and acquisitions that are set aside for small businesses are exempt. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 22, 25, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–36, FAR case 2009–014), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0141, Buy American Act—Construction. The interim rule affects the certification and information collection requirement in the clause at FAR 52.225–11. The impact, however, is negligible.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this interim rule implements the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. However, pursuant to Pub. L. 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1503 [Amended]

■ 2. Amend section 22.1503 in paragraph (b)(4) by removing ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

PART 25—FOREIGN ACQUISITIONS

■ 3. Amend section 25.003 by—

■ a. Revising paragraph (1) in the definition ''Designated country'' ; and

■ b. Removing from the definition ''World Trade Organization Government Procurement Agreement (WTO GPA) country'' the words ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

■ The revised text reads as follows:

25.003 Definitions.

* * * * *

Designated country * * *

(1)A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu'' (Chinese Taipei)) or United Kingdom);

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by revising the date of the clause, and paragraphs (b)(20) and (b)(33) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (Aug 09)

* * * * *

(b) * * *

____ (20) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (Aug 09) (E.O. 13126).

* * * * *

____ (33) 52.225–5, Trade Agreements (Aug 09) (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).

* * * * *

■ 5. Amend section 52.213–4 by revising the date of the clause, and paragraph (b)(1)(i) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS)(Aug 09)

* * * * *

(b) * * *

(1) * * *

(i) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (Aug 09) (E.O. 13126). (Applies to contracts for supplies exceeding the micro-purchase threshold.)

* * * * *

52.222–19 [Amended]

■ 6. Amend section 52.222–19 by removing from the clause heading ''(Feb 2008)'' and adding ''(Aug 09)'' in its place; and removing from paragraph (a)(4) ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

■ 7. Amend section 52.225–5 by revising the date of the clause; and in paragraph (a), in the definition ''Designated Country'', revising paragraph (1) to read as follows:

52.225–5 Trade Agreements.

* * * * *

TRADE AGREEMENTS (Aug 09)

(a) *Definitions.* * * *

Designated country * * *

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei))'', or United Kingdom);

* * * * *

52.225–11 [Amended]

■ 8. Amend section 52.225–11 by removing from the clause heading ''(June 2009)'' and adding ''(Aug 09)'' in its place; and in paragraph (a), in the definition ''Designated country'', removing from paragraph (1) ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

52.225–23 [Amended]

■ 9. Amend section 52.225–23 by removing from the clause heading ''(Mar 2009)'' and adding ''(Aug 09)'' in its place; and in paragraph (a), in the definition ''Recovery Act designated country'', removing from paragraph (1) ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

[FR Doc. E9–19164 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 25, and 52

[FAC 2005–36; FAR Case 2008–004; Item IV; Docket 2008–0001; Sequence 21]

RIN 9000–AL01

Federal Acquisition Regulation; FAR Case 2008–004, Prohibition on Restricted Business Operations in Sudan and Imports from Burma

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 6 of the Sudan Accountability and Divestment Act of 2007. Section 6 requires certification in each contract entered into by an Executive Agency that the contractor does not conduct certain business operations in Sudan. In addition, the Councils added Burma to the list of countries from which most imports are prohibited. This action was taken in accordance with Executive Order (E.O.) 13310, Blocking Property of the Government of Burma and Prohibiting Certain Transactions, and E.O. 13448, Blocking the Property and Prohibiting Certain Transactions Related to Burma.

DATES: *Effective Date*: August 11, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–36, FAR case 2008–004.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation (FAR) to implement Section 6 of the Sudan Accountability and Divestment Act of 2007, which was signed on December 31, 2007.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 73 FR 33636 on June 12, 2008. The public comment period ended August 11, 2008.

This rule amends the FAR to implement Section 6 of the Sudan Accountability and Divestment Act of 2007 (the Act), which requires certification in each contract entered into by an executive agency that the contractor does not conduct certain business operations in Sudan. In addition, the Councils added Burma to the list of countries from which most imports are prohibited.

B. Discussion and Analysis.

The FAR Secretariat received five (5) responses to the interim rule. These responses included a total of 16 comments on 11 issues. A sixth response was simply a copy of the statute and was not counted as a comment. All of the responses concerned the implementation of the Act; there were no comments on the addition of Burma to the list of prohibited countries. Each issue is discussed in the following sections.

No public comments were received regarding the portion of the interim rule addressing Burma. Therefore, that part of the interim rule is unchanged (see the **Federal Register** at 73 FR 33636 dated June 12, 2008).

1. Delete the definition of ''person'' and other issues with definitions.

Comment: **a**. Two respondents recommended that the final rule delete the definition of ''person.'' The respondents point out that Section 2 of the Act, which defines the key terms in the Act, does not define ''contractor'' but does define ''person.'' The term person, however, is used frequently in Section 3 of the Act, which addresses divestiture by State and local governments (not a subject of the FAR coverage), but it is not used at all in Section 6 of the Act, which the FAR is implementing. The respondents point out that, had the Congress intended ''person'' and ''contractor'' to be synonymous, it should have defined them so, and one respondent points out portions of the legislative history that reinforce its conclusion that the congressional intent was to have a different meaning for each term.

b. In addition, one respondent requested that the definition of ''restricted business operations'' at FAR sections 25.702–1 and 52.225–20 either delete the phrase ''as those terms are defined in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110–174)'' or replace ''defined in'' with the phrase ''described in Section 3(d) of''.

c. Last, a respondent reminded the Councils that in the ''definition of the

term 'business operations' in Section 3(d) of the Act, the term means 'engaging in commerce in any form *in Sudan*' (emphasis added).''

Response: **a**. The Councils have deleted the definition of ''person''. The definition of ''person'' was included at FAR 25.702–1, Definitions, and the clause at 52.225–20, as well, because Section 6 of the Act requires contractors to certify that they do not conduct business operations as described in Section 3(d) of the Act. This description of business operations that are restricted uses the term ''person'', which is therefore used in the rule within the definition of ''restricted business operations''. A cross reference to the definition of ''person'' in the Act is included within the definition of ''restricted business operations,'' rather than including a separate definition of ''person'' in the rule. The rule does not use the term ''person'' as synonymous with ''contractor'' or ''offeror''.

b. The Councils note that, although the statute describes the business operations that are restricted and does not define the term ''restricted business operations,'' the terms that are used within that definition of ''restricted business operations'' in the rule (''power production activities,'' ''mineral extraction activities,'' ''oil-related activities,'' and ''military equipment'') are all defined in section 2 of the Act, which is entitled ''DEFINITIONS''.

c. The Councils have not added ''in Sudan'' in the definition of ''business operations''. The Councils defined the term ''restricted business operations'' to include any business operations in Sudan, which the Councils believe fully implements the intent of the statute. In addition, the other specific conditions regarding what types of business operations are restricted are addressed at FAR sections 25.702–1, 52.212–3(a), and 52.225–20(a).

2. Apply the certification requirement only to offerors that would be in privity of contract with the U.S. Government.

Comment: **a**. Effectively, this recommendation is a logical outcome of the comment immediately above. Two respondents believed that, given the words the Congress chose, the way in which the law is structured, and the legislative history of the statute, it is clear that Congress intended the certification requirement to apply to the business operations of contractors themselves and not the business operations of other entities in their corporate families. One respondent quoted the report of the Senate Banking, Housing, and Urban Affairs Committee, in the section discussing divestment, not in the discussion of Section 6, says that ''(i)mplicit in this definition (of ''person'') is the requirement that parent companies to subsidiaries, or subsidiaries that share the same parent company, may be targeted for divestment as long as there is credible evidence linking their affiliates to business operations in key sectors of Sudan'' (emphasis added). In addition, the corporate entity that is submitting the proposal may not have any control over, or insight into, an affiliate or subsidiary of a shared corporate parent. In support of this position, another respondent states that ''(c)learly, only the offeror making the certification required under the interim regulation is the party that will be in privity of contract.''

b. In addition, a respondent claimed that, because the statute used the term ''contractor'' rather than ''offeror,'' the certification should be restructured so that not every offeror has to certify and the certification will be required only of the successful offeror. This change, according to the respondent, will substantially reduce the scope of the certification in terms of the number of companies it impacts.

Response: **a**. The Councils note that the plain words of the Act, Section 6, require each ''contractor,'' not each ''person,'' to certify, and only the definition of ''person'' includes the highly inclusive elements of affiliates, subsidiaries, and so forth. The interim rule has plainly implemented this, except that the term ''contractor'' has been changed to ''offeror'' due to the timing of the certification. The certification requires the offeror to certify that ''it'' does not conduct any restricted business operations in Sudan. This has been made even clearer by substituting ''the offeror'' for ''it''.

b. With regard to the timing of the certification requirement, however, the Councils do not agree that it should be delayed from proposal submission to a time immediately prior to award (when the Government knows which is the presumptive successful offeror) or should be limited solely to the successful offeror. The Government's solicitation and contract award process does not contemplate a second certification round wherein only the successful offeror is required to complete a certification(s). A failure to certify that it does not conduct restricted business operations in Sudan should remove an offeror from consideration for award. If an offeror is unable to certify, then it will not qualify for award, and the Government should not be expending time and money evaluating that offeror's proposal.

3. Apply the certification requirement to affiliated companies.

Comment: Two respondents were concerned that the interim rule does not explicitly extend to affiliated companies. One of these respondents notes that the report accompanying the Act specifically ''defines 'persons' to include 'parent companies to subsidiaries, or subsidiaries that share the same parent company' in addition to 'successors, subunits, or subsidiaries'''', and the respondent encourages the Councils to interpret the legislation to include affiliated companies in the contract certification requirement. Another respondent quotes the same language from the report in requesting that affiliates be included.

Response: In response to the first comment above, the Councils attempted, in the interim rule, to stay as close as possible to the literal requirements in terms of the statute. Given that the statute does not use the term ''person,'' with its expansive definition, in Section 6 of the Act, the Councils do not agree that the certification requirement should be expanded to include affiliates. Please see also the response at Section 2 above.

4. Don't apply the certification requirement to affiliated companies.

Comment: A respondent stated that requiring companies to certify more broadly about the activities of their affiliates would require them to attest to factual matters typically beyond their reach. As a practical and legal matter, according to the respondent, offerors often do not have the right to access information about the activities of their affiliates, particularly of their parent or subsidiaries of that parent.

Response: The Councils agree that it is unlikely that most prospective Government contractors would be able to access the information needed to certify to the activities of their affiliates, parents, or parent-company subsidiaries. Please see responses to Comments 2 and 3 above.

5. Apply the requirement to all subcontractors.

Comment: A respondent believed that the rule could be improved by extending the contract prohibition to all subcontractors of companies that receive Federal contracts. Another respondent, also, was concerned that the exclusion of subcontractors would result in the exclusion of a significant portion of entities seeking to carry out work for the U.S. Government.

Response: In the Preamble to the interim rule, the Councils noted that the Act does not require flow down of the certification provision to subcontractors but only addresses contracts entered

into by executive agencies, *i.e.*, prime contracts. The Councils do not think it appropriate to exceed the limits of the statute.

6. Apply the certification requirement only to future contracts.

Comment: The interim rule requested comments on whether the law should also be applied to existing contracts to ensure compliance with the overall intent of the law. Two respondents were against extending the certification requirement ''retroactively,'' and they noted that there is no indication in the Act's legislative history to indicate any such intention on the part of the Congress.

Further, one respondent recommended that the certification not be required (1) under the annual Online Representations and Certifications (ORCA) update, (2) upon the exercise of an option or issuance of a task or delivery order under an existing contract, or (3) pursuant to the performance of warranty work or safety-related repair work for an otherwise completed project in Sudan.

Response: The Councils have resisted applying new requirements to existing contracts, and the Councils do not recommend doing so now. This final rule will have normal effective date (prospective) language, as set forth in FAR 1.108(d).

This rule does not require the new certification upon exercise of options or issuance of a task or delivery order.

With regard to annual update of the Online Representations and Certifications (ORCA), that has no impact on an existing contract. Annual updates to ORCA are only applicable to future contracts.

With regard to the third situation posed by the respondent above, this seems to be an extreme situation and should be treated by the contracting officer, if it occurs, under the FAR deviation process.

7. Ensure that contract extensions are covered.

Comment: A respondent was concerned that ''under existing practice, Federal contracts may be extended in some cases without being formally renewed and thus would not be subject to the contract prohibition rule.'' The respondent encouraged the Councils to ''address this potential loophole'' and ensure that contract extensions are covered by the certification requirement.

Response: The Councils are unaware of any circumstances under which the FAR sanctions the informal extension of contracts.

8. Require certification in ORCA and each individual offer.

Comment: A respondent encouraged a final rule that requires certification in both the ''ORCA Application'' and each individual proposal.

Response: The final rule does not change the interim rule's requirement to include the certification in each new procurement. In addition, the certification will be part of ORCA, and it will be considered in the contractor's annual ORCA certification. Annual updates to ORCA are only applicable to future contracts.

9. Require contractors to certify that they will not engage in targeted business operations during contract performance.

Comment: One respondent wanted the FAR to require companies that are awarded contract extensions to disclose any potential targeted business operations with Sudan and to explicitly require that companies certify they will not engage in targeted business operations for the duration of the contract.

Response: The statute does not require that the certification apply to future (targeted) business operations or include a promise not to engage in restricted business operations in Sudan for the duration of the company's contract with the U.S. Government. Therefore, the Councils do not think that it would be appropriate to substitute their judgment for the language of the statute.

10. Make certification into a check-the-box certification.

Comment: A respondent recommended that the final rule change the certification to a check-the-box certification. The respondent said that, ''(g)iven that the certification requirement may only be incorporated by reference into a solicitation, the FAR could create a substantial risk to offerors'' because offerors that are unaware of the content of the certification provision may unknowingly, and falsely, certify compliance. The respondent argued, also, that an explicit, check-the-box certification requirement would eliminate a potential defense to a falsely certifying contractor that it did not realize it was certifying at all.

Response: The respondent is incorrect in claiming that the certification may only be incorporated by reference. Incorporation by reference is the case for commercial items in the clause at 52.212–5; it is not the case for 52.225–20, Prohibition on Conducting Restricted Business Operation in Sudan—Certification, or 52.212–1, Instructions to Offerors—Commercial Items. In any case, a company signs and is responsible for complying with all requirements of the contract, whether a provision is reproduced in full or by reference.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule will only impact an offeror that is conducting restricted business operations in Sudan and wants to do business with the U.S. Government because there are already numerous sanctions against dealing with Sudan (*e.g.*, E.O.s 13412, 13400, and 13067, and 31 CFR Part 538), the number of entities impacted will be minimal. No comments to the contrary were received from small entities in response to the interim rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 4, 15, 25, and 52 which was published in the **Federal Register** at 73 FR 33636 on June 12, 2008, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 25—FOREIGN ACQUISITION

■ 2. Amend section 25.702–1 by removing the definition ''Person''; and in the definition ''Restricted business

operations'' revising the introductory text of paragraph (2) to read as follows:

25.702–1 Definitions.

* * * * *

Restricted business operations— * * *

(2) Does not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Revising in paragraph (a), in the definition ''Restricted business operations'' the second sentence of the introductory text; and

■ c. Removing from paragraph (m) ''that it'' and adding ''that the offeror'' in its place.

■ The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (Aug 2009)

* * * * *

(a) *Definitions.* * * *

Restricted business operations * * * Restricted business operations do not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

* * * * *

■ 4. Amend section 52.225–20 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraph (a) the definition ''Person'', and revising the second sentence in the introductory text of the definition ''Restricted business operations''; and

■ c. Removing from paragraph (b) ''that it'' and adding ''that the offeror'' in its place.

■ The revised text reads as follows:

52.225–20 Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

* * * * *

PROHIBITION ON CONDUCTING RESTRICTED BUSINESS OPERATIONS IN SUDAN—CERTIFICATION (Aug 2009)

(a) *Definitions.* * * *

Restricted business operations * * * Restricted business operations do not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

* * * * *

[FR Doc. E9–19165 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 28 and 52

[FAC 2005–36; FAR Case 2006–013; Item V; Docket 2006–0033; Sequence 1]

RIN 9000–AK71

Federal Acquisition Regulation; FAR Case 2006–013, List of Approved Attorneys, Abstractors, and Title Companies

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to update the procedures for the acceptance of a bond with a security interest in real property.

DATES: *Effective Date*: September 10, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–36, FAR case 2006–013.

SUPPLEMENTARY INFORMATION:

A. Background

FAR Subpart 28.2 requires agencies to obtain adequate security for bonds when bonds are used with a contract. A corporate or individual surety is an acceptable form of security for a bond. FAR Subpart 28.2 provides that when an individual surety secures a bond with an interest in real estate, the surety must provide evidence of title (*i.e.*, ownership) in the form of a certificate of title prepared by a qualified title attorney or abstractor, or a title insurance policy issued by title insurance company that has been approved by the Department of Justice (DOJ). Since DOJ no longer maintains a list of approved title insurance companies, agency contracting officers must now take other steps to ensure the adequacy of the title evidence or ensure the surety obtains a title insurance policy for the full amount of the Government's lien interest from a qualified title insurance company.

This FAR rule revises the types of acceptable title evidence by individual sureties to include mortgagee title insurance or other evidence of title consistent with Section 2 of the DOJ Title Standards 2001, maintained on a DOJ website. FAR clause 52.228–11, Pledges of Assets, is also updated with this new reference.

The rule also provides that contracting officers should request the assistance of agency legal counsel in determining if title evidence from individual sureties is consistent with the Justice Department Standards.

PUBLIC COMMENTS

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 12584 on March 16, 2007. The Councils received a single comment on the proposed rule. The Councils have partially adopted this comment and revised the final rule accordingly.

Comment: For those cases where real property is pledged to secure a bond, the proposed rule provided that ''depending on the value of the property, contracting officers should consider requesting assistance from agency designated legal counsel to determine if the evidence of title is adequate.'' The commenter believes this legal consultation should be mandatory.

Response: Partially adopted. The final rule drops the qualifier ''depending on the value of the property'' on seeking legal counsel when real property is pledged to secure a bond. However, the term ''should'' has been retained to provide contracting officers with the discretion to use their business judgment.

In considering the public comment, the Government revisited the proposed rule in total. In consultation with the Department of Justice, it was decided that when real property is pledged to secure a bond, instead of only allowing evidence of title that is consistent with DOJ standards as set forth in the proposed rule, that sureties could provide a mortgagee title insurance policy in an insurance amount equal to the amount of the lien. The Department of Justice observed that mortgagee title insurance is the most common form of title evidence in the commercial marketplace.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the incidence of the use of bonds secured by interest in real property is very low.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 28 and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 28 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 28 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 28—BONDS AND INSURANCE

■ 2. Amend section 28.203–3 by revising paragraph (a)(1) and removing from paragraph (d) ''shall be'' and adding ''shall be signed by all owners of the property and'' in its place.

■ The revised text reads as follows.

28.203–3 Acceptance of real property.

(a) * * *

(1) A mortgagee title insurance policy, in an insurance amount equal to the amount of the lien, or other evidence of title that is consistent with the requirements of Section 2 of the United States Department of Justice Title Standards at *http://www.usdoj.gov/enrd/2001__Title__Standards.html*. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government under paragraph (d) of this subsection. Agency contracting officers should request the assistance of their designated agency legal counsel in determining if the title evidence is consistent with the Department of Justice standards;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.228–11 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(1) ''and/or;'' and adding ''; and/or'' in its place; and

■ c. Revising paragraph (b)(2)(i).

■ The revised text reads as follows:

52.228–11 Pledges of Assets.

* * * * *

PLEDGES OF ASSETS (Sept 2009)

* * * * *

(b) * * *

(2) * * *

(i) A mortgagee title insurance policy, in an insurance amount equal to the amount of the lien, or other evidence of title that is consistent with the requirements of Section 2 of the United States Department of Justice Title Standards at *http://www.usdoj.gov/enrd/2001__Title__Standards.html*. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government as required by FAR 28.203–3(d);

* * * * *

[FR Doc. E9–19166 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 30 and 52

[FAC 2005–36; FAR Case 2007–002; Item VI; Docket 2008–0001, Sequence 22]

RIN 9000–AL09

Federal Acquisition Regulation; FAR Case 2007–002, Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the contract clauses related to the administration of the Cost Accounting Standards (CAS) to maintain consistency between the FAR and CAS.

DATES: *Effective Date*: August 11, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR Case 2007–002.

SUPPLEMENTARY INFORMATION:

A. Background

The CAS Board published a final rule in the **Federal Register** at 72 FR 32809 on June 14, 2007, revising the contract clauses for CAS administration. The final rule effected the following changes:

• Amended the CAS applicability threshold to be the same as the threshold for compliance with the Truth in Negotiations Act (TINA) as required by section 822 of the 2006 National Defense Authorization Act (Pub. L. 109–163). The TINA threshold is currently $650,000.

• Changed the effective dates of 48 CFR 9903.201–3 and 48 CFR 9903.201–4(a), (c), and (e) from April 2000 and June 2000, respectively, to June 2007.

The CAS Board published a final rule in the **Federal Register** at 65 FR 37470 on June 14, 2000, revising the contract clauses for CAS administration. The final rule specified that the interest rate for overpayments by the Government under 48 CFR 9903.201–4(a), (c), and (e) shall be computed at the annual rate established under section 6621(a)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 6621(a)(2)).

In order to maintain consistency between CAS and FAR, the Councils issued an interim rule revising 30.201–4 and 50.230–1 through 50.230–5.

This final rule adopts, without change, the interim rule published in the **Federal Register** at 73 FR 54011 on September 17, 2008. No public comments were received in response to the interim rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive

Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601, *et seq.*, because contracts and subcontracts awarded to small businesses are exempt from the Cost Accounting Standards.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 30 and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 30 and 52, which was published in the **Federal Register** at 73 FR 54011 on September 17, 2008, is adopted as a final rule without change.

[FR Doc. E9–19167 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 52

[FAC 2005–36; Item VII; Docket 2009–0003, Sequence 4]

Federal Acquisition Regulation; Technical Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation in order to make editorial changes.

DATES: *Effective Date*: August 11, 2009.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat, 1800 F Street, NW., Room 4041, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FAC 2005–35, Technical Amendments.

SUPPLEMENTARY INFORMATION: This document makes amendments to the Federal Acquisition Regulation in order to make editorial changes.

List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 32 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 32 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 32—CONTRACT FINANCING

32.503–9 [Amended]

■ 2. Amend section 32.503–9 in paragraph (a)(7) by removing paragraph ''(a)(4'') and adding paragraph ''(a)(5'') in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.213–4 [Amended]

■ 3. Amend section 52.213–4 by revising the date of the clause; and removing from paragraph (a)(2)(vi) ''(Mar 2009'') and adding August 11, 2009 in its place.

■ 4. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Revising paragraphs (c)(1)(i), (c)(1)(ii), (c)(1)(iii), (c)(1)(vii), and (c)(1)(ix) to read as follows:52.244–6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (August 11, 2009)

* * * * *

(c)(1) * * *

(i) 52.203–13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110–252, Title VI, Chapter 1 (41 U.S.C. 251 note)), if the subcontract exceeds $5,000,000 and has a performance period of more than 120 days. In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(ii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5), if the subcontract is funded under the Recovery Act.(iii) 52.219–8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), if the subcontract offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $550,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

* * * * *

(vii) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201), if flow down is required in accordance with paragraph (g) of FAR clause 52.222–39).

* * * * *

(ix) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. App. 1241 and 10 U.S.C. 2631), if flow down is required in accordance with paragraph (d) of FAR clause 52.247–64.

* * * * *

[FR Doc. E9–19168 Filed 8–10–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009–0002, Sequence 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–36; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This Small Entity Compliance Guide

has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–36 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005–36 which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Hada Flowers, FAR Secretariat, (202) 208–7282. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005–36

Item	Subject	FAR case	Analyst
I	Federal Technical Data Solution (FedTeDS)	2008–038	Loeb.
II	Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses	2007–021	Murphy.
III	New Designated Country—Taiwan	2009–014	Murphy.
IV	Prohibition on Restricted Business Operations in Sudan and Imports from Burma	2008–004	Murphy.
V	List of Approved Attorneys, Abstractors, and Title Companies	2006–013	Chambers.
VI	Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses.	2007–002	Chambers.
VII	Technical Amendments		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–36 amends the FAR as specified below:

Item I—Federal Technical Data Solution (FedTeDS) (FAR Case 2008–038)

This final rule amends the Federal Acquisition Regulation (FAR) subparts 5.1, 5.2, and 7.1 to remove all references to the Federal Technical Data Solution (FedTeDS) System, and refer to the enhanced capabilities of the Governmentwide Point of Entry (GPE) system. The FedTeDS system was used to post on-line technical data packages and other items associated with solicitations that required some level of access control. It was interfaced directly with the GPE system. In April 2008, the newest version of the GPE was launched. This version incorporated the capabilities of FedTeDS, allowing the FedTeDS system to be retired. This rule will only have a slight impact on Government. It will inform and direct both internal and external users to the new system and website. This rule does not have a significant impact on any automated systems.

Item II—Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses (FAR Case 2007–021)

This final rule amends the Federal Acquisition Regulation (FAR) to specifically require the incorporation of FAR clauses 52.222–43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts) and 52.222–44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, in time-and-materials and labor-hour service contracts that are subject to the Service Contract Act.

Item III—New Designated Country—Taiwan (FAR Case 2009–014) (Interim)

This interim rule implements in FAR Parts 22, 25, and 52, as appropriate, the designation of Taiwan under the World Trade Organization Agreement on Government Procurement, which took effect on July 15, 2009. This FAR change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

Item IV—Prohibition on Restricted Business Operations in Sudan and Imports From Burma (FAR Case 2008–004)

This final rule converts the interim rule published in the **Federal Register** at 73 FR 33636 on June 12, 2008, to a final rule with changes. This final rule implements Section 6 of the Sudan Accountability and Divestment Act of 2007, which requires certification in each contract entered into by an executive agency that the contractor does not conduct certain business operations in Sudan. In addition, in accordance with Executive Orders 13310 and 13448, the Councils added Burma to the list of countries from which most imports are prohibited.

Item V—List of Approved Attorneys, Abstractors, and Title Companies (FAR Case 2006–013)

This final rule amends Federal Acquisition Regulation (FAR) 28.203–3 and 52.228–11 to update the procedures for the acceptance of a bond with a security interest in real property. The FAR has relied on the Department of Justice (DOJ) to provide a ''List of Approved Attorneys, Abstractors, and Title Companies''. However, DOJ has discontinued maintenance of the List. Replacing the List, DOJ published ''Title Standards 2001'', establishing the evidence requirements for acceptance of title to real property for individual sureties.

The rule also provides that in lieu of evidence of title that is consistent with DOJ standards, that sureties may provide a mortgagee title insurance policy in an insurance amount equal to the amount of the lien.

Item VI—Cost Accounting Standards (CAS) Administration and Associated Federal Acquisition Regulation Clauses (FAR Case 2007–002)

This final rule converts, without change, the interim rule published in the **Federal Register** at 73 FR 54011 September 17, 2008. No comments were received in response to the interim rule. The interim rule amended the Federal Acquisition Regulation (FAR) to revise FAR 30.201–4(b)(1) and FAR 52.230–1 through 52.230–5 to maintain consistency between the Federal Acquisition Regulation (FAR) and Cost Accounting Standards (CAS) regarding the administration of the CAS Board's rules, regulations and standards.

Effective June 14, 2007, the CAS Board amended the contract clauses contained in its rules and regulations at 48 CFR 9903.201–4, pertaining to the administration of CAS, to adjust the CAS applicability threshold in accordance with section 822 of the 2006 National Defense Authorization Act (Pub. L. 109–163). That section amended 41 U.S.C. 422(f)(2)(A) to require that the threshold for CAS applicability be the same as the threshold for compliance with the Truth in Negotiations Act (TINA).

Item VII—Technical Amendments

Editorial changes are made at FAR 32.503–9, 52.213–4, and 52.244–6.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9–19169 Filed 8–10–09; 8:45 am]

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To authorize the Director of the United States Patent and Trademark Office to use funds made available under the Trademark Act of 1946 for patent operations in order to avoid furloughs and reductions-in-force, and for other purposes. (Aug. 7, 2009; 123 Stat. 1968)

H.R. 3357/P.L. 111–46

To restore sums to the Highway Trust Fund and for other purposes. (Aug. 7, 2009; 123 Stat. 1970)

H.R. 3435/P.L. 111–47

Making supplemental appropriations for fiscal year 2009 for the Consumer Assistance to Recycle and Save Program. (Aug. 7, 2009; 123 Stat. 1972)

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